9/Case 350

Federal
Labor Relations
Authority

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NUMBER 350 REPORT OF CASE DECISIONS February 21, 1986

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21 FLRA No. 1

**Federal
Labor Relations
Authority**

AFGE, Local 1336 and HHS, SSA, Case No. 0-NG-1206
(Decided January 22, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
    2700. Petition for Review
        2702. Timeliness

STATUTE

7105(a)(2)(E)

SUBJECT MATTER INDEX ENTRIES

Negotiability
    Procedure
        Timeliness
            Reaffirmation of Prior Allegations of Nonnegotiability

DIGEST NOTES

Where a petition for review is filed concerning an agency's allegation of nonnegotiability which is only a restatement of a prior allegation, and no changes in the substance or language of the proposal were made during the period between allegations, the petition seeks review of the earlier allegation. Thus a union's petition for review must be filed within the prescribed time limit (15 days) from the date of service on the union of the agency's first allegation rather than the date of service of the second allegation.

Federal
Labor Relations
Authority

21 FLRA No. 2

Federal Labor Relations Authority

National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Case No. 0-NG-629 (Decided January 31, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
    2011. Conditions of Employment
    2150. Management Rights
        2151.05 Management Official's Right to Determine Budget

STATUTE

7103(a)(14)
7106(a)(1)
7119

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
      Labor Relations Activity May Qualify As "Official Business"
  Management Rights
    Determine Budget
      Agency's Claim of Interference Unsubstantiated
  Proposal Alleged Inconsistent with Government-Wide Regulation
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    5 U.S.C. § 5701 *et seq.*
Official Time
  Official Business
5 U.S.C. § 5701 *et seq.*, Travel Expense Act
31 U.S.C. § 3529 (1982 ed.)
44 Comp Gen. 189 (1964)
FPM Letter 711-162 (January 19, 1984)
Pub. L. No. 96-74, 93 Stat. 559, 560, Treasury, Postal Service and General Government Appropriations Act of 1980
Pub. L. No. 98-151, 97 Stat. 964, Continuing Resolution of 1984

DIGEST NOTES

A proposal seeking payment of travel expenses incurred while on official time concerned a condition of employment which is within the Agency's administrative discretion, and is not inconsistent with the Travel Expense Act, 5 U.S.C. 5701 *et seq.*, or Federal Travel Regulations and is therefore negotiable.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Representation of employees in matters concerning their employment affects the working conditions of those employees. A proposal seeking payment of travel expenses incurred because of such representational activity clearly involves a condition of employment not excepted from the definition thereof.

The Travel Expense Act governs the general subject of payment of travel expenses for employees traveling on "official business," it does not specifically address payment for travel engaged in while conducting labor-management activity. Thus, a proposal concerning such payment is not precluded as involving a matter specifically provided for by Federal statute so as to be excepted from the definition of conditions of employment.

A proposal seeking payment of travel expenses incurred while on official time is not contrary to provisions of the Travel Expense Act and Federal Travel Regulations so as to make it nonnegotiable as inconsistent with Federal law and Government-wide regulations. The Act and the Regulations provide that federal employees on "official business," i.e., activity sufficiently in the interest of the United States, are entitled to appropriate expenses and allowances. The agency has the discretion to determine whether such activity served the convenience of the agency or was in the primary interest of the Government. The Authority found that the proposal would not require the agency to authorize either specific travel or expenses which do not comport with regulatory requirements and restrictions. Further, the agency failed to cite legal or regulatory precedent which would absolutely prohibit it from exercising through negotiations its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States to constitute official business.

A proposal seeking payment of travel expenses incurred while on official time does not interfere with right of the agency to determine its budget under § 7106(a). The proposal does not expressly require that a line item be added to the agency's budget nor does it prescribe an amount to be allocated in the agency's budget for programs or operations. The agency provided no specific information or estimates of the financial impact of the proposal, therefore the Authority rejected its general claim that the "significance and unavoidability of increased costs attendant to the payment of travel expenses resulting from labor-management relations activities has been 'officially recognized.'"

Federal employees traveling on official business are entitled to appropriate expenses and allowances. "Official business," is not specifically defined by law or regulation. As a general proposition, the Comptroller General has ruled that payment of travel expenses is authorized where the activity involved was sufficiently within the interest of the United States so as to be regarded as official business. 44 Comp. Gen. 189 (1964).

Federal Labor Relations Authority

21 FLRA No. 3

SSA and Local 3239, AFGE (Ellmann, Arbitrator), Case No. 0-AR-1061 (Decided February 5, 1986)

DIGEST HEADINGS

1000. ARBITRATION
    1500. Review of Arbitration Award
        1550. Procedure

STATUTE

7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
   Procedure
      Interlocutory Appeal

DIGEST NOTES

The Authority will not consider an appeal to an Arbitrator's interim award where the the award only decided the first part of the issue presented and expressly deferred final disposition as to the remedy in the dispute. The agency's exceptions and the request for stay herein, must be dismissed as interlocutory in accordance with section 2429.11 of the Authority's Rules and Regulations, which provides that the Authority and the General Counsel ordinarily will not consider interlocutory appeals.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

[illegible]

21 FLRA No. 4

Federal
Labor Relations
Authority

NAGE, Local R14-87 and
Kansas Army National Guard,
Case No. 0-NG-968 (Decided
February 7, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
  2150. Management Rights
    2152.60 With Respect To Filling Positions, to Select From:
  2210. Mandatory Subjects of Bargaining
    2210.05 Appropriate Arrangements

STATUTE

7105(a)(2)(E)
7106(a)(2)(C)
7106(b)(1), (2) and (3)
7114(c)
7117(a)(1)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Hours of Work
    Advance Notice of Change in Work Schedule
  Mandatory Subjects of Bargaining
    Appropriate Arrangements
      "Direct Interference Test" - Rejected
      "Excessive Interference Test" - Adopted
  Management Rights
    Fill Positions
      Selections From Appropriate Source
        Demoted Employees - RIF
        Select Employee With Highest Retention Standing
  Proposal Alleged Inconsistent with Government-Wide Regulation
    5 C.F.R. § 610.121
Technician Personnel Manual 351
32 U.S.C. § 709(b)
5 C.F.R. § 351.201(a)(2)
5 C.F.R. § 351.901
5 C.F.R. § 550.101
5 C.F.R. § 610.101
5 C.F.R. § 610.121
5 C.F.R. § 610.121(b)(2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

Proposals concerning "appropriate arrangements" for employees adversely affected by the exercise of management rights under § 7106(b)(3) are negotiable unless the arrangements "excessively interfere" with the exercise of management rights.

In cases where the Authority addresses a management allegation that a union proposal of appropriate arrangements is nonnegotiable because it conflicts with management rights described in § 7106(a) or (b)(1), the Authority will consider whether such an arrangement is appropriate for negotiation within the meaning of § 7106(b)(3) or whether it is inappropriate because it excessively interferes with the exercise of a management right. In making such a determination, the Authority will examine the record to ascertain as a threshold question whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of those rights. In order to address this threshold question, a union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse.

Once the Authority has concluded that a proposal is in fact intended as an arrangement, it will then determine whether the arrangement is appropriate or whether is is inappropriate because it excessively interferes. This will be done by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as: (1) What is the nature and extent of the impact experienced by the adversely affected employees, *i.e.*, what conditions of employment are affected and to what degree? (2) To what extent are the circumstances giving rise to the adverse affects within the employee's control? (3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, *i.e.*, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved? (4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement? (5) What is the effect of the proposal on effective and efficient government operations? Additional considerations will be applied where relevant and appropriate.

A proposal would not excessively interfere with management's rights under § 7106(a)(2)(C) which provides that when management decides to fill a vacant position from which employees have been demoted in a reduction-in-force (RIF) and there are two or more such demoted employees who are candidates for the position, management would select the candidate who has the highest retention standing. The provision constitutes an appropriate arrangement for employees adversely affected by the exercise of management rights within the meaning of § 7106(b)(3). The Authority found that: (1) the proposal related solely to employees who have been demoted through reduction-in-force. Such actions have extremely significant negative impact on affected employees. (2) By its very definition a reduction-in-force cannot legally be based on matters personal to the employee and hence within his control. (3) The management right affected by the provision (to fill positions by making selection from any appropriate source) is an important one. However, the qualifications of the employee to be placed in the position under the provision are unquestioned. No other management right is affected by the proposal, and it is significant that the proposal in no way attempts to intrude on management's underlying decision concerning whether or not to fill a vacancy. Nor can it be construed to require management to take any affirmative act concerning the organization, management, or assignment of its workforce in order to carry out its mission and determine how work shall be performed. (4) Any "burden" on management, under the circumstances, was insubstantial in comparison to the detriment originally suffered, and benefit later obtained by the affected employees(s). (5) In requiring that "the employee who possessed the highest retention standing . . . be promoted," the proposal on its face will further, rather than impede, the purposes of effective and efficient government operation.

A proposal that requires at least seven days advance notice of a change in an employee's work schedule is nonnegotiable because it conflicts with 5 C.F.R. § 610.121, a Government-wide regulation. The proposal would prevent the agency from complying with the mandate of the Government-wide regulation that management change such schedules as soon as it becomes aware of the need to do so.

21 FLRA No. 5

Federal Labor Relations Authority

Dep't of the Army, U.S. Combined Arms Center and Fort Leavenworth and AFGE, Local 738 (Hamilton, Arbitrator), Case No. 0-AR-1090 (Decided February 10, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a) and (b)
1550. Procedure	
1552. Time Limits for Filing Exceptions	

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with sections 2425.1, 2429.21 and 2429.22 of the Authority's Rules and Regulations, applicable to the computation of time limits.

Federal
Labor Relations
Authority

21 FLRA No. 6

AFGE, Local 3048 and Dep't of Justice, Bureau of Prisons, Federal Correctional Facility, Lompoc, Cal., Case No. 0-NG-1236 (Decided February 10, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7105(a)(2)(E)
2700. Petition for Review	7117(c)(2)
2702. Timeliness	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Procedure
    - Timeliness

DIGEST NOTES

The Union's petition for review was dismissed as untimely because it failed to file its petition within the specified time limits, after service of the agency's allegation of nonnegotiability and in accordance with sections 2424.3, 2429.21 and 2429.22 of the Authority's Rules and Regulations.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

21 FLRA No. 6

AFGE, Local 3048 and Dep't of Justice, Bureau of Prisons, Federal Correctional Facility, Lompoc, Cal., Case No. 0-NG-1236 (Decided February 10, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7105(a)(2)(E)
2700. Petition for Review	7117(c)(2)
2702. Timeliness	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Timeliness

DIGEST NOTES

The Union's petition for review was dismissed as untimely because it failed to file its petition within the specified time limits, after service of the agency's allegation of nonnegotiability and in accordance with sections 2424.3, 2429.21 and 2429.22 of the Authority's Rules and Regulations.

Federal Labor Relations Authority

SSA and AFGE (Miller, Arbitrator), Case No. 0-AR-1089 (Decided February 12, 1986)

DIGEST HEADINGS

1000. ARBITRATION
    1550. Procedure
        1552. Time Limits for Filing Exceptions

STATUTE

7122(a) and (b)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with sections 2425.1, 2429.21 and 2429.22 of the Authority's Rules and Regulations, applicable to the computation of time limits.

21 FLRA No. 7

SBA and AFGE (Miller, Arbitrator), Case No. 0-AR-1089 (Decided February 12, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS

STATUTE

1000. ARBITRATION 7122(a) and (b)

1550. Procedure

1552. Time Limits for Filing Exceptions

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with sections 2425.1, 2429.21 and 2429.22 of the Authority's Rules and Regulations, applicable to the computation of time limits.

ALL OPINIONS SUBJECT TO [illegible]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1336

Union

and Case No. 0-NG-1206

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

On August 30, 1985, the Union submitted proposals regarding the Employee Assessment Plan (EAP) to the Agency in preparation for upcomimg negotiations. By memorandum of September 16, 1985, the Agency notified the Union that most of its proposals appeared to be nonnegotiable. In an attachment included with that memorandum, the Agency indicated each proposal which it considered to be nonnegotiable and the reasons therefore. After the parties resumed negotiations on September 19, 1985, the Union agreed to set aside the proposals which the Agency stated were nonnegotiable and complete negotiations on other issues. On September 20, 1985, the parties entered into a Memorandum of Understanding whereby the parties agreed to a revised EAP. That agreement provided that negotiations could be reopened to resolve those areas regarding the EAP that still remained in dispute between the parties.

On October 3, 1985, the Union requested a written declaration of nonnegotiability from the Agency in respect to its disputed proposals. On October 4, 1985, the Agency sent a memorandum to the Union, requesting that the Union refer to the September 16th memorandum, and more specifically, to the attachment thereto which described the proposals that the Agency had previously indicated were nonnegotiable. On October 7, 1985, the Union requested clarification of the October 3, 1985, statement of nonnegotiability, stating that the September 16th Memorandum was defective under section 2424.1 of the Authority's Rules and Regulations. In a memorandum dated October 28, 1985, the Agency reaffirmed its position previously stated in the October 4, 1985, letter. The Union then filed the instant negotiability appeal on November 7, 1985, or within 15 days from the date of service of the Agency's letter of October 28, 1985.

It is well established that a petition for review must be filed within 15 days from the date of service on the Union of an Agency nonnegotiability allegation. See, e.g., National Treasury Employees Union, Chapter 226 and U.S. Department of Agriculture, Food and Nutrition Service, 15 FLRA 97 (1984). While the Union's November 7, 1985, petition was filed within 15 days from the date of service of the Agency's letter of October 28, 1985, the record indicates that the Agency's letter merely reaffirmed its earlier allegation of October 4, 1985.[1] The Authority has held that where a petition for review is filed concerning an agency's allegation of nonnegotiability which is only a restatement of a prior allegation, and no changes in the substance or language of the proposal have been effectuated during the period between allegations, the petition seeks review of the earlier allegation. American Federation of Government Employees, AFL-CIO, Local 2303 and Metropolitan Washington Airports, Federal Aviation Administration, U.S. Department of Transportation, 17 FLRA No. 8 (1985). In this case, the Union provides no indication that it effected any changes in the contested proposals between October 4 and 28, 1985. Accordingly, the Union's petition seeks review of the October 4 allegation. Since, as noted previously, the Union's petition was not filed with the Authority until November 7, 1985, it is outside the time limits set forth in section 2424.3 of the Authority's regulations and, is, therefore, untimely.

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[1] The Union's contention that the Agency's October 4, 1985 letter did not constitute an allegation of nonnegotiability since it referred to the September 16th memorandum that was defective must be rejected. Here, in response to a written request by the Union for an allegation of nonnegotiability, the Agency stated in its October 4, 1985 letter that the proposals that it deemed to be nonnegotiable were outlined in the attachment to the September 16th memorandum. Thus, the record clearly shows that the Agency's October 4th letter set forth its statement of the nonnegotiability of the disputed proposals by referring to the attachment to the September 16th memorandum.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.[2]

For the Authority

Issued, Washington, D.C., January 22, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

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[2] In view of the disposition of the subject negotiability appeal, it is unnecessary for the Authority to rule on the Agency's motion to dismiss.

21 FLRA No. 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. 0-NG-293
9 FLRA 629

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The sole question presented is whether payment by an agency of travel expenses and per diem allowances incurred by employees using official time in the conduct of labor-management relations is within the duty to bargain under the Federal Labor-Management Relations Statute (the Statute).

In a previous decision in this case, National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 629 (1982), the Authority found the following Union proposal to be within the duty to bargain.

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

The original finding of negotiability was premised upon the conclusion that where "official time" had been granted by the Statute, or negotiated between the parties, employees using it are on "official business" and thus, under law, are entitled to travel expenses and per diem allowances. See Interpretation and Guidance, 2 FLRA 265 (1979). That interpretation was rejected by the Supreme Court in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983). In footnote 17 at p. 107 of its decision the Supreme Court stated that, "unions may presumably negotiate for such payments in collective bargaining as they do in the private sector." In light of the decision, the Authority requested, and the Court of Appeals ordered, remand of the instant case. Upon remand, the Authority issued a "Notice of Reopened Proceedings and Request for Statements of Position" in which it solicited a statement of position from each of the parties as to the effect of the Supreme Court's decision on the negotiability of the above proposal.

II. Positions of the Parties

As explained by the Union, the proposal seeks agreement as to what categories of union activities shall be construed to be in the primary interest of the Government and, hence, "official business" for purposes of reimbursement of incidental and otherwise proper travel expenses. Once such a determination is made the Union acknowledges that "of course, all the specific Travel Regulations apply."

The Agency contends that the proposal is not within the duty to bargain for three independent reasons:

a. It does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

b. it is inconsistent with Federal law and Government-wide regulations;

c. it interferes with its right to determine its budget under section 7106(a)(1).

III. Analysis

A. "Condition of Employment"

The proposal clearly involves a condition of employment not excepted from the definition thereof. Representation of employees in matters concerning their employment affects the "working conditions" of those employees. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980)(Union Proposal II), enf'd as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 455 U.S. 945 (1982). For relevant private sector decisions similarly finding such expenses to be conditions of employment, see Midstate Telephone Corporation v. NLRB, 706 F.2d 401 (2nd Cir. 1983) and Axelson, Inc. v. NLRB, 599 F.2d 91 (5th Cir. 1979).

Whether travel expenses incurred in the conduct of labor-management relations activity are payable from federal funds is not specifically addressed by the Statute or the Travel Expense Act, 5 U.S.C. §§ 5701, et seq. The Statute and its legislative history are silent on this subject. Indeed if it were not, the present litigation might well be unnecessary. While the Travel Expense Act governs the general subject of payment of travel expenses for employees traveling on "official business," it does not specifically address payment for travel engaged in while conducting labor- management activity. Thus the Agency's contention that the proposal involves a matter specifically provided for by Federal statute so as to be excepted from the definition of conditions of employment must be rejected.

B. "Inconsistent with Federal Law or Government-Wide Rules or Regulations"

The thrust of the Agency's argument is that because no law specifically provides for such payment of expenses, it must be inferred that such payments are precluded.[1] It further argues that the Federal Travel Regulations (hereinafter FTRs) limit payment to those travel expenses which are essential to the transacting of official business, and that the granting of "official time" does not confer "official business" status on travel undertaken while on official time.[2] It contends that a determination as to whether an employee is on "official business" is dependent on the particular facts involved in each individual situation. Consequently, such a determination is not a matter of "unlimited discretion" on the part of the Agency.[3]

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[1] To the extent the Agency contends that the expenditure of funds to pay the travel expenses and per diem allowances of Agency employees using official time to conduct labor-management relations is unsupported by a congressional appropriation of funds, the claim is without merit. In September 1979, Congress appropriated funds for the "necessary expenses" of the Customs Service for fiscal year 1980. Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559, 560. A line item for "travel and transportation of persons"

(Continued)

(Continued)

was included in the Customs Service's budget estimate for that fiscal year. Budget of the United States Government, Fiscal Year 1980, Appendix, at p. 762. Subsequent to fiscal year 1980 the activities of the Customs Service, including travel of employees, have been carried out under continuing resolutions. See, e.g., Continuing Resolution of 1984, Pub. L. No. 98-151, 97 Stat. 964. Such congressional appropriation acts, which presumably have supported travel by employees representing the Agency in connection with labor relations activities, also would support the disbursement of funds for such travel by Agency employees as may occur under the Union's proposal in this case.

2/ The FTRs have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23 (1983).

3/ The Agency incorporates by reference guidance issued by the Office of Personnel Management (OPM) that a determination that specific travel related to union activities is in the primary interest of the Government and, hence, constitutes "official business" is a decision reserved solely and exclusively to agencies. FPM Letter 711-162 (Subject: Payment of Travel and Per Diem Expenses for Employee Negotiators Representing Unions in Collective Bargaining) dated January 19, 1984. The Authority notes that such guidance is merely that and is not binding on the various federal agencies. See National Treasury Employees Union v. Devine, 587 F. Supp. 960, 963 (D.D.C. 1984); see also Federal/Postal/Retiree Coalition v. Devine, 751 F.2d 1424 (D.C. Cir. 1985).

The provisions of the Travel Expense Act and the FTRs are set forth, in relevant part, in appendices A and B. Briefly summarized the statutory provisions state that federal employees traveling on "official business" are entitled to appropriate expenses and allowances. The regulations in turn limit such reimbursement to that "which is necessary to accomplish the purposes of Government effectively and economically."

In exercising his authority to render decisions on questions involving payments and vouchers pursuant to 31 U.S.C. 3529 (1982 ed.), the Comptroller General of the United States administers and interprets the Travel Expense Act. Neither the Travel Expense Act nor the regulations specifically define the term "official business." As a general proposition the Comptroller General has ruled that payment is authorized where the activity involved was sufficiently in the interest of the United States so as to be regarded as official business. 44 Comp. Gen. 189 (1964).

In the labor-relations context, the Comptroller General has applied a similar standard. Prior to passage of the Statute, an agency was not precluded from making payment of travel expenses and per diem allowances to union representatives upon a determination that it served the convenience of the agency or was otherwise in the primary interest of the Government. BATF, supra, pp. 100-01 n. 11 and 107 n. 17 citing 46 Comp. Gen. 21 (1966).[4]

Thus determinations concerning whether to make such payments are within the discretionary administrative authority of an agency. The Authority has consistently held that insofar as an agency has discretion regarding a matter affecting conditions of employment it is obligated under the Statute to exercise that discretion through negotiation unless precluded by regulatory or statutory provisions.

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[4] Relying upon the principles enunciated by the Comptroller General in that opinion, the Federal Labor Relations Council, established by E.O. 11491 to administer labor-management relations in the Federal service, held a proposal seeking travel costs for certain contract administration activities to be within the duty to bargain under the provisions of that Executive Order. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Region VII, 5 FLRC 250 (1977).

National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 759-60 (1980). Moreover, nothing in the Statute limits this duty to matters over which an agency has total discretion. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 FLRA 409 (1982). In the instant case, the Agency has not cited any legal or regulatory provision, nor is any apparent, which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business.[5/]

The Union has acknowledged that payment of any travel expenses flowing from this proposal, if agreed upon, would be subject to the provisions of the FTRs.[6/] Hence, we conclude the proposal would not require the Agency to authorize either specific travel or expenses which do not comport with the regulatory requirements and restrictions. The proposal was not intended to, and could not, require the Agency to use specific authorization procedures and practices relating to actual travel which conflicted with the FTRs. It would not foreclose individual determinations regarding the propriety under the FTRs of authorizing particular travel and expenses. To the extent that case-by-case determinations are required under law and regulation, this proposal would not be inconsistent with such procedures. Cf. U.S. Department of Justice v. FLRA, 727 F.2d 481, 489-90 (5th Cir. 1984) (wherein the Court held in the circumstances presented that

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[5/] See also Unpublished Decision of the Comptroller General, B-195409, July 7, 1980 (wherein the Comptroller General, in ruling on a particular employee's entitlement to travel expenses, noted that payment of such expenses could be authorized by, among other things, provisions of a negotiated agreement). It is noted that where a determination as to whether something is in the Government's interest is within an agency's administrative discretion, such determination is subject to bargaining. American Federation of Government Employees, AFL-CIO, Local 3525 and U.S. Department of Justice, Board of Immigration Appeals, 10 FLRA 61, 65 (1982).

[6/] Union Reply Brief to Agency Statement of Position at 4: "of course, all the specific Travel Regulations apply."

law and regulations required case-by-case determination as to method or means of travel used by employees). Thus the Agency's contention that the proposal is inconsistent with Federal law, and Government-wide regulations must be rejected.

C. "Conflicts with the Right to Determine (the Agency's) Budget"

The Authority has previously held that interference with the right of an agency to determine its budget under section 7106 insulates the negotiation process in two fundamental respects. First, an agency cannot be required to negotiate particular budgetary matters relating to the determination of the programs and operations to be included in its estimation of proposed expenditures and the amounts required to fund them. Second, where an agency makes a substantial demonstration that a significant and unavoidable increase in costs, not offset by compensating benefits, will result, an otherwise negotiable proposal may be found to violate this section 7106(a) right of the Agency. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra, at page 608.

The Agency acknowledges that the Union Proposal does not expressly require that a line item be added to the Agency's budget and tacitly concedes that it would not prescribe an amount to be allocated in the Agency's budget for programs or operations. The Agency argues (without specific support) that the proposal would entail significant and unavoidable costs which are not offset by compensating benefits to the Agency. It only claims generally that the significance and unavoidability of increased costs attendant to the payment of travel expenses resulting from labor-management relations activities has been "officially recognized."[7]

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[7] This claim is apparently premised or made in reli[illegible] upon the following:

a. A report in Government Employees Relations Report (GERR) regarding an OPM estimate that payment of travel and per diem for union negotiators on official time under section 7131(a) of the Statute would cost 15 sample agencies $2 million per year. GERR (BNA) No. 852 at 11 (1980).

(Continued)

No specific information or estimates of the financial impact of the proposal have been presented. Based on this record, the Agency's poorly supported assertion cannot provide a ground for concluding that there is a substantial demonstration that the proposal would result in a significant and unavoidable increase in costs. Therefore, its allegation that the proposal is inconsistent with its right to determine its budget cannot be sustained. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 6 FLRA 423 (1981), aff'd mem. sub nom. Office of Personnel Management v. FLRA, 706 F.2d 1229 (D.C. Cir. 1983).

IV. Conclusion

Based on the foregoing analysis, the Authority finds that the Union Proposal concerns a condition of employment which is within the Agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. Therefore, it is within the duty to bargain.8/ In making

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(Continued)

b. Information contained in the record of an unrelated impasse proceeding before the Federal Service Impasses Panel (FSIP) wherein the agency in that proceeding stated that in the contract negotiations involved in that dispute, travel and per diem for the union team cost $107,302.25. Equal Employment Opportunity Commission, Washington, D.C. and Equal Employment Opportunity Commission Council 216, American Federation of Government Employees, AFL-CIO, 80 FSIP 38, Report No. 179 (1981).

c. The statement of the Supreme Court in BATF at 464 U.S. 100 that:

> Under the 1962 Executive Order establishing the first federal labor relations program, the decision whether to pay union representatives for the time spent in collective bargaining was left within the discretion of their employing agency, apparently on the ground that, without some control by management, the length of such sessions could impose too great a burden on government business. [Citation and footnote omitted.]

8/ In finding this proposal within the duty to bargain the Authority makes no judgment as to its merits.

this finding, it is noted that while the Agency must bargain in good faith over the disputed proposal it is under no obligation to agree to this particular formulation. Consideration by management of the consequences of the proposal are a legitimate aspect of the bargaining process. Should matters of concern to the Agency, such as perceived potential for increased expenditures, prevent the parties from reaching agreement, such considerations could be presented tc the Federal Service Impasses Panel in a proceeding pursuant to section 7119 of the Statute.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union Proposal.

Issued, Washington, D.C., January 31, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX A

Relevant Provisions of
Travel Expense Act
5 U.S.C. §§ 5701 *et seq.*

§ 5702. Per diem; employee traveling on official business

(a) Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

. . . .

(c) Under regulations prescribed under section 5707 of this title, the Administrator of General Services, or his designee, may prescribe conditions under which an employee may be reimbursed for the actual and necessary expenses of official travel when the maximum per diem allowance would be less than these expenses, except that such reimbursement shall not exceed $75 for each day in a travel status within the continental United States when the per diem otherwise allowable is determined to be inadequate (1) due to the unusual circumstances of the travel assignment, or (2) for travel to high rate geographical areas designated as such in regulations prescribed under section 5707 of this title.

. . . .

§ 5704. Mileage and related allowances

(a) Under regulations prescribed under section 5707 of this title, an employee who is engaged on official business for the Government is entitled to not in excess of--

(1) 20 cents a mile for the use of a privately owned motorcycle;

(2) 25 cents a mile for the use of a privately owned automobile; or

(3) 45 cents a mile for the use of a privately owned airplane;

instead of actual expenses of transportation when that mode of transportation is authorized or approved as more advantageous to the Government. A determination of such advantage is not required when payment on a mileage basis is limited to the cost of travel by common carrier including per diem. Notwithstanding the preceding provisions of this subsection, in any case in which an employee who is engaged on official business for the Government chooses to use a privately owned vehicle in lieu of a Government vehicle, payment on a mileage basis is limited to the cost of travel by a Government vehicle.

(b) In addition to the mileage allowance authorized under subsection (a) of this section, the employee may be reimbursed for--

(1) parking fees;

(2) ferry fees;

(3) bridge, road, and tunnel costs; and

(4) airplane landing and tie-down fees.

. . . .

§ 5706. Allowable travel expenses

Except as otherwise permitted by this subchapter or by statutes relating to members of the uniformed services, only actual and necessary travel expenses may be allowed to an individual holding employment or appointment under the United States.

§ 5707. Regulations and reports-

(a) The Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter, except that the Director of the Administrative Office of the United States Courts shall prescribe such regulations with respect to official travel by employees of the judicial branch of the Government.

APPENDIX B

Relevant Provisions of Federal Travel Regulations

1-1.3. General rules.

. . . . .

b. Reimbursable expenses. Traveling expenses which will be reimbursed are confined to those expenses essential to the transacting of official business.

. . . . .

1-1.4. Authorization of travel.

a. Travel policy. It is the policy of the Government that agencies shall authorize only that travel which is necessary to accomplish the purposes of the Government effectively and economically.

b. Agency responsibilities.

(1) Except as otherwise provided by law, all travel shall be either authorized or approved by the head of the agency or by an official to whom such authority has been delegated. Ordinarily, a travel authorization shall be issued before the incurrence of the expenses. Agencies shall prescribe procedures for travel situations where it is not practical or possible to issue a written authorization in advance.

(2) Agency heads shall communicate the Government's travel policy (see a, above) to all travel authorizing officials at all levels within their respective agencies and establish controls to ensure that only travel that is essential to the purposes of the Government and for accomplishment of the agency's mission is authorized or approved.

(3) Travel authorizing officials shall authorize or approve only that travel necessary to accomplish the agency mission in the most effective

and economical manner. Authorizing officials should be aware of travel plans, including plans to take annual leave in conjunction with travel, and shall ensure appropriate consideration of the need for the travel, the use of travel substitutes (i.e., mail, teleconferencing, etc.), and the most cost effective routing and means of accomplishing travel. Each employee's travel shall be authorized separately under specific guidelines provided in 1-1.5.

1-1.5. Guidelines for issuing travel authorizations. The travel policies and practices of each agency shall reflect, but not be limited to, the guidelines stated herein.

a. Types and use of travel authorizations. General or blanket travel authorizations for entire agencies or groups of employees shall not be used. To ensure adequate managerial and supervisory attention to the need for all travel, each employee's travel shall be authorized separately under one of the following types of travel authorization:

(1) Unlimited open authorization. This type of authorization allows an employee to travel for any purpose without further authorization. Unlimited open authorizations shall be issued only for department or agency heads, their deputies, or other principal agency officials as the agency head or deputy may designate, and managers of major subunits where no supervisor is present.

(2) Limited open authorization. This type of authorization allows an employee to travel without further authorization under certain specified conditions (i.e., travel to specific geographical area(s), for specific purpose(s), subject to trip cost ceilings, or for specific periods of time). Limited open authorizations may be provided for employees whose duties require frequent repetitive travel. Such authorizations, however, should be reviewed and revalidated at least quarterly and should include realistic limitations on purpose(s), geographic area(s), number of trip(s), trip duration, and costs.

(3) Trip-by-trip authorization. This type of authorization allows an individual or group of individuals to take one or more specific trips and shall include the specific purpose, itinerary, and estimated costs. Travel not covered in an unlimited or limited open authorization (see (1) and (2), above) shall be separately authorized on a trip-by-trip basis.

b. Levels of approval and requirements for special purpose travel. Due to the relatively high costs associated with certain kinds of travel, such travel shall be authorized only on a trip-by-trip basis and reviewed at a level of authority sufficient to provide policy approval. The types of travel covered by this requirement are indicated in (1) thru (3), below.

Authorization of travel for purposes other than those listed in (1) thru (3), below, should be delegated to the lowest management level which has responsibility for both program accomplishment and obligation or commitment of funds.

(1) Conferences, meetings, and training sessions. Travel for conference and meeting attendance and training sessions shall be authorized on a trip-by-trip basis. When authorizing travel for conference and meeting attendance, the approving official shall ensure that the number of attendees from the agency is necessary and justified. In addition, the need for conferences and meetings for which total travel and per diem estimates exceed $5,000 shall be certified by a level of authority sufficient to provide policy approval as designated by the head of the agency scheduling the conference or meeting.

. . . .

c. Purpose(s) of travel. Each travel authorization and the associated travel voucher(s) (see 1-11.5g) shall specify clearly the purpose(s) of the travel. For uniformity in establishing travel purposes on authorizations, agencies should use travel purpose categories that conform to the extent possible to those listed in appendix 1-B.

d. Cost estimates. Travel authorizations shall include estimates of the cost of the travel. Both unlimited and limited open authorizations shall also include an estimate of the travel costs to be incurred over the period covered by the authorization. Agencies shall use these estimates to obligate the funds necessary to carry out that particular travel in order to improve travel budgetary controls. (For advance of funds for the estimated costs of travel, see 1-10.3.)

. . . . . .

1-2.1. Expenses payable as transportation. Transportation expenses which the Government may pay either direct [sic] or by reimbursement include fares, rental fees, mileage payments, and any expenses incident to transportation such as baggage transfer; official telegraph, telephone, radio, and cable messages in connection with items classed as transportation; steamer chairs, steamer cushions, and steamer rugs at customary rates actually charged; staterooms on steamers; and other expenses set forth in 1-2 through 1-6 and 1-9.

21 FLRA No. 3

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1061

LOCAL 3239, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Erwin B. Ellmann filed by the Agency pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. The Agency has also filed a request for a stay of the award under part 2429 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions and the request for a stay must be dismissed as interlocutory.

According to the Arbitrator, the parties agreed that the issue to be resolved by him was whether the Detroit Teleservice Center (the Activity) violated the parties' collective bargaining agreement by eliminating free-of-charge parking for some employees when the Activity moved to a new location; and, if so, what should the appropriate remedy be? In the instant award the Arbitrator essentially found that the Activity had violated the parties' agreement. However, the Arbitrator expressly deferred any award as to an appropriate remedy until the parties had an opportunity to explore various possibilities. In that latter regard, the Arbitrator only directed the parties to consider those possibilities and to notify him of the results within a set period of time. The Arbitrator further advised the parties that if they reached agreement he would, if the parties so desired, review their agreement with the object of confirming it in his award; and if they did not reach an agreement, they should be prepared to submit additional evidence and argument at a further hearing on this matter.

Section 2429.11 of the Authority's Rules and Regulations provides: "The Authority and the General Counsel ordinarily will not consider interlocutory appeals." That is, the Authority ordinarily will not consider an appeal until a final decision has been rendered on the entire proceeding.

In this case, it is clear that the Arbitrator has not rendered a final award on the entire dispute before him. Rather, as indicated above, the Arbitrator issued an interim award deciding the first part of the issue presented, i.e., whether the Activity violated the parties' collective bargaining agreement, and expressly deferred final disposition as to the remedy in the dispute. Thus, the Agency's exceptions are considered interlocutory and the facts and circumstances are not such as to warrant review of the exceptions at this time.

Accordingly, since the Agency's exceptions are interlocutory and Authority review is not warranted under the circumstances, the exceptions and the request for a stay are hereby dismissed. However, the dismissal is without prejudice to the renewal of any of the Agency's contentions in exceptions duly filed with the Authority after a final award is rendered by the Arbitrator.

For the Authority.

Issued, Washington, D.C. February 5, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R14-87

Union

and

Case No. O-NG-968

KANSAS ARMY NATIONAL GUARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two provisions of a negotiated agreement disapproved by the Agency head under section 7114(c) of the Statute. The first provision, while important, can be disposed of by application of previous Authority precedent whereas the second provision raises significant issues for which the Authority adopts a new analytical framework.

II. Background

The Authority's analysis of the second provision at issue in this case (cited in its entirety below), presents an opportunity for fundamental reevaluation of previous Authority precedent. This reexamination is necessitated by the holding of the U.S. Circuit Court of Appeals for the District of Columbia in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

In deciding that case the Court rejected the so-called "direct interference" test previously applied by the Authority in evaluating the negotiability of matters described as "appropriate arrangements" under section 7106(b)(3) of the Statute. While that Court had previously sustained the application of that test as to "procedures" under section 7106(b)(2)[1], it had not had an opportunity to address its applicability to "appropriate arrangements." In rejecting "direct interference" as an analytical device in section 7106(b)(3) cases, the Court enunciated a standard which requires an analysis of whether "excessive interference" with a right reserved to management would result from implementation of the proposal. The Court stated that:

> Undoubtedly, some arrangements may be inappropriate because they impinge on management prerogatives to an excessive degree. . . . Beyond that, we decline to speculate as to what the word "appropriate" may lawfully be interpreted to exclude. Its precise content is for the Authority to determine in the first instance, based on its knowledgeable estimation of the competing practical needs of federal managers and union representatives.

702 F.2d at 1188

Since the date of that decision the Authority has applied the D.C. Circuit rule and rationale only to cases remanded to it by that Court.[2] We have not, as a general matter of law, embraced that reasoning in deciding pending negotiability cases. Today we adopt that test as the Authority's standard. Additionally, we articulate factors to be considered in arriving at a determination of whether or not a given proposal is appropriate as an arrangement and therefore negotiable, or inappropriate as an arrangement because it excessively interferes with management prerogatives, and is therefore nonnegotiable.

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[1] Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140, 1159 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945, 102 S. Ct. 1443 (1982).

[2] Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 20 FLRA No. 85 (1985); National Labor Relations Board Union and National Labor Relations Board, Office of the General Counsel, 18 FLRA No. 42 (1985); and American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., Decision and Order on Remand, 14 FLRA 801 (1984).

III. Provision 1

> Section 3. When a change of work schedule or hours of work resulting from other than mission requirements is necessary, the employer agrees to notify the union and the employees at least 7 days in advance. Such notices will be given by publishing announcements in sufficient time so as to give adequate notice to all employees. With regard to employees who are absent from duty on leave, notice will be mailed to them by their supervisor at their listed emergency notification address. If an employee is not given notice of any such change and reports to duty based on the superseded schedule, he will be retained in a "work status" and assigned appropriate work for that day.

A. Positions of the Parties

The Agency asserts that Provision 1 is nonnegotiable because it conflicts with 5 CFR 610.121, a Government-wide regulation. The Union argues that the provision is merely a renewal of a previously approved provision and that it does not conflict with the Government-wide regulation.

B. Analysis

Provision 1 would require the Agency to provide the Union and unit employees seven (7) days advance notice whenever a change in employee work schedules is necessary. In this respect, the provision at issue has substantially the same effect as Provision 1 in American Federation of Government Employees, AFL-CIO, Local 2484 and U.S. Army Garrison, Fort Detrick, Maryland, 17 FLRA No. 106 (1985), appeal docketed sub nom. American Federation of Government Employees, AFL-CIO, Local 2484 v. Federal Labor Relations Authority, No. 85-1405 (D.C. Cir. July 3, 1985). The provision at issue in that case required the agency to provide two (2) weeks notice to employees of any change in work schedules. The Authority determined that the provision was outside the duty to bargain under section 7117(a)(1) of the Statute because it was inconsistent with an applicable Government-wide regulation, 5 CFR 610.121(b)(2). In particular, the Authority found that the proposal, by requiring at least two weeks notice to employees of a change in work schedules, would prevent the agency from complying with the mandate of the Government-wide regulation that management change such schedules as soon as it becomes aware of the need to do so. Just as in Fort Detrick, the National Guard civilian technicians covered by this provision, are covered by 5 CFR 610.121. (See 5 CFR 610.101, 550.101.)

C. Conclusion

For the reasons set forth in the Fort Detrick decision, Provision 1 is outside the duty to bargain under section 7117(a)(1) of the Statute because it is inconsistent with an applicable Government-wide regulation. In this connection, the Union's argument that the provision is a renewal of previous contract language is not relevant.

IV. Provision 2

> Section 7. a. When the specific position, in an activity, from which an employee has been demoted through reduction in force (RIF) becomes vacant and is being filled, the demoted employee will be considered for repromotion noncompetitively to the position subject to paragraph b., below.
>
> b. A basis for nonpromotion will be an unsatisfactory performance rating which is documented in the employee's OPF, or that his work either before or after demotion by reduction in force was not at an acceptable level of competence.
>
> c. If more than one employee meets the criteria contained in a and b above the employee who possessed the highest

> retention standing at the time he/she was changed to a lower grade will be promoted.
>
> d. All employees previously demoted without personal cause, misconduct or inefficiency, will receive special consideration for repromotion.
>
> [Only the underlined portion of the provision is in dispute.]

By its terms and as interpreted by both the Union and the Agency, which interpretation is adopted by the Authority, Provision 2 would provide that when management decides to fill a vacant position from which employees have been demoted in a reduction-in-force (RIF) and there are two or more such demoted employees who are candidates for the position, management would select the candidate who has the highest retention standing. National Guard RIF regulations provide for employees to be released from their tenure group based upon their relative retention standing. Thus, the employee who has the highest relative retention standing among competing employees would be released, if he or she is reached for release, after employees with lower standing. The effect of the provision, therefore, would be to require the repromotion of the employee with the highest relative retention standing before employees with lower standing.[3]

The parties apparently agree that the provision would not require the selection of an employee who is not qualified or does not possess the compatible military grade for the position. Since the position for which the employee with the highest retention standing would be selected is the same position from which he or she had been demoted through no fault of the employee, that person would obviously be qualified and possess the requisite military grade for the vacancy. This distinguishes Provision 2 from Union Proposals 3 and 6 in Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 20 FLRA No. 85 (1985). In that case, the Authority held that Union Proposals 3 and 6 were contrary to law, 32 U.S.C. § 709(b), because they required management to place civilian technicians in positions without regard to compatibility of military grade.

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[3] For a detailed analysis of retention standing for National Guard employees, see Association of Civilian Technicians, Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, 3 FLRA 50 (1980); American Federation of Government Employees, AFL-CIO, Local 2953 and National Guard Bureau, Office of the Adjutant General, Nebraska, 7 FLRA 87 (1981), affirmed sub nom. American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority, 730 F.2d 1534 (D.C. Cir. 1984).

A. Positions of the Parties

The Agency contends that the provision, by mandating the selection of the repromotion eligible employee with the highest retention standing, violates its right under section 7106(a)(2)(C) to fill positions by making selections from any appropriate source. The Union argues to the contrary, citing the decision of the U.S. Court of Appeals for the District of Columbia Circuit in AFGE, Local 2782, that the provision constitutes an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute, for employees adversely affected by the exercise of management's rights.[4] The Agency's response to that argument is that only proposals which "indirectly affect" management rights are negotiable as appropriate arrangements under section 7106(b)(3) of the Statute.

B. Analysis

1. Adoption of the Excessive Interference Test

The issue before the Authority in determining the negotiability of the second provision is whether the locally agreed-upon arrangement for employees demoted without fault interferes with the exercise of management's rights under section 7106(a) so as to be rendered inappropriate for negotiation under section 7106(b)(3) of the Statute. As stated at the outset of this decision, the Authority finds the considerations addressed by the District of Columbia Circuit in AFGE, Local 2782 to be applicable here and the Authority will apply the excessive interference test enunciated therein both in this decision and in future decisions analyzing appropriate arrangement issues.[5] By so doing, we reject the Agency's argument that only proposals which indirectly affect management rights are negotiable.

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[4] In its Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), the Authority held that, even though the proposal at issue constituted an appropriate arrangement under section 7106(b)(3), it nevertheless was outside the duty to bargain because it was inconsistent with certain provisions of the Federal Personnel Manual which were applicable Government-wide regulations. The Authority reaffirmed that conclusion in its Decision and Order on Motion for Reconsideration (July 11, 1985). However, those provisions of the Federal Personnel Manual are not applicable to National Guard civilian technicians and, thus, are not at issue in the instant case.

In its decision in that case the Court reasoned:

> [t]hat an arrangement proposed under paragraph (b)(3) of § 7106 is not ipso facto invalidated by conflicting with paragraph (a)(2)(C) [a "management right"] is evident from the prologue of subsection (b), which states that "[n]othing in this section shall preclude any agency and any labor organization from negotiating" over the specified items. The prologue of subsection (a) makes the same point, declaring that all management prerogatives it contains (including those in paragraph (a)(2)(C)) are "[s]ubject to subsection (b) of this section." . . .
>
> The conclusion is inavoidable that what was intended was an exception to the otherwise governing management prerogative requirements of subsection (a). . . .

---

[5] In adopting the D.C. Circuit's rationale, the Authority notes the analysis applied in United States Air Force, Headquarters, Warner Robins Air Force Logistics Command, Robins Air Force Base, Georgia v. Federal Labor Relations Authority, 727 F.2d 1502 (11th Cir. 1984), reversing American Federation of Government Employees, AFL-CIO, Local 987 and Headquarters, Warner Robins Air Force Logistics Command, Robins Air Force Base, Georgia, 8 FLRA 667 (1982), wherein the 11th Circuit cited with approval the District of Columbia Circuit test enunciated in AFGE, Local 2782, but held that the proposal at issue in that case did not constitute an appropriate arrangement under section 7106(b)(3) because it "substantively infringed" on the exercise of management's rights.

> The portions of legislative history most precisely directed to the point at issue here support the interpretation we have adopted. . . .
>
> Undoubtedly, some arrangements may be inappropriate because they impinge upon management prerogatives to an excessive degree. . . .
>
> [T]he Authority is free to determine whether the union's proposal, albeit not invalid simply because it contravenes . . . management rights, is nonetheless inappropriate.

702 F.2d 1185-1188. [Emphasis in original.]

In this and future cases where the Authority addresses a management allegation that a union proposal of appropriate arrangements is nonnegotiable because it conflicts with management rights described in section 7106(a) or (b)(1), the Authority will consider whether such an arrangement is appropriate for negotiation within the meaning of section 7106(b)(3) or, whether it is inappropriate because it excessively interferes with the exercise of management's rights.

In making that determination, the Authority will first examine the record in each case to ascertain as a threshold question whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. In order to address this threshold question, the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights.

Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit, by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

> (1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree?
>
> (2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?
>
> For example, compare AFGE, Local 2782 and Bureau of the Census, Decision and Order on Remand, 14 FLRA 801 (1984), (proposal applies to employees demoted through no fault of their own) with National Labor Relations Board Union and National Labor Relations Board, Office of the General Counsel, 18 FLRA No. 42 (1985) (proposal concerned employees management proposed to demote or terminate due to demonstrated inability or unwillingness to perform acceptably).
>
> (3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?
>
> See, for example, Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 20 FLRA No. 85 (1985) (Proposal 1) (proposal which would have precluded management, regardless of circumstances, from obtaining additional personnel with skills unavailable in the unit held to excessively interfere with management rights).

> (4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?
>
> See, for example, Montana Air National Guard, supra, (Proposal 1) (harm to agency's mission balanced against uncertain benefits of the proposal to employees).
>
> (5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved?

These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. Inasmuch as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties to cases of this nature filed in the future to address any and all relevant considerations as specifically as possible.

2. The Test As Applied to The Provision at Issue

The provision relates solely to employees who have been demoted through reduction-in-force. Such actions have extremely significant negative impact on affected employees. Demotion, even though no fault of one's own, causes eventual loss of grade, pay, and attendant benefits. Demotion through RIF frequently results in the employee being placed in a position which requires skills, knowledges, and abilities less than those required in his or her previous position with concomitant lack of job satisfaction. Next to removal from the Federal service, it is difficult to imagine any action with more severe impact than a demotion. Such actions with respect to Federal employees generally are considered of a magnitude sufficient to trigger the limited subject matter jurisdiction of the Merit Systems Protection Board. See 5 CFR 351.901.

By its very definition a reduction-in-force cannot legally be based on matters personal to the employee and hence within his control. See, generally, Technician

Personnel Manual (TPM) 351. Compare as to Federal employees generally, 5 CFR 351.201(a)(2); see especially, Losure v. Interstate Commerce Commission, 2 MSPB 361 (1981).

The management right affected by the provision (to fill positions by making selections from any appropriate source) is an important one. However, it must be remembered that the qualifications of the employee to be placed in the position under the provision are unquestioned. Indeed, the employee must have previously performed the duties of the position acceptably in order for the provision to apply. No other management right is affected by the provision, and it is significant that the provision in no way attempts to intrude on management's underlying decision concerning whether or not to fill a vacancy. Nor can it be construed to require management to take any affirmative act concerning the organization, management, or assignment of its workforce in order to carry out its mission and determine how work shall be performed.

Reductions-in-force for National Guard technicians under the National Guard regulations, like reductions-in-force for Federal employees generally, are not premised solely on seniority as that concept has emerged in private sector labor relations. To the contrary, reductions-in-force of National Guard technicians are governed by an intricate regulatory scheme which recognizes and quantifies the performance of employees in both their civilian and military capacities as well as their length of service.[6] Thus, in requiring that "the employee who possessed the highest retention standing . . . be promoted," the provision on its face will further, rather than impede, the purposes of effective and efficient government operation. Accordingly, to require selection of the employee with the highest retention standing is to do nothing more than to require selection of the person who but for the depth of the RIF would have been, and would still be, encumbering the position. Any "burden" on management in these circumstances is insubstantial in comparison to the detriment originally suffered, and benefit later obtained, by the affected employee(s).

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[6] National Guard Bureau regulation, Technician Personnel Manual (TPM) 351. See also Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (Proposal 2), and the cases cited in note 3, supra.

C. Conclusion

The Authority finds, therefore, that Provision 2 would not excessively interfere with management's rights under section 7106(a)(2)(C) and that the provision constitutes an appropriate arrangement for employees adversely affected by the exercise of management's rights within the meaning of section 7106(b)(3) of the Statute. See Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), affirmed in Decision and Order on Motion for Reconsideration (July 11, 1985).

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Provision 1 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall rescind its disapproval of Provision 2, which was bargained on and agreed to by the parties at the local level.[7]

Issued, Washington, D.C., February 7, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[7] In deciding that Provision 2 is within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

21 FLRA No. 5

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY COMBINED
ARMS CENTER AND FORT
LEAVENWORTH

Agency

and

Case No. 0-AR-1090

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 738

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Don Hamilton by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated December 26, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,1/ and section 2425.1 of the Authority's Rules and Regulations, as amended,2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on January 29, 1986. However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until January 31, 1986.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 10, 1986

Harold D. Kessler

Harold D. Kessler
Managing Director for Case Processing

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3048

Union

and

Case No. 0-NG-1236

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, FEDERAL
CORRECTIONAL FACILITY,
LOMPOC, CALIFORNIA

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained.

The Agency's allegation of nonnegotiability in this case apparently was served on the Union by mail on January 2, 1986. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on January 22, 1986. However, the petition for review was not filed until February 3, 1986, and thus was untimely.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 10, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

21 FLRA No. 7

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Activity

and Case No. 0-AR-1089

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Anne Harmon Miller filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated December 18, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on January 21, 1986. However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until January 28, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 12, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA

SOCIAL SECURITY ADMINISTRATION

Activity

and

Case No. 0-AR-[illegible]

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator [illegible] Miller filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated December 18, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended 1/ and section 2425.1(b) of the Authority's Rules and Regulations, as amended 2/ which amendments are applicable to exceptions [illegible] filed with the Authority on or after March 1, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, [illegible] exceptions to the Arbitrator's award [illegible] had to be filed, that is, received in the national office of the Authority, not later than the close of

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983, Pub. L. No. 98-224, [illegible] 97 Stat. 47, [illegible] to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. [illegible] (1984).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
BALTIMORE, MARYLAND

Activity

and

Case No. 0-AR-949
(20 FLRA No. 82)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, BALTIMORE, MARYLAND

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This case is before the Authority on a request for reconsideration filed by the Union on December 23, 1985, seeking reconsideration of the Authority's Decision of November 22, 1985. For the reason set forth below, the request must be denied.

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

The Authority's Decision was dated and served on the Union by mail on November 22, 1985. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Union's request for reconsideration was due in the national office of the Authority before the close of business on December 9, 1985. Since, as indicated above, the Union's request was not filed until December 23, 1985, it is clearly untimely and must be denied.

Accordingly, for the reason set forth above, and apart from other considerations, the Union's request for reconsideration is hereby denied.

For the Authority.

Issued, Washington, D.C., December 31, 1985

Harold D. Kessler

Harold D. Kessler
Managing Director for Case Processing

[ORDER DENYING MOTION FOR RECONSIDERATION OF 15 FLRA No. 184]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-764
15 FLRA No. 184

PATENT OFFICE PROFESSIONAL ASSOCIATION

Union

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority on the union's motion for reconsideration of the Authority's decision of August 31, 1984, denying the union's exceptions to an arbitration award. The motion for reconsideration asserts in essence that reconsideration is warranted under section 2429.17 of the Authority's Rules due to "extraordinary circumstances" arising from allegedly prohibited ex parte communications.[1] For the reasons discussed below, the union's motion has failed to demonstrate the existence of "extraordinary circumstances" within the meaning of section 2429.17 of the Authority's Rules and therefore must be denied.

In its motion, the union alleges that one letter and two telephone conversations relating to this case while it was pending before the Authority constitute prohibited ex parte communications within the meaning of part 2414 of the Authority's Rules. Upon careful consideration of the union's motion, including an internal inquiry into the specific allegations made by the union, the Authority concludes that no prohibited ex parte communications occurred in this matter and reconsideration accordingly is not warranted.

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[1] Section 2429.17 of the Authority's Rules provides in pertinent part:

> **[A] party . . . who can establish extraordinary circumstances for so doing, may move for reconsideration of [an Authority] final decision or order. . . .**

The Authority's regulations relating to ex parte communications are set forth in 5 C.F.R. Part 2414. The regulations prohibit interested persons from making, in "any agency proceedings subject to 5 U.S.C. § 557(a)," any prohibited ex parte communication to Authority officials or employees who are or may reasonably be expected to be involved in the decisional process of the proceeding. 5 C.F.R. § 2414.2(a) (1984). Under the Statute, Authority proceedings subject to 5 U.S.C. § 557(a) include only unfair labor practice cases. However, the Authority applies the same standards contained in the regulations to other cases which are presented to it for resolution, including cases in which the Authority is called upon to resolve exceptions to arbitrators' awards.

The term "ex parte communications" is defined in section 2414.3(b) as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, subject however, to provisions of §§ 2414.5 and 2414.6." Those sections, in turn, provide in relevant part that prohibited ex parte communications do not include oral or written requests for information solely with respect to the status of a proceeding (section 2414.6(b)), and also do not include written communications which are contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of part 2429 of the Authority's Rules (section 2414.5(a)).

Applying these standards to the instant case, the Authority concludes that, contrary to the union's assertions, no prohibited ex parte communications occurred herein. Specifically, the union asserts that a letter dated August 24, 1984, from the Commissioner of Patents and Trademarks to the then Chairman of the Authority constitutes a prohibited ex parte communication. This assertion is without merit because, apart from other considerations, the letter was contemporaneously served on the union in accordance with the provision of part 2429 of the Authority's Rules and therefore was not a prohibited ex parte communication under the rules set forth above. Moreover, the letter was not considered by the Authority in rendering its decision in the instant case. Thus, the letter provides no basis for granting reconsideration in the instant case.

Further, the union contends that two telephone calls from the Commissioner constitute prohibited ex parte communications. This contention is also without support. In August 1984, the Commissioner telephoned the Chairman and inquired into the status of the proceeding before the Authority. The Chairman referred the Commissioner to the Authority's Director of Case Management, who informed him that the case was under active consideration and was likely to be issued shortly. In neither conversation were the merits of the proceeding discussed. Consequently, the Authority finds that the telephone calls constituted oral requests for information solely with respect to the status of the proceeding and therefore were not prohibited ex parte communications under the rules set forth above. Thus, the union's assertion in this regard likewise provides no basis for granting reconsideration in the instant case.

Accordingly, as the union's motion fails to demonstrate the existence of "extraordinary circumstances" necessary to warrant the granting of reconsideration, the motion is hereby denied.[2]

Issued, Washington, D.C. February 5, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In view of the Authority's decision herein, the related relief requested in the union's motion is also denied.

9/Case No. 351

Federal
Labor Relations
Authority

Washington, D.C. 20424

NUMBER 351 REPORT OF CASE DECISIONS February 28, 1986

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NEGOTIABILITY CASE

21 FLRA No. 9 (February 24, 1986)

American Federation of Government Employees, AFL-CIO, National GSA Council and General Services Administration, Case No. 0-NG-1202

ARBITRATION CASES

21 FLRA No. 8 (February 24, 1986)

Department of Defense Dependents Schools, Germany Region and Overseas Education Association (Cushman, Arbitrator), Case No. 0-AR-1094

21 FLRA No. 10 (February 24, 1986)

Patent and Trademark Office and Patent Office Professional Association (Seidenberg, Arbitrator), Case No. 0-AR-1097

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

February 25, 1986

0-AR-1045 0-AR-1046 0-AR-1048 0-AR-1049
0-AR-1050 0-AR-1058 0-AR-1060 0-AR-1066

Y3.F31/21-3:

21 FLRA No. 8

Federal Labor Relations Authority

Dep't of Defense Dependents Schools, Germany Region and Overseas Education Assn. (Cushman, Arbitrator), Case No. 0-AR-1094 (Decided February 24, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a) and (b)
1550. Procedure	
1552. Time Limits for Filing Exceptions	

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with the filing reqirements of section 2425.1 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 9

Federal Labor Relations Authority

AFGE, National GSA Council and GSA, Case No. 0-NG-1202 (Decided February 24, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
    2700. Petition for Review
        2702. Timeliness

STATUTE

7105(a)(2)(E)
7117(c)

SUBJECT MATTER INDEX ENTRIES

Negotiability
    Procedure
        Allegation of Nonnegotiability
            Memorandum of Understanding Reached in Negotiations
        Timeliness
            Reaffirmation of Prior Allegations of Nonnegotiability
            Service Date

DIGEST NOTES

Where a petition for review is filed concerning an agency's allegation of nonnegotiability which is only a restatement of a prior allegation, and no changes in the substance or language of the proposal were made during the period between allegations, the petition seeks review of the earlier allegation. Thus a union's petition for review must be filed within the prescribed time limit (15 days) from the date of service on the union of the agency's first allegation rather than the date of service of the second allegation.

A memorandum of understanding between the parties amounted to a written request by the union for an allegation and a simultaneous written response by the agency alleging the matter was nonnegotiable. Thus, the execution of the memorandum of understanding became the effective service date of the agency's allegation of nonnegotiability.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

21 FLRA No. 10

Patent and Trademark Office and Patent Office Professional Association (Seidenberg, Arbitrator), Case No. 0-AR-1097 (Decided February 24, 1986)

STATUTE

7122(a) and (b)

DIGEST HEADINGS

1000. ARBITRATION
  1550. Procedure
    1552. Time Limits for Filing Exceptions

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with the filing reqirements of section 2425.1 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, applicable to the computation of time limits.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS, GERMANY REGION

Activity

and

Case No. 0-AR-1094

OVERSEAS EDUCATION ASSOCIATION

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Bernard Cushman filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated December 31, 1985, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on February 3, 1986. However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until February 4, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 24, 1986

Harold D. Kessler
Harold D. Kessler
Director of Case Management

21 FLRA No. 9

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL GSA
COUNCIL

Union

and

Case No. 0-NG-1202

GENERAL SERVICES ADMINISTRATION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

From the record before the Authority, it appears that on June 17, 1985, the parties began bargaining over a new collective bargaining agreement. During the course of these negotiations, a dispute arose concerning the negotiability of a Union proposal U-3 concerning employee performance ratings. On June 25, 1985, the parties entered into a Memorandum of Understanding, which provided in pertinent part that, "The Union has presented a proposal contained in Article 9 Performance Appraisal Systems (union proposal U-3), dated 6-21-85, which Management intends to declare nonnegotiable. The exact proposal is section 5E." That agreement provided further that "The Union has indicated that it intends to file an appeal of the agency's declaration of nonnegotiability." Article 9, Section 5E provided as follows:

> E. An employee who believes he/she is performing at the level he/she was last rated in a previous annual rating, and was not notified during an earlier conference that the performance had fallen below that rating, the employee may not be rated lower on an element which was rated higher.

On September 1, 1985, the parties executed a national agreement.

On October 3, 1985, the Union made a written request for an allegation of nonnegotiability on what it characterizes as a "carryover" proposal from the previous agreement. The proposal read as follows:

> A performance rating for an employee may not contain any lower rating on any element which was rated higher on the previous annual rating if the employee was not notified during an earlier conference that the employee's performance was not consistent with the higher rating.

By memorandum dated October 21, 1985, the Agency responded that the Union's October 3, 1985, request was untimely because the proposal presented was the subject of a Memorandum of Understanding executed on June 25, 1985. The Union then filed the instant negotiability appeal on October 28, 1985, or within 15 days from the date of service of the Agency's letter of October 21, 1985.

In this case, the parties' Memorandum of Understanding of June 25, 1985, amounts to a written request by the Union for an allegation and a simultaneous written response by the Agency alleging the matter proposed to be nonnegotiable.[1] It is well settled that a petition for review must be filed within 15 days from the date of service on the Union of an Agency nonnegotiability allegation. See, e.g. National Treasury Employees Union, Chapter 226 and U.S. Department of Agriculture, Food and Drug Nutrition Service, 15 FLRA 97 (1984). Although the Union contends that its letter of October 3, 1985, constituted a different request for a negotiability determination on a "modified" U-3 proposal which was presented during subsequent negotiations, such contention can not be sustained. The record clearly indicates that the proposal set forth in the October 3, 1985, request is merely a restatement of the original proposal which the Agency had declared nonnegotiable in the June 25, 1985, Memorandum of Understanding. The restatement effected no changes in the substance or language of the proposal. Thus, while the Union's petition filed with the Authority on October 28, 1985, was filed within 15 days from the date of service of the Agency letter of October 21, 1985, that letter was, in essence, only a restatement of the earlier allegation. It is therefore clear that the Union's petition in this case seeks review of the Agency's allegation of June 25, 1985. Thus, under section 7117(c) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on July 10, 1985. However, the petition for review was not filed until October 28, 1985, and thus was untimely.

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[1] See American Federation of Government Employees, AFL-CIO, National GSA Council and General Services Administration, 20 FLRA No. 50 (1985).

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.[2]

For the Authority.

Issued, Washington, D.C., February 24, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

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[2] In view of the disposition of the subject negotiability appeal, it is unnecessary for the Authority to rule on the Agency's motion to dismiss.

21 FLRA No. 10

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1097

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Jacob Seidenberg filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated January 2, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended, 1/ and section 2425.1 of the Authority's Rules and Regulations, as amended, 2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on February 5, 1986. However the exceptions were not filed until February 7, 1986. Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., February 24, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT

Agency

and

Case No. 0-AR-1045

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFL-CIO), NATIONAL
COUNCIL OF HUD LOCALS 222

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Ellen M. Bussey filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2341, AFL-CIO

Union

and

Case No. 0-AR-1046

U.S. DEPARTMENT OF AGRICULTURE,
NATIONAL FINANCE CENTER,
NEW ORLEANS, LA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator F. Jay Taylor filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR REWORK FACILITY
PENSACOLA, FLORIDA

Activity

Case No. 0-AR-1048

and

LODGE 1960, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jay W. Murphy filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ROBINS AIR FORCE BASE

Activity

and

Case No. 0-AR-1049

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator James E. Fulford filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION, MID-AMERICA
PROGRAM SERVICE CENTER

Agency

and

Case No. 0-AR-1050

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL COUNCIL
OF SOCIAL SECURITY PAYMENT CENTER LOCALS,
LOCAL NO. 1336

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Merton C. Bernstein filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL CENTER

Activity

and

Case No. 0-AR-1058

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2031

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Barbara W. Doering filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NEWARK AIR FORCE STATION

Activity

Case No. 0-AR-1060

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2221

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator George W. Van Pelt filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., February 25, 1986

Calhoun

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MILITARY OCEAN TERMINAL,
SUNNY POINT (MOTSU),
SOUTHPORT, NORTH CAROLINA

Activity

and

Case No. 0-AR-1066

LOCAL 1708, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Max B. Jones filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., February 25, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Washington, D.C. 20424

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UNFAIR LABOR PRACTICE CASES

21 FLRA No. 12 (March 13, 1986)

Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire and Dennis R. Lacroix, an Individual, Case No. 1-CA-40151

NEGOTIABILITY CASES

21 FLRA No. 11 (March 13, 1986)

American Federation of Government Employees, AFL-CIO, Administrative Council of Locals, Local 547 and Veterans Administration, James A Haley Medical Center, Tampa, Florida, Case No. 0-NG-1233

21 FLRA No. 13 (March 14, 1986)

American Federation of Government Employees, Local 217 and Veterans Administration Medical Center, Augusta, Georgia, Case No. 0-NG-635

ARBITRATION CASES

21 FLRA No. 14 (March 14, 1986)

American Federation of Government Employees and Social Security Administration (Smith, Arbitrator), Case No. 0-AR-983

21 FLRA No. 15 (March 14, 1986)

Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148 (Mount, Arbitrator), Case No. 0-AR-701

Y3.F31/21-3:

*Case No. 0-AR-952 (Order Denying Request for Clarification of 18 FLRA No. 81) (March 11, 1986)

Department of the Air Force, Air Force Logistics Command, Wright Patterson Air Force Base, Ohio and American Federation of Government Employees, Council of Locals, No. 214

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

March 7, 1986

0-AR-1057 0-AR-1067 0-AR-1069 0-AR-1073
0-AR-1074 0-AR-1075

March 12, 1986

0-AR-1022

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

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21 FLRA No. 11

Federal Labor Relations Authority

AFGE, Administrative Council of Locals, Local 547 and VA, James A. Haley Medical Center, Tampa, Fl., Case No. 0-NG-1233 (Decided March 13, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7105(a)(2)(E)
2700. Petition for Review	7117(c)(2)
2702. Timeliness	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Jurisdiction
      Timeliness of Petition for Review Affects Jurisdiction
    Timeliness

DIGEST NOTES

The Union's petition for review was dismissed as untimely where the activity had demonstrated proper service of its allegation of nonnegotiability, and it was clear that the union's petition was filed beyond the due date, regardless of whether the due date is calculated in terms of the date of service by mail, or date received.

The timeliness of petitions for review filed with the Authority is not a determination that is optional at the Authority's discretion. The Authority's jurisdiction over a petition for review is dependent on its own determination of whether the petition was filed within the 15 days mandated by the Statute for such filings.

21 FLRA No. 12

Federal Labor Relations Authority

Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H. and Dennis R. Lacroix, Case No. 1-CA-40151 (Decided March 13, 1986)

DIGEST HEADINGS	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (2)
4200. Discrimination as to Conditions of Employment	7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Discrimination
      - Lowered Performance Appraisal
  - Environmental Differential
    - Discrimination Alleged for Filing Grievance
  - Position
    - Involuntary Transfer of Employee
  - Safety
    - Asbestos
      - Discrimination Alleged for Filing Grievance

DIGEST NOTES

There was no evidence of union animus on the part of the supervisor herein and the record evidence did not show any relationship between the grievances filed by the employee herein and his allegedly lowered performance appraisal rating. Further, there was no correlation between the employee's complaint to his union representative concerning the work assignments given to certain employees and the performance rating in question. The Authority therefore concluded, as did the Judge, that the General Counsel failed to meet the burden of proving that the activity unlawfully discriminated against the employee.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

21 FLRA No. 12

Dep't of the Navy,
Portsmouth Naval Shipyard,
Portsmouth, N.H. and Dennis
R. Lacroix, Case No
1-CA-40151 (Decided March
13, 1986)

DIGEST HEADINGS	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (2)
4200. Discrimination as to Conditions of Employment	7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Discrimination
      - Lowered Performance Appraisal
- Environmental Differential
  - Discrimination Alleged for Filing Grievance
- Position
  - Involuntary Transfer of Employee
- Safety
  - Asbestos
    - Discrimination Alleged for Filing Grievance

DIGEST NOTES

There was no evidence of union animus on the part of the supervisor herein and the record evidence did not show any relationship between the grievances filed by the employee herein and his allegedly lowered performance appraisal rating. Further, there was no correlation between the employee's complaint to his union representative concerning the work assignments given to certain employees and the performance rating in question. The Authority therefore concluded, as did the Judge, that the General Counsel failed to meet the burden of proving that the activity unlawfully discriminated against the employee.

Federal Labor Relations Authority

21 FLRA No. 13

AFGE, Local 217 and VA Medical Center, Augusta, Ga., Case No. 0-NG-635 (Decided March 14, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
  2150. Management Rights
    2151.20 Determine Internal Security Practices
  2200. Subjects of Bargaining
    2201. At Election of Agency
      2201.05 Technology of Performing Work
      2201.10 Methods and Means of Performing Work
  2650. Compelling Need Determination

STATUTE

7105(a)(2)(E)
7106(a)(1), (b)(1) and (3)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Compelling Need
    Agency Regs. - No Compelling Need
  Management Rights
    Determine Internal Security Practices
      Uniforms
  Subjects of Bargaining
    At Election of Agency
      Technology, Methods and Means of Performing Work
        Uniforms
    Mandatory Subjects
      Appropriate Arrangements
        Uniforms - Clothing Appropriate to Physical Conditions
  Waiver of Rights
    Waiver Negotiated Under E.O. 11491 Not Applicable Under Statute

DIGEST NOTES

Language placed in a contract pursuant to an Executive Order 11491 requirement does not constitute a voluntary and conscious yielding by the union of its right to negotiate under the Statute.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal giving employees the option to wear uniforms or civilian clothes would effectively negate the agency's decision to require uniforms for the purpose of achieving ready identification of employees and, hence, directly interferes with the Agency's exercise of the right under § 7106(a)(1) to determine internal security practices. (proposal A)

There is direct relationship between the uniform requirement and the agency's need to be able to readily identify its employees in order to protect its property and accomplish its mission. Thus, a proposal giving employees the option as to whether or not they wear uniforms relates to the methods and means of performing work and is negotiable only at the discretion of the agency. (proposal A)

Proposals that would assure that uniforms worn by employees are appropriate to the weather and work place conditions, relate to the impact and implementation of an agency action which adversely affects employees and constitute appropriate arrangements. The proposals relate to the agency's decision to require the employees to wear uniforms and do not interfere with the agency's right to determine internal security practices. The proposals are therefore within the duty to bargain under § 7106(b)(3). (proposals B and C)

Proposals that would assure that uniforms worn by employees are appropriate to the weather and work place conditions do not involve the technology, methods and means of performing work. The proposals are limited to attempting to assure that the uniforms are suitable for the conditions in which the employees work. They would not interfere with an instrumentality, including an agent, tool, device, measure, plan or policy used by the agency for the accomplishing or the furthering of the performance of work. (proposal B and C)

Federal Labor Relations Authority

AFGE and SSA (Smith, Arbitrator), Case No. 0-AR-983 (Decided March 14, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a)
1600. Grounds for Review	7131(d)
1601. Awards Conflicts with Applicable Law	
1650. No Basis for Review	
1652.05. Exceptions Not Supported By "Sufficient Facts and Circumstances"	
1652.15. Award Ignores Collective Bargaining Agreement	
7500. OFFICIAL TIME	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Award Conflicts with Applicable Law
      - 5 U.S.C. § 5542(a)
      - 5 U.S.C. § 5543
  - Bifurcated Arbitration Process
  - Compensation
    - Compensatory Time
      - Denial of Official Time
    - Overtime
      - Denial of Official Time
  - Exceptions Asserted in Appeal
    - Award Conflicts with Applicable Law
      - 5 U.S.C. § 5542(a)
    - Award Conflicts with Prior Interim Order
    - Award Fails to Draw Essence from Agreement
  - Official Time
    - Wrongful Denial
      - Award of Compensatory or Overtime Time Not Appropriate
      - § 7131(d) Provides Remedy
  - Remedy
    - Compensation at Straight-Time Rate under § 7131(d)
- 5 C.F.R. Part 551 (Pay Administration under the Fair Labor Standards Act)
- 29 U.S.C. § 201 *et seq.* (Fair Labor Standards Act, as amended)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The exceptions in this case were filed to all bench decisions of the arbitrator rendered in the second phase of a bifurcated arbitration process. The dispute concerned official time for representational activities in the agency's field offices. The decisions of the arbitrator sustained grievances relating the wrongful denial of official time and awarded as a remedy compensatory time off or overtime compensation.

In an exception to the arbitrator's bench awards, the agency contended that the awards were arbitrary and capricious because they directly conflicted with the prior interim and final award of the Arbitrator. The Authority found that the portion of the award cited by the agency related to travel and per diem and not to the wrongful denial of official time. Accordingly, the exception provided no basis for finding the award deficient and was denied.

In an exception to the arbitrator's bench awards, the agency contended that the awards failed to draw their essence from the collective bargaining agreement. In as much as, the grievances pertained to nonduty time of the union official grievants, the agency asserted that they were not within the definition of grievance under the agreement limiting grievances to matters relating to employment. The Authority denied the exception because it failed to establish that the wrongful denial of official time did not relate to employment.

The agency contended that the arbitrator's bench awards of either compensatory time off or overtime compensation for the agency's wrongful denial of official time were contrary to the provisions of 5 U.S.C. § 5542(a) pertaining to overtime work. The Authority has previously held that a union official's performance of representational activities on nonduty time (i.e., outside regular work hours) was not the performance of "hours of work officially ordered or approved" that constituted overtime work under the governing provisions of 5 U.S.C. § 5542(a) for which overtime pay or compensatory time off could be granted. The arbitrator's awards are deficient to the extent that they have awarded compensatory time off or overtime compensation and therefore, they must be modified to substitute entitlements provided by § 7131(d).

Where official time, authorized by official time provisions of a collective bargaining agreement consistent with section 7131(d), is wrongfully denied and representational functions thereafter performed on nonduty time, § 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. The arbitrator's bench awards should have granted the grievants compensation for the amount of time spent performing union representational activities on non-duty time which the arbitrator ruled should have been performed on official time. Accordingly, the bench awards are modified by substituting for the respective number of hours of overtime compensation or compensatory time off an equal number of hours of compensation at the appropriate straight-time rate.

21 FLRA No. 15

Federal Labor Relations Authority

Bureau of Prisons, Dep't of Justice and AFGE, Local 148
(Mount, Arbitrator), Case No. 0-AR-701 (Decided March 14, 1986)

DIGEST HEADINGS

- 1000. ARBITRATION
  - 1600. Grounds for Review
    - 1601. Award Conflicts with Applicable Law
  - 1650. No Basis for Review
    - 1652.01. Disagreement with Arbitrator's Reasoning
    - 1652.05. Exceptions Not Supported By "Sufficient Facts and Circumstances"
    - 1652.15. Award Ignores Collective Bargaining Agreement

STATUTE

7106(a)(2)(A) and (B)
7106(b)(3)
7121(e)
7122(a)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Critical Elements
    - Scope of Arbitral Review
  - Exceptions Asserted in Appeal
    - Award Based on Nonfacts
    - Award Contrary to Applicable Law
      - 5 U.S.C. § 4302
    - Award Contrary to FSLMR Statute
      - § 7106(a)(2)(A) and (B)
    - Award Fails to Draw Essence From Agreement
  - Management Rights
    - Assign Work
      - Arbitral Review of Employee Performance Appraisal
    - Direct Employees
      - Arbitral Review of Employee Performance Appraisal
  - No Basis for Review
    - Disagreement with Arbitrator's Findings of Fact
    - Disagreement with Arbitrator's Reasoning and Conclusions
  - Performance Standards
    - Quantitative vs. Nonquantitative Standards
    - Scope of Arbitral Review
  - Remedy
    - Modify Performance Appraisal

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A grievance was submitted to arbitration claiming that under the established performance standards, the grievant's performance level with respect to all four of his job elements should have been rated "outstanding rather than "exceeds." The arbitrator ruled that the performance of the grievant, as evaluated under the established standards and specifically described and appraised in the grievant's formal annual performance appraisal, was quantitatively perfect in three of his job elements. The arbitrator further determined in accordance with the definition of outstanding performance that the grievant was entitled under the established standards to a rating of "outstanding" as to those three elements. As his award the arbitrator ordered that the disputed annual appraisal be changed accordingly and that the grievant be granted any recognition that is normal for employees receiving an appraisal of "outstanding."

In its exception the agency contended the award was contrary to § 7106(a)(2)(A) and (B) because the arbitrator substituted his judgment for that of management in the establishment of performance standards and was therefore contrary to management's right to direct employees and assign work. The Authority held that consistent with management's rights under § 7106(a)(2)(A) and (B) and consistent with Authority precedent, the award simply and appropriately applied to the grievant the performance standards established by management. The arbitrator properly limited his review of the grievant's performance to that which was specifically described and appraised in the grievant's formal annual appraisal. The grievance and the award properly related only to the application of management's performance standards to the grievant. The award does not relate to the establishment by management of those standards: it has not affected management's discretion to determine the content of the standards, it has not resulted in the substitution of judgment by the Arbitrator for that of management as to the content of the standards or the appraisal of the grievant's performance, and has not resulted in the setting of new standards. Accordingly, no basis is provided for finding the award deficient as contrary to the Statute.

In its exception the agency contended that the arbitrator's award was contrary to 5 U.S.C. § 4302 in that the award barred the use of a nonquantitative performance standard which is expressly permitted by § 4302. The Authority held that the award in no manner bars management from establishing a nonquantitative performance standard in accordance with § 4302. The award simply determined that with the standards that management had established stated solely in quantitative terms, it would be arbitrary and capricious for outstanding performance, which management had already defined, to be characterized in other than quantitative terms. The exception provided no basis for finding the award deficient.

The Authority found that the agency's contention that the arbitrator's award failed to draw its essence from the parties collective agreement, constituted nothing more than disagreement with the arbitrator's findings of fact and his reasoning and conclusions and that consequently the exception provided no basis for finding the award deficient.

The agency's contention that the award was based on nonfact because it was premised on two mistaken findings of fact is nothing more than a disagreement with the arbitrator's findings of fact and his reasoning and conclusions. The arbitrator properly took into account the performance of the grievant as stated in his performance appraisal, and consequently the contention of the agency is this respect provides no basis for finding the award deficient.

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21 FLRA No. 11

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, ADMINISTRATIVE
COUNCIL OF LOCALS, LOCAL 547

Union

and

Case No. 0-NG-1233

VETERANS ADMINISTRATION
JAMES A. HALEY MEDICAL CENTER
TAMPA, FLORIDA

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained.

As part of its petition for review, the Union submitted a copy of the Activity's allegation of nonnegotiability dated December 24, 1986, that was addressed to an Alan Pedigo of St. Petersburg, Florida. Thus, the Activity's allegation of nonnegotiability in this case apparently was served on the Union by mail on December 24, 1985. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the Union's petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on January 13, 1986. However, the petition for review dated January 16, 1986, was not filed until January 16, 1986. The parties were given telephonic notice of the timeliness issue and an opportunity to respond in writing.

The Activity has supplied the Authority with a copy of its return receipt -- or "green card"-- showing that Mr. Alan Pedigo of St. Petersburg, Florida accepted delivery on December 27, 1986. The Union has filed a written response arguing that: (1) the Activity sent its allegation dated December 24, 1985, by "regular U.S. Mail" and, therefore, was not in compliance with section 2429.27(b) of the Authority's Rules and Regulations; (2) the Union is willing to accept and acknowledge service by regular mail and be bound by the date received, which was December 27, 1986; and (3) the Authority is causing unnecessary litigation on procedural questions that have not been raised by the parties.

The Activity's return receipt for Mr. Pedigo shows that it was in compliance with section 2429.27(b) of the Authority's rules of procedure when it served its allegation of nonnegotiability on the Union by certified mail. Moreover, even assuming that the Authority had the discretion in this instance to calculate the timeliness of the Union's petition for review from December 27, 1986 -- the date of receipt by the Union of the Activity's allegation -- sections 2424.3 and 2429.21 of the Rules and Regulations dictate that the due date for any petition for review of that allegation was January 13, 1986.

With respect to the Union's assertion that the Authority is intervening on the side of dismissing appeals when no procedural question has been raised by either party, the timeliness of petitions for review filed with the Authority is not a determination that is optional at the Authority's discretion. Section 7117(c)(2) of the Statute states in pertinent part: "The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation . . . institute an appeal . . . by . . . filing a petition with the Authority . . . ." Clearly, the question whether the Authority has jurisdiction over a petition for review is dependent on its own determination of whether the petition was filed within the 15 days mandated by the Statute for such filings.

In sum, the Activity has demonstrated proper service of its allegation on the Union, and it is clear that the Union's petition was filed beyond the due date, regardless of whether the due date is calculated in terms of date of service by mail, or date received. Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 13, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and Case No. 1-CA-40151

DENNIS R. LACROIX, An Individual

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and the Respondent filed an opposition to the General Counsel's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's conclusion and recommended Order. In adopting the Judge's conclusion that the complaint should be dismissed herein, the Authority notes particularly that the record evidence does not establish that the employee herein was discriminated against or interfered with because he filed grievances or engaged in other protected activity. More specifically, the Authority finds, as did the Judge, that there was no evidence of union animus on the part of the supervisor herein; that the record evidence did not show any relationship between the grievances filed by the employee herein and his allegedly lowered 1983 performance appraisal rating; and that no correlation was shown between the employee's complaint to his union representative concerning the work assignments given to certain employees and his 1983 performance rating. Accordingly, the Authority concludes that the General Counsel has failed to meet the burden of proving that the Respondent unlawfully discriminated against the employee, and the complaint alleging a violation of section 7116(a)(1) and (2) of the Statute shall be dismissed.*/

ORDER

IT IS ORDERED that the complaint in Case No. 1-CA-40151 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 13, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In reaching such conclusion, the Authority does not rely on the Judge's suggestion on page 5 of the decision that the subject employee's complaint about the work assignments of certain employees, in the circumstances of this case, was not protected activity or on his statements on pages 5 and 6 regarding a "mixed motive" analysis.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD,
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and

Case No.: 1-CA-40151

DENNIS R. LACROIX, An Individual

Charging Party

. . . .

Peter F. Dow, Esquire
For the General Counsel

Richard H. Greenberg, Esquire
For the Respondent

Before: ELI NASH, Jr.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on May 29, 1984 by the Regional Director for the Federal Labor Relations Authority, Boston, Massachusetts Region, a hearing was held before the undersigned on July 24, 1984.

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It resulted from charges originally filed on February 21, 1984 and amended on May 18, 1984 by Dennis R. Lacroix (herein called Mr. Lacroix) against the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, (herein called Respondent).

The Complaint alleges that the agency violated sections 7116(a)(1) and (2) of the Statute by considering the protected Union activity of Mr. Lacroix in preparing his annual performance appraisal for calendar year

1983 and by preparing and issuing a lowered performance appraisal for calendar year 1983 because of Mr. Lacroix's protected Union activity.

Respondent's Answer denied the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

On Monday, April 4, 1983 Dennis R. Lacroix was involuntarily transferred to the crew of supervisor James Knowles.[1] Mr. Knowles, credibly testified that he did not know the reason for Mr. Lacroix's transfer to his crew. In any event, the involuntarily transfer resulted from an unfair labor practice charge being filed alleging discrimination by Mr. Lacroix's previous supervisor. The transfer was subsequently found by the Authority in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 17 FLRA No. 107 (1985), to be in violation of the Statute. Mr. Lacroix continued to work under Mr. Knowles' supervision until sometime in March 1984.

During 1983, while he worked on the crew supervised by Mr. Knowles', Mr. Lacroix was told by both Knowles and General Foreman Joseph Freda that he was doing a good job; there were no problems with the quantity or quality of his work; and they were both satisfied with his work. These same things were told Mr. Lacroix by his Foreman and General Foreman regarding his performance in 1982, when Lacroix received a "highly satisfactory" overall summary rating. Without question Mr. Lacroix was safety conscious and indeed he voiced a number of complaints and filed several grievances. The grievances concerned environmental differential or Code 27 pay for exposure to asbestos while working aboard ship and a counselling session on or around August 18, 1983.

During his period as temporary foreman, Mr. Knowles supervised between ten and twelve individual employees in the time frame in which Mr. Lacroix worked under his supervision. Of the ten or twelve employees who Knowles supervised he had the opportunity to evaluate and prepare appraisals on only seven of those employees. The reason he was not allowed to evaluate four of the employees was because of shift transfers prior to evaluations in several instances and at least one employee was an apprentice, who was evaluated under a somewhat different system. Mr. Knowles testified that he would probably have rated three of the four "right in the satisfactory range." A breakdown of the seven he actually supervised shows one outstanding; four highly satisfactory and two satisfactory.

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[1] Although Mr. Knowles was acting as a Temporary Foreman, he was at the time of the hearing a WG-10 pipefitter, having been returned to the bargaining unit after serving a two year period as Temporary Foreman.

The two satisfactory ratings went to Mr. Lacroix and Mr. Wood. Of considerable note is a chart prepared by the General Counsel which shows appraisals for the seven employees evaluated by Mr. Knowles in 1983 and a comparison with the 1982 ratings of each employee:

	1982 Ratings				1983 Ratings			
Employees	S	H/S	Outst.	Overall Summary	S	H/S	O	Overall Summary
Hallam	0	4	0	H/S	0	0	4	O
Hannigan	0	4	0	H/S	0	2	2	H/S
Cressey	0	4	0	H/S	0	2	2	H/S
Liberty	4	0	0	S	0	3	1	H/S
Tanguay	4	0	0	S	0	4	0	H/S
Wood	1	3	0	H/S	2	2	0	S
Lacroix	0	4	0	H/S	3	1	0	S

This chart shows that Mr. Knowles did not rate most of those employees the same as their 1982 supervisor. In fact when the evaluations are compared there is a wide discrepancy between what previous supervisors and Mr. Knowles felt about many of these employees. One reason for such disparity is probably that new and different standards of evaluation were applied.

During mid-August 1983, Mr. Lacroix and Mr. Wood were assigned a high pressure air line job on the 605 boat. According to Mr. Knowles, who at that time was acting as General Foreman, he sent Mr. Lacroix to Building 299 to obtain some fittings needed to connect certain hoses and he sent Mr. Wood to the shop to attempt to get some from the supervisor in the shop.

Mr. Knowles testified that some 15-20 minutes went by and that he was called by Mr. Wood and told, "They wouldn't allow us to have any." Later, Mr. Knowles went to Building 299, and asked for the fittings. The tool room tenant gave him two fittings. Mr. Knowles, states that he asked the tool room tenant, "Has anybody been in since suppertime to see you?" And the tool room tenant responded, "Since supper?" And said, "Very seldom do we get asked for these anymore, because we never have them in, we're always out of stock, it seems like." Upon returning to the work area, Mr. Knowles testified that he found Lacroix, Wood and a welder standing around talking. The two were counselled concerning this incident and a grievance concerning their counselling was filed by Steward Joseph R. Luvisi on October 7, 1983.

The grievance was pursued vigorously by Luvisi through several steps, but its revocation was finally denied on January 20, 1984. The General Counsel points out that Mr. Wood's 1983 appraisal was also lowered. However, to my knowledge there is no allegation that Mr. Wood was discriminated against because of his participation in this incident or because he filed a grievance or participated in protected activity.

Interestingly, Luvisi and another steward, Robert Liberty, had nothing but praise for Mr. Knowles' handling of labor relations matters. Luvisi who handled several of Mr. Lacroix's complaints stated, "I've never had any problem at all with Jimmy Knowles. Every time I've talked to him about any kind of concern, whether it be a safety problem or any kind of labor management relations, he's always been very receptive."

Mr. Liberty, who was at one time a chief steward also testified that Mr. Knowles relationship with him as steward and chief steward was "very good." Mr. Liberty also testified that while he was phasing out his union activities during the time he worked for Mr. Knowles, he had filed one grievance on behalf of Mr. Lacroix. Voluntarily, Mr. Liberty added that Mr. Knowles was the type supervisor who believed in 8 hours work for 8 hours pay.

Aside from the one counselling session mentioned above Mr. Knowles considered Mr. Lacroix's work satisfactory. Mr. Knowles testified in detail concerning his 1983 rating of employees, including Mr. Lacroix. The testimony reveals that Mr. Knowles never looked at any previous ratings; that his comparison with higher rated employees was just a matter of perception; that he took the attitude of attacking the job and doing it, not trying to skirt the issue of the employees into consideration. In sum, he felt that Mr. Lacroix, when working on more complex jobs had time delays and problems which were not outside the realm of satisfactory work, but was in substance clearly not highly satisfactory. On the other hand he felt more comfortable assigning more complex work to other employees. Mr. Knowles' assignments to employees like Hallam and Hannigan was the subject of complaints. Mr. Knowles no doubt had a great deal of confidence in this duo.

With regard to the grievances filed by Mr. Lacroix concerning Code 27 pay the record clearly demonstrates that contrary to the General Counsel's view, Mr. Knowles supported those grievances. He not only approved one, but three requests for environmental differential pay for Mr. Lacroix and, in fact the grievances were submitted with his signature. The record shows that grievances were filed on September 26, 1983 and February 1 and 14, 1984. It is noted that at least one and probably two of these grievances were filed after Mr. Lacroix filed after the 1983 appraisal was prepared and presented to Mr. Lacroix the latter two grievances. The position that Mr. Knowles took on these grievances was contrary to the ultimate management position that environmental differential pay was not warranted and there is no doubt that he told Luvisi that he had gotten his "ass chewed." Consequently, one of the grievances resulted in arbitration. Unquestionably environmental differential pay for asbestos exposure was a controversial area, as the record shows, and it no doubt stimulated much concern as shown by the congressional and outside interests in the matter. Taken in proper context, Mr. Knowles' got his "ass chewed" because he took a position, which was not the management position and not because he had filed for Code 27 pay for Mr. Lacroix. I see no connection between these grievances and Mr. Lacroix's allegedly lowered rating.

Finally, I find no correlation between Mr. Lacroix's complaining about Hallam and Hannigan working together and his rating. Notwithstanding the fact that Mr. Lacroix complained long and hard concerning this assignment, so did others. Others who were rated by Mr. Knowles in the highly satisfactory range. Moreover, assignment of employees, as employees, is not within the purview of another employee so Mr. Lacroix's complaints about those assignments are not, in my view, protected activity.

Discussion and Conclusions

The General Counsel asserts that it made a prima facie showing that Mr. Lacroix had engaged in protected activity and that the protected conduct was a motivating factor in reducing Mr. Lacroix's 1983 rating to "satisfactory." Notwithstanding its contention that a prima facie case was made, the General Counsel urges reconsideration of the Authority's application of its established standards in mixed-motive cases.2/

On the other side of the coin, the Respondent maintains that the rating given Mr. Lacroix had no negative impact on his career opportunities; that notwithstanding a highly satisfactoy rating in the preceding year, Mr. Knowles' evaluation was higher than the evaluation

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2/ See, Internal Revenue Service, Washington, D.C., 6 FLRA No. 23 (1981); see also, Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA 73 (1982), American Federation of Government Employees v. Federal Labor Relations Authority, 716 F.2d 47 (1983). The General Counsel does not thoughtlessly suggest such an approach. However, subsequent to the D.C. Circuit decision, the Authority has reiterated its application of the IRS standard to mixed motive cases. There is validity in the General Counsel's overall argument that the Authority, in essence, may be unnecessarily denying itself the power to act in future cases where union activities are considered in the selection process but are not determinative and where no independent violations of the Statute are found. Notwithstanding such possible denial, the Authority has clearly adopted Mt. Healthy City School District Board of Education v. Doyle, 529 U.S. 274 (1977) as the test for establishing a section 7116(a)(2) violation under the Statute. Based on my overall findings in this matter it is not necessary, in my opinion, to recommend to the Authority based on the instant record any change in that approach. Accordingly, the General Counsel's argument is rejected.

Mr. Lacroix received two years before;[3] there was no anti-union animus involved; and, finally Mr. Knowles' standards were higher than the supervisor who had rated Mr. Lacroix the previous year.

Having established its prima facie case under IRS the burden shifted to the Respondent to establish by a preponderance of the evidence basically, that Mr. Lacroix's appraisal for 1983 would have been the same even in the absence of his protected activity.

Respondent presented evidence which clearly met its burden of proof. While it is not clear what adverse impact would result from Mr. Lacroix's receiving only a satisfactory rating, such ratings could, but it is not shown how in this record, impair Mr. Lacroix's career. Furthermore, ratings are considered in seniority for reductions-in-force under present regulations and could indeed impact of Mr. Lacroix's federal job retention rights. The above is merely speculation, but show that there may indeed be some impact despite Respondent's position to the contrary. More importantly, however, Mr. Knowles was a new Temporary Foreman rating employees for the first time; Mr. Knowles was rating employees under different criteria than they had been previously rated; Mr. Knowles did not rate most of the employees he evaluated for 1983 the same as their supervisor had the previous rating year; Mr. Knowles gave sufficient legitimate business reasons which satisfy the undersigned that the appraisal, while it might have been based on interpersonal relations, was not motivated by Mr. Lacroix's participation in any protected Union activity. Even more important is the fact that there is no record evidence to establish that Mr. Lacroix was, during the period of time in question, more than a satisfactory employee. In fact, the 1983 appraisal is consistent with the evaluation Mr. Lacroix received two years earlier and runs counter to a finding that Mr. Lacroix was more than a satisfactory employee. Thus, he was rated satisfactory in two of the three rating periods shown on the record. Inasmuch as the record clearly supports a finding that the 1983 evaluation was based on Mr. Knowles' assessment of Mr. Lacroix as a satisfactory employee it is concluded that the appraisal should not be disturbed by finding a violation of section 7116(a)(2) of the Statute.

The General Counsel also suggests that Respondent violated section 7116(a) (1) of the Statute by considering the protected activity of Mr. Lacroix in preparing his annual performance appraisal for 1983. Respondent counters that there is a complete lack of anti-union animus. In fact, it argues that there are no statements or conduct which would interfere with or coerce any employees under the Statute. I agree.

A review of the record shows that Mr. Knowles, while a Temporary Foreman seemingly had excellent rapport with the Union. It reveals further that he supported Mr. Lacroix rather than opposed him in his quest for Code 27 pay; that he counselled Mr. Lacroix and Mr. Wood's for what appear to be legitimate concerns; and, that his conduct evinced no animus whatsoever upon which to base a section 7116(a)(1) violation. Moreover, it was not established that Mr. Knowles considered Mr. Lacroix's protected union activity in preparing the 1983 appraisal.

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[3] Department of the Air Force, Scott Air Force Base, 14 FLRA No. 54 (1984).

Accordingly, it is recommended that the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED, that the Complaint in Case No. 1-CA-40151 be, and it hereby is, dismissed.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: August 12, 1985
Washington, DC

21 FLRA No. 13

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 217

Union

and

Case No. O-NG-635

VETERANS ADMINISTRATION MEDICAL
CENTER, AUGUSTA, GEORGIA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The petition raises issues concerning the negotiability of three Union proposals made in response to the Agency's announcement that it intended to require wage grade employees assigned to the Supply Service warehouse to wear uniforms. The Union proposals are as follows:

A. That the employees of Supply Service warehouse be given the option as to whether or not they wear such uniforms.

B. The uniforms will consist of Spring and Summer shirts, short sleeve and pants; Fall and Winter shirts, long sleeve, and pants, including jackets and overcoats.

C. That employees be provided with safety shoes and galoshes and rain gear for inclement weather.

II. Positions of the Parties

The Agency contends that all of the proposals are nonnegotiable. First, it argues that the proposals conflict with an agency regulation, Agency Manual M-1, Part VII, Chapter 7, which, pursuant to language in the parties' collective bargaining agreement, is binding on the Union and, thus, effectively limits the scope of bargaining. The Agency asserts that the uniform requirement has been an established agency-wide (i.e., Veterans Administration) policy since 1971 but that it has not been "strictly enforced" by the local supply service.[1] Second, it argues that the proposals conflict with the Agency's right under section 7106(a)(1) of the Statute to determine its internal security practices. Third, it alleges that the proposals conflict with its right under section 7106(b)(1) to determine the technology, methods and means of performing work. With respect to Proposals B and C, the Agency further argues that they regard matters which are not relevant to the impact and implementation of the management decision to require uniforms.

The Union contends that its proposals relate to a management-initiated change in an established past practice relating to conditions of employment and are, therefore, negotiable. It takes issue with the Agency's assertion that the proposals are barred by the above-cited agency regulation, arguing among other things that the regulation does not mandate that warehouse personnel wear uniforms. As to Proposals B and C, it asserts, in essence, that they are intended to assure that necessary and appropriate attire is available to employees and, hence, they relate to the impact and implementation of the Agency's requirement that a uniform be worn.

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[1] The contract language cited follows:

> General Stipulation
>
> Section 1. In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

III. Analysis

A. Effect of Agency Regulation and Collective Bargaining Agreement

It is well established that during the term of a collective bargaining agreement the exclusive representative is entitled under the Statute to notice and an opportunity to negotiate over proposed changes in established conditions of employment unless it has clearly and unmistakably waived its bargaining rights. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1980). The Agency tacitly concedes that the Union was entitled to notice and an opportunity to bargain regarding management's decision to require certain employees to wear a uniform. It contends in effect, however, that the Union agreed in the parties' collective bargaining agreement to limit the scope of bargaining to matters consistent with agency regulations and thereby effectively waived its right to bargain matters, such as the proposals at issue, which the Agency contends conflict with such regulations.

The Authority notes that the contract involved was negotiated originally in 1976 under Executive Order 11491, as amended, and that the requirements of the contract characterized by the Agency as having been agreed upon by the Union actually were mandated by the Executive Order to be expressly stated in collective bargaining agreements.[2] We hold that language placed in a contract pursuant to an Executive Order requirement does not constitute a voluntary and conscious yielding by the Union of its right to negotiate to the full extent of the scope of bargaining allowed under a subsequently enacted statute. See Immigration and Naturalization Service, 10 FLRA 202 (1982), reversed as to other matters sub nom. Immigration and Naturalization Service v. Federal Labor Relations Authority, No. 82-2398 (D.C. Cir. Feb. 29, 1984). Thus, we find that the cited contract provisions do not limit the Agency's bargaining obligation to proposals which are consistent with the terms of the agency's regulations. Absent a waiver, otherwise negotiable proposals which conflict with an agency rule or regulation are within the obligation to bargain unless a compelling need exists for the rule or regulation. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 451 (1980). The Agency in this case makes no showing whatsoever that a compelling need exists for the regulation with which it claims the proposals conflict. Hence, there is no basis for concluding that the proposals are barred from negotiation by such rule or regulation.

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[2] Section 12 of E.O. 11491, as amended, provided:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> (a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved;

(Continued)

B. Effect on Agency's Right to Determine Its Internal Security Practices

The record establishes that the requirement for wage grade employees assigned to the Supply Service warehouse to wear distinctive clothing is directly related to the Agency's need to be able to readily identify such employees in order to, among other things, protect its property. Inasmuch as Proposal A would make wearing the uniform optional on the part of employees, it effectively would negate the Agency's

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(Continued)

> and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;
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> . . . .
>
> The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

decision to require uniforms for the purpose of achieving ready identification of employees and, hence, directly interferes with the Agency's exercise of the right under section 7106(a)(1) to determine internal security practices. See American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, 2 FLRA 875 (1980). Thus, we find that Proposal A is not negotiable.

Turning to Proposals B and C, as explained by the Union, they would assure that the clothing worn by the Supply Service warehouse employees is appropriate to the weather and work place conditions. As such, the Union contends that these proposals seek to negotiate over the impact and implementation of an Agency action which adversely affects employees. Thus, the Union's essential contention is that Proposals B and C constitute appropriate arrangements for employees adversely affected by the Agency's action. The Authority finds, contrary to the Agency's contentions, first, that these two proposals relate to the Agency's decision to require the employees to wear a specific type of clothing, i.e., a uniform; and, second, that they do not interfere with the Agency's right to determine its internal security practices. These proposals would not present any interference with the Agency's decision that Supply Service warehouse employees wear distinctive uniform clothing for internal security purposes. Since they do not in any way defeat the purpose for which the concept of distinctive uniform clothing was adopted, i.e., the ability to readily identify Supply Service warehouse employees as such and distinguish them from other individuals, they are not outside the duty to bargain.[3] Rather, they provide only that the prescribed uniform clothing will be suitable for the conditions under which the employees must work. As such, they constitute appropriate arrangements for employees adversely affected by the Agency's decision to require that uniforms be worn and therefore are within the duty to bargain under section 7106(b)(3). Because Proposals B and C do not interfere at all with the Agency's right under section 7106 to determine its internal security, it is not necessary to apply any test for determining "excessive interference" with the relevant management right under section 7106(b)(3). National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986) (Provision 2).

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[3] Cf. American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 8 FLRA 347 (1982) (Union Proposal 2), reversed as to other matters sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority, 709 F.2d 724 (D.C. Cir. 1983) (wherein the Authority found that because a proposal did not defeat the purpose for which a particular "means of performing the work of the Agency" was adopted, the proposal did not interfere with the Agency's right under section 7106(b)(1) in that regard).

C. Effect on Agency's Right to Determine the Technology, Methods and Means of Performing Work

The Agency contends that all of the proposals involve the methods and means of performing work and are therefore negotiable only at the discretion of the Agency under section 7106(b)(1). With regard to Proposal A, we agree. The record establishes that there is a direct relationship between the uniform requirement and the Agency's need to be able to readily identify its employees in order to protect its property and to accomplish its mission. Thus, we find that Proposal A relates to the methods and means of performing work and is nonnegotiable for that reason as well as the reasoning set forth in Section B of this Order.

The Agency, however, has not shown, nor is it otherwise apparent from the record, that Proposals B and C involve the technology, methods and means of performing the Agency's work. In this regard, as previously stated, the proposals are limited to attempting to assure that the uniforms are suitable for the conditions in which employees work. They would not interfere with an instrumentality, including an agent, tool, device, measure, plan or policy used by the Agency for the accomplishing or the furthering of the performance of its work. See U.S. Department of Justice, Immigration and Naturalization Service and National Border Patrol Council, Local 1613, American Federation of Government Employees, 18 FLRA No. 3 (1985). Thus, we find that Proposals B and C are within the duty to bargain.

IV. Conclusions

The Authority finds that the proposals relate to the change proposed by the Agency, i.e., that the employees wear specified clothing. The Authority further finds that negotiation over the proposals is not barred in this instance by the existence of contract language which purportedly binds the parties to follow existing and future provisions of the

Agency's regulations. Because Union Proposal A, however, conflicts with the Agency's right to determine its internal security practices and involves methods and means of performing work, it is not within the duty to bargain. Union Proposals B and C do not conflict with the Agency's right to determine its internal security practices or its right to determine the technology, methods and means of performing its work. Rather, those proposals constitute appropriate arrangements for employees adversely affected by the Agency's decision to require that uniforms be worn and, therefore, are within the duty to bargain.[4]

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review insofar as it relates to Proposal A be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Proposals B and C.

Issued, Washington, D.C., March 14, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In finding these proposals within the duty to bargain the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

and . Case No. 0-AR-983

SOCIAL SECURITY ADMINISTRATION

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the awards of Arbitrator Justin C. Smith filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.[1]

II. BACKGROUND AND ARBITRATOR'S AWARD

According to the record before the Authority, this case involves the dispute submitted by the parties to the Arbitrator concerning official time for representational activities in the Agency's field offices. By agreement of the parties, a bifurcated arbitration process was set up to resolve this dispute that had resulted in numerous grievances. The first phase of this process involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement and resulted in an interim award, later made final by the Arbitrator, resolving the proper interpretation and application of the Statute and the agreement to various disputed situations over which grievances were pending.[2] The second phase of the process involves hearings by the Arbitrator to resolve, by bench decisions when practicable, specific grievances pending in various regions of the Agency. The exceptions in this case have been filed to all the bench decisions of the Arbitrator rendered on April 29, 1985, that sustained grievances and awarded as a remedy compensatory time off or overtime compensation. In terms of these decisions, the Arbitrator had generally ruled with respect to the situations of the specific grievances sustained by his bench decisions that in such circumstances, the denial of official time for purposes of representational activities to union officials was in violation of the parties' agreement which had been negotiated consistent with the Statute. With respect to each bench decision as to which exceptions have been filed, the Arbitrator specifically sustained in accordance with his prior awards the individual grievance claiming a wrongful denial of official time and awarded compensatory time off or overtime compensation to correspond with the amount of time spent by the union official to perform the representational activities.

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[1] In its opposition the Union contends that the exceptions should be dismissed as untimely. However, contrary to the Union's contention, the Authority has determined that the exceptions were timely filed under the Statute and the Authority's Rules and Regulations.

III. FIRST EXCEPTION

A. Contention

In its first exception, the Agency contends that the bench awards are arbitrary and capricious because they directly conflict with the prior interim and final award of the Arbitrator.

B. Analysis and Conclusion

The Authority finds that the portion of the prior awards cited by the Agency relates to travel and per diem and not to the wrongful denial of official time for purposes of representational activities. Accordingly, this exception provides no basis for finding the award deficient and must be denied.

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[2] Exceptions filed by the Agency to this interim award and the related final award previously have been denied by the Authority. Case No. 0-AR-738 (Oct. 31, 1984); Case No. 0-AR-969 (Sept. 16, 1985).

IV. SECOND EXCEPTION

A. Contention

In its second exception the Agency contends that the bench awards fail to draw their essence from the collective bargaining agreement. Specifically, the Agency argues that because the grievances pertain to nonduty time of the union official grievants, they are not within the definition of grievance under the agreement limiting grievances to matters relating to employment.

B. Analysis and Conclusion

The Authority finds that the exception fails to establish that the matter of the wrongful denial of official time does not relate to employment. Accordingly, this exception must be denied.

V. THIRD EXCEPTION

A. Contention

In its third exception, the Agency contends that the award of either compensatory time off or overtime compensation is contrary to the provisions of 5 U.S.C. § 5542(a) pertaining to overtime work.

B. Analysis and Conclusion

As the Authority has previously indicated, the legal basis for overtime pay is the performance by an employee of overtime work which means "hours of work officially ordered or approved" in excess of eight hours in a day or in excess of 40 hours in an administrative workweek. 5 U.S.C. § 5542(a). Similarly, the legal basis for granting compensatory time off arises under 5 U.S.C. § 5543 as a result of overtime work performed by an employee. In this regard, the Authority has specifically held that a union official's performance of representational activities on nonduty time (i.e., outside regular work hours) was not the performance of "hours of work officially ordered or approved" that constituted overtime work under the governing provisions of section 5542(a) for which overtime pay or compensatory time off could be granted. Social Security Administration and American Federation of Government Employees, AFL-CIO, 19 FLRA No. 104 (1985); Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO, 19 FLRA No. 4 (1985). In both of these cases, the overtime work provisions of section 5542(a) were determined to govern and provisions relating to hours of work under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq., were not considered because it was not contested that the union officials were employees exempt from coverage under FLSA. See generally 5 CFR part 551 (Pay Administration Under the Fair Labor Standards Act). In terms of this case, it is apparent that the bench awards involved employees who also are exempt from FLSA.3/ Accordingly, the Authority similarly finds that the bench awards in this case are deficient to the extent they have awarded compensatory time off or overtime compensation and that therefore they must be modified to substitute the entitlements provided by the Statute.

The Authority has previously indicated that section 7131(d) of the Statute4/ expressly authorizes the parties to negotiate for the granting of official time for the performance of the specified representational activities and that the Statute effectively provides a remedy when official time under section 7131(d) is wrongfully denied. Specifically, the Authority determined that where official time, authorized by the official time provisions of a collective bargaining agreement consistent with section 7131(d) of the Statute, is wrongfully denied and represen-

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3/ In this regard the Agency's exception implicitly presumes that the union officials involved in the bench decisions of April 29, 1985, are exempt from coverage under FLSA, and the Union in its opposition indicates that the union officials involved are exempt employees. Union Opposition at 10.

4/ Section 7131(d) provides:

> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

tational functions are thereafter performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. *SSA*, 19 FLRA No. 104; *U.S. Department of the Air Force, Headquarters Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916*, 19 FLRA No. 105 (1985); *Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3231*, 19 FLRA No. 109 (1985); *Local 1164, American Federation of Government Employees, AFL-CIO and Social Security Administration, Boston Region*, 19 FLRA No. 110 (1985). In terms of this case, as has been noted, the Arbitrator with respect to each bench decision essentially found that the denial of official time was in violation of the parties' collective bargaining agreement which had been negotiated consistent with the Statute. Thus, the Arbitrator effectively found that all the conditions of section 7131(d) had been met. Consequently, under the decisions of the Authority, the bench awards should have granted the grievants compensation for the amount of time spent performing union representational activities on nonduty time which the Arbitrator ruled should have been performed on official time.

VI. DECISION

Accordingly, for the above reasons, the bench awards are modified by substituting for the respective number of hours of overtime compensation or compensatory time off an equal number of hours of compensation at the appropriate straight-time rate.

Issued, Washington, D.C., March 14, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 15

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF PRISONS,
DEPARTMENT OF JUSTICE

Activity

and

Case No. 0-AR-701

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 148

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Robert H. Mount filed by the Agency under section 7122(a) of the Federal Sector Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming that under the established performance standards, the grievant's performance level with respect to all four of his job elements should have been rated "outstanding" rather than "exceeds." The Arbitrator observed that the established standards for the performance levels of "minimally satisfactory," "fully successful," and "exceeds" for each of the job elements of the grievant's position are stated in quantitative terms. The Arbitrator specifically noted, for example, that for the element pertaining to patient care, the standard for "exceeds" provides that there shall be no more than one instance during the rating period when the incumbent failed to provide adequate medical care. The Arbitrator further observed that although there is no definition in the four job elements for the standard of "outstanding," management by regulation defines outstanding performance as "performance which clearly demonstrates a level of achievement which exceeds to an exceptional degree the established standards." The Arbitrator noted in this respect that it is proper to have no definition of "outstanding" in the performance standards because the use of the term "established standards" in the regulatory definition relates to the standards set for performance below the level of "outstanding." Thus, in accordance with the definition of outstanding performance set by management, the Arbitrator questioned whether the grievant's level of performance exceeded the established standards to an exceptional degree. With respect to the grievant's level of performance, the Arbitrator rejected the Activity's arguments that the grievant's level of performance was lower than as described and appraised in his performance appraisal because of disciplinary actions not described in the appraisal that were taken against the grievant over performance-related matters. The Arbitrator ruled that the performance of the grievant that must be evaluated under the established standards is the grievant's performance as specifically described and appraised in the grievant's formal annual performance appraisal. With respect to the posed question of what level of performance exceeded to an exceptional degree the established standards, the Arbitrator reiterated that the established standards were solely quantitative. Thus, the Arbitrator ruled that it would be arbitrary and capricious in such circumstances to evaluate what constituted outstanding performance in other than quantitative terms, and he consequently again rejected consideration of disciplinary actions against the grievant. Because the grievant's performance as specifically described and appraised in his performance appraisal was quantitatively perfect in three of his job elements, the Arbitrator determined in accordance with the definition of outstanding performance that the grievant was entitled under the established standards to a rating of "outstanding" as to those three elements. As his award the Arbitrator therefore ordered that the disputed annual appraisal be changed accordingly and that the grievant be granted any recognition that is normal for those so appraised.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award is contrary to section 7106(a)(2)(A) and (B) of the

Statute. Specifically, the Agency argues that by a substitution of judgment of the Arbitrator for that of management in the establishment of performance standards, the award is contrary to management's right to direct employees and to assign work.

B. Analysis and Conclusions

The Authority has consistently held that proposals which substantively restrict management in its identification of critical elements of a position and establishment of performance standards are inconsistent with section 7106(a)(2)(A) and (B) of the Statute as improper interferences with management's right to direct employees and to assign work. E.g., National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982); American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981) (Proposals 1-2), aff'd sub nom. AFGE, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). Similarly, the Authority has held that proposals which would, as their sole effect, subject management's determinations concerning the identification of critical elements and the content of performance standards to the grievance procedure and arbitral review constituted improper interference with management's rights. E.g., Saint Lawrence Seaway Development Corporation, 5 FLRA 70 (Proposal 4). In so holding, the Authority has noted that subjecting managerial evaluations concerning critical elements and performance standards to arbitral review would require an arbitrator to substitute his or her judgment as to how the agency should be run for that of management. National Treasury Employees Union and Department of Health and Human Services, Region 10, 13 FLRA 732, 734 (1982), aff'd sub nom. NTEU v. FLRA, 767 F. 2d 1315 (9th Cir. 1985). "Under the Statute, however, management has the right to evaluate the relative importance of job tasks and to formulate levels of achievement for those tasks based upon its own determination of the agency's operating needs, goals, and priorities." Id.

With respect to the arbitrator's role in resolving grievances involving performance appraisal matters, consistent with the above holdings and section 7106(a)(2)(A) and (B) of the Statute, an arbitrator could not determine that a grievance directly challenging an agency's identification of job elements or establishment of performance standards is grievable and arbitrable. Nor could an arbitrator render an award substituting his or her judgment concerning the identification of critical job elements and establishment of performance standards for that of management. E.g., Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO, 20 FLRA No. 39 (1985).

It is equally well established, on the other hand, that there is a duty to bargain under section 7106(b)(3) on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), e.g., actions which adversely affect employees taken under the performance standards established by management. E.g., American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784, 791-92 (1980) (Proposal 5). Thus, in the facts of that case, the Authority specifically found that the proposal in dispute merely established a general, nonquantitative requirement by which the application of critical elements and performance standards established by management may subsequently be evaluated in a grievance by an employee who believes that he or she has been adversely affected by the application of management's performance standard to him or her. To that extent, the Authority held that the proposal was within the duty to bargain. Under such a proposal the Authority noted that an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121(e) of the Statute, raise the issue of whether the performance standards as applied to him or her meet the contractual requirements, i.e., the arbitrator of such a grievance would simply determine if the standard established by management as applied to the grievant complied with the "fair and equitable . . ." requirements of the parties' agreement. In finding that proposal to be within the duty to bargain, the Authority specifically noted that such an arrangement did not affect management's discretion to determine the content of performance standards nor did it authorize an arbitrator to substitute his or her judgment for that of management as to the content of the standards.

The Authority has distinguished between proposed grievance procedures subjecting management's identification of critical elements and establishment of performance standards to arbitral review and grievance procedures relating only to the application of such elements and standards to an individual employee through the appraisal process. Saint Lawrence Seaway Development Corporation, 5 FLRA 70 (Proposal 4). As has been noted, the Authority found in that case that a proposed procedure which provided for grievances directly challenging the identification of critical elements and the establishment of the performance standards conflicted with management's rights. In contrast, however, the Authority citing AFGE Local 32, also ruled that a proposed extension of the grievance procedure to any action taken as a result of the application of performance standards to an employee appropriately would extend the negotiated grievance procedure to matters relating to the adverse affect on an employee of the exercise by management of its authority under section 7106 of the Statute. In ruling that the application of management's elements and standards to an employee in the context of a performance appraisal is grievable, the Authority has consistently emphasized, as in the AFGE Local 32 case discussed above, that such a grievance would not relate to the establishment of the standards, because the review by an arbitrator would not preclude management from determining the content of the elements and standards and would not result in the setting of new elements and standards. Instead, arbitral review would simply and appropriately determine whether the application of the elements and standards to the employee through a performance appraisal complied with applicable law, regulation, and the parties' collective bargaining agreement. See, e.g., American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981) (Proposal 7).

Consistent with the above holdings and the Statute, an arbitrator may resolve a grievance by an employee who believes that he or she has been adversely affected by management's application of performance standards in a performance appraisal to that particular employee. In judging management's application of standards and elements to a grievant, an arbitrator may determine that, in the circumstances of the case, management has not applied the elements and standards which it had established to a grievant or has applied those, or other elements and standards, in violation of law, regulation, or an appropriate agreed-upon general, nonquantitative review criterion. In such circumstances, an arbitrator could, for example, sustain an employee's grievance alleging that management had not applied the elements and standards which it had established or had applied those, or other elements and standards, in violation of law, regulation, or an appropriate agreed-upon general, nonquantitative review criterion. In sustaining the grievance the arbitrator as a remedy could direct that the grievant's work product be granted the rating to which entitled under the standards and elements established by management or be reevaluated by management utilizing those standards and elements. Bureau of Engraving and Printing, 20 FLRA No. 39; Social Security Administration and American Federation of Government Employees, SSA, Local 1923, AFL-CIO, 7 FLRA 544 (1982). However, in resolving such a grievance, an arbitrator may not, of course, substitute his or her judgment for that of the agency as to the appropriateness of elements and standards established by management. Further, an arbitrator may not conduct an independent evaluation of an employee's performance under the elements and standards established by management and substitute his or her judgment as to what should be that employee's performance evaluation and rating. Bureau of Engraving and Printing.

In terms of this case, as has been noted, the Arbitrator, in resolving the grievance claiming that under management's established performance standards, the grievant's performance should have been rated higher, expressly examined the performance standards established by management and the regulatory definition of outstanding performance; he specifically evaluated the application of the standards established by management to the grievant's performance as described in his performance appraisal prepared by management; and as his award he determined in accordance with the definition of outstanding performance and management's own appraisal of the grievant's performance that the grievant was entitled under the established standards to a rating of "outstanding" as to three of his job elements. Thus, contrary to the Agency's contention that the award improperly interferes with management's right to establish performance standards, the Authority finds that consistent with management's rights under section 7106(a)(2)(A) and (B) and consistent with the Authority precedent described above, the award has simply and appropriately applied to the grievant the performance standards established by management. In this respect, contrary to the argument of the Agency, the Authority likewise finds that consistent with FDIC, Chicago, 7 FLRA 217, which identified the performance appraisal as constituting the application of management's performance standards to an employee, the Arbitrator properly limited his review of the grievant's performance to that which was specifically described and appraised in the grievant's formal annual performance appraisal. Furthermore, the Authority similar to its decision in Social Security Administration, 7 FLRA 544, finds that the Arbitrator appropriately applied the established standards to the grievant's performance described in his appraisal based on the Arbitrator's determination that with the established standards stated solely in quantitative terms, it would be arbitrary and capricious for outstanding performance to be characterized in other than quantitative terms which precluded management's consideration of disciplinary actions. In short, the grievance and the award properly relate only to the application of management's performance standards to the grievant. The award does not relate to the establishment by management of those standards: it has not affected management's discretion to determine the content of the standards, it has not resulted in the substitution of judgment by the Arbitrator for that of management as to the content of the standards or the appraisal of the grievant's performance, and it has not resulted in the setting of new standards. Accordingly, no basis is provided for finding the award deficient as contrary to the Statute.

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Agency contends that the award is contrary to 5 U.S.C. § 4302. Specifically, the Agency argues that the award bars the use of a nonquantitative performance standard which is expressly permitted by section 4302.

B. Analysis and Conclusions

The Authority finds that the award in no manner bars management from establishing a nonquantitative performance standard in accordance with section 4302. As has been noted, the Arbitrator in his award simply determined that with the standards that management had established stated solely in quantitative terms, it would be arbitrary and capricious for outstanding performance, which management had defined as that which exceeded to an exceptional degree the established standards, to be characterized in other than quantitative terms. Consequently, this exception provides no basis for finding the award deficient as alleged by the Agency.

V. THIRD EXCEPTION

A. Contentions

In its third exception the Agency contends that the award fails to draw its essence from the parties' collective bargaining agreement. In support the Agency argues that the award has no basis in the parties' collective bargaining agreement.

B. Analysis and Conclusions

The Authority concludes that this exception constitutes nothing more than disagreement with the Arbitrator's findings of fact and his reasoning and conclusions and that consequently this exception provides no basis for finding the award deficient. *See*, *e.g.*, *Federal Correctional Institution, Petersburg, Virginia and American Federation of Government Employees, Local 2052, Petersburg, Virginia*, 13 FLRA 108 (1983).

VI. FOURTH EXCEPTION

A. Contentions

In its fourth exception the Agency contends that the award is based on nonfacts because it is premised on two mistaken findings of fact. In support the Agency contends that the Arbitrator mistakenly evaluated the grievance on the basis of the grievant's performance as stated in his performance appraisal and mistakenly extrapolated in an arithmetic progression the established performance standard for "outstanding."

B. Analysis and Conclusions

As determined in the resolution of the first exception and contrary to the contention of the Agency, the Arbitrator properly took into account the performance of the grievant as stated in his performance appraisal, and consequently the contention of the Agency in this respect provides no basis for finding the award deficient. The remaining contention of the Agency constitutes nothing more than disagreement with the Arbitrator's findings of fact and his reasoning and conclusions and likewise provides no basis for finding the award deficient on the ground that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. See, e.g., General Services Administration and American Federation of Government Employees, Council 236, 15 FLRA 328 (1984).

VII. DECISION

For the reasons stated above, the Agency's exceptions accordingly are denied.

Issued, Washington, D.C., March 14, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIF FORCE,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Activity

and

Case No. 0-AR-952
(18 FLRA No. 81)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF LOCALS,
NO. 214

Union

ORDER DENYING REQUEST FOR CLARIFICATION

This matter is before the Authority on a request filed by the Department of the Air Force (the Agency) seeking clarification of the Authority's decision of June 21, 1985 (18 FLRA No. 81). In that decision, on exceptions filed by the Agency, the Authority set aside the Arbitrator's interest arbitration award directing the parties to include a provision in their collective bargaining agreement authorizing 100 percent official time for certain Union representatives. In its request for clarification, the Agency asks whether the Authority set aside the Arbitrator's resolution of the parties' entire negotiation impasse that was before him or only that portion excepted to by the Agency, i.e., the portion dealing with full-time union representatives, and whether all other portions of his award remain in effect.

As set forth in the Authority's decision, the entire dispute before the Arbitrator concerned an impasse which arose during the parties' negotiation of a new Master Labor Agreement. The Federal Service Impasses Panel had directed that the impasse be referred to mediation-arbitration for resolution. Negotiations under the Arbitrator's direction apparently produced agreement on all issues except a Union proposal that 100 percent official time be authorized for certain Union representatives. Before the Arbitrator, the Agency contended, as it had earlier, that the Union's proposal was not within the duty to bargain under the Federal Service Labor-Management Relations Statute.

In its decision, the Authority concluded that the Agency's allegation raised a negotiability issue under section 7117(c)(1) of the Statute and that by deciding that the parties' agreement should contain the disputed provision, the Arbitrator had determined that the Agency had an obligation under the Statute to bargain on the matter, despite its allegation to the contrary. Under established Authority precedent, the Arbitrator was without authority to decide such a negotiability issue arising under section 7117(c)(1) since, as required by section 7105(a)(2)(E), such issues may only be resolved by the Authority. Accordingly, the Authority set aside the Arbitrator's award deciding the negotiability issue as contrary to section 7105(a)(2)(E).

The Authority concludes that the Agency's request for clarification must be denied. Thus, without passing upon whether the Authority's Rules and Regulations provide for the filing of such requests, the Authority finds that clarification is not warranted in this case. As indicated above, the Authority clearly set aside only that portion of the Arbitrator's resolution of the parties' dispute that was before the Authority on exceptions filed by the Agency, i.e., the interest arbitration award directing the parties to include in their agreement the disputed provision authorizing 100 percent official time for certain Union representatives. The Authority did not address any other aspect of the parties' entire dispute or the effect of the decision on such other aspects or on other proceedings in the dispute.

Accordingly, since the decision appears clear in that regard, the Agency's request for clarification is denied.

Issued, Washington, D.C., March 11, 1986

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236

Union

and
Case No. 0-AR-1057

GENERAL SERVICES ADMINISTRATION,
KANSAS CITY, MISSOURI

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Clifford E. Smith filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

C. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
(OFFICE OF HEARINGS AND APPEALS)

Agency

and

Case No. 0-AR-1067

LOCAL 1760, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator David M. Kaplan filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 85

Union

and

Case No. 0-AR-1069

VETERANS ADMINISTRATION MEDICAL
CENTER, LEAVENWORTH, KANSAS

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Francis X. Quinn filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AUDIE L. MURPHY VA HOSPITAL

Activity

and

Case No. 0-AR-1073

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3511

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Albert V. Carter filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORFOLK NAVAL SHIPYARD,
NORFOLK, VIRGINIA

Activity

and

Case No. 0-AR-1074

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Harold D. Jones, Jr. filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
NATIONAL CAPITAL REGION

Activity

and

Case No. 0-AR-1075

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1773

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert B. Lubic filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 7, 1986

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

Case No. 0-AR-1022

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 147

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator C. Chester Brisco filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 12, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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21 FLRA No. 19 (March 20, 1986)

National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, Case No. 0-NG-1021

21 FLRA No. 20 (March 20, 1986)

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21 FLRA No. 21 (March 25, 1986)

American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, Case No. 0-NG-1034

21 FLRA No. 22 (March 25, 1986)

American Federation of Government Employees, AFL-CIO, Local 2677 and Department of Health and Human Services, Office of Community Services, Case No. 0-NG-920

ARBITRATION CASES

21 FLRA No. 16 (March 20, 1986)

National Association of Government Employees, Local R1-25 and Brockton/West Roxbury V.A. Medical Center (O'Brien, Arbitrator), Case No. 0-AR-975

3.F31/21-3:

21 FLRA No. 17 (March 20, 1986)

Colorado River Storage Project, Bureau of Reclamation, U.S. Department of the Interior and International Brotherhood of Electrical Workers, Local 2159 (Rentfro, Arbitrator), Case No. 0-AR-495

21 FLRA No. 23 (March 25, 1986)

Department of Health and Human Services, Social Security Administration and Local 3369, American Federation of Government Employees (Simons, Arbitrator), Case No. 0-AR-454

**Federal
Labor Relations
Authority**

21 FLRA No. 16

NAGE, Local R1-25 and
Brockton/West Roxbury VA
Medical Center (O'Brien,
Arbitrator), Case No.
0-AR-975 (Decided March 20,
1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7106(a) and (a)(2)(B)
1600. Grounds for Review	7122(a)
1601. Award Conflicts With Applicable Law	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Set Aside
  - Exceptions Asserted in Appeal
    - Award Contrary To FSLMR Statute
      - § 7106(a)(2)(B)
  - Management Rights
    - Assign Work
      - Midweek Holiday
    - Award May Not Interpret or Enforce CBA to Improperly Deny Management Its § 7106 Rights
    - Past Practice May Not Preclude Exercise of Management Right

DIGEST NOTES

A grievance was submitted to arbitration alleging that the activity violated the parties' collective bargaining agreement when it required certain employees to work a midweek holiday. The activity alleged that it had acted within its rights to assign work. The Arbitrator determined that management's right to assign work is not absolute and may be abridged by provisions of the agreement and by past practices. Accordingly he sustained the grievance and directed the employer to cease and desist from requiring employees to work on midweek holidays. The Authority found that by effectively prohibiting the assignment of work on midweek holidays, the award had enforced the parties' agreement and practices so as to improperly deny the agency its right under § 7106(a)(2)(B) to determine when work which had been assigned would be performed. Consequently, the award was set aside.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

An arbitration award may not interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under the statute.

No past practice may be established regarding the rights enumerated in § 7106(a) that would bind management to the particular manner in which it had exercised such rights in the past so as to preclude management from acting otherwise in the exercise of those rights.

Federal Labor Relations Authority

21 FLRA No. 17

Colorado River Storage Project, Bureau of Reclamation, Dep't of Interior and IBEW, Local 2159 (Rentfro, Arbitrator), Case No. 0-AR-495 (Decided 20, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a)
1600. Grounds for Review	7131(d)
1601. Awards Conflicts With Applicable Law	
1650. No Basis for Review	
1652.01. Disagreement with Arbitrator's Reasoning	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Exceptions Asserted in Appeal
    - Award Contrary to Evidence
    - Award Contrary to FSLMR Statute
      - § 7131(d)
  - Interest Arbitration
    - Procedure for Final Approval of Local Agreements
    - Travel and Per Diem
      - Presentation of Grievance
  - No Basis For Review
    - Disagreement With Arbitrator's Evaluation of the Evidence
    - Disagreement with Arbitrator's Reasoning and Conclusions
- Negotiability
  - Mandatory Subjects of Bargaining
    - Travel and Per Diem
- Official Time
  - Travel and Per Diem

DIGEST NOTES

This dispute was referred to interest arbitration for resolution and concerned the negotiation impasse of the parties over what modification, if any, should be made in the grievance procedures and what procedures should be followed by the parties in effecting final approval of agreements negotiated on the local level. The union had proposed a change in the grievance procedures to provide travel and per diem expenses for the grievant, witnesses, and representatives while presenting a grievance. The arbitrator concluded that if each party pays its own way in pursuing a grievance, the stakes are more equitable and the parties are encourage to settle the grievance at an early stage without resort to arbitration. He thus, determined not to incorporate the union's proposal into the the collective bargaining agreement. The arbitrator determined not to change the procedure for approval of local agreements, but suggested a clarification of the existing agreement and proposed certain language for consideration by the parties.

In its first exception the union contended that the arbitrator's resolution of the impasse over grievance procedures by determining not include the travel and per diem provision was contrary to § 7131(d) and ignores the evidence showing hardships on employees of grievances and the evidence showing that it is not traditional in the federal sector for each side to pay its own costs. The Authority concluded that the arbitrator's determination not to require that the union's proposal be included in the agreement was not contrary to to § 7131(d) and that the union's contention that the award was contrary to the evidence was nothing more than disagreement with the arbitrator's evaluation of the evidence and with his reasoning and conclusions in reaching his determination.

In its second exception the union contended that the arbitrator's resolution of the impasse over the approval procedure was contrary to law and contrary to the evidence. The Authority found that the exception did not address the arbitrator's award, which resolved the impasse in favor of the union by ruling not to change the approval procedure of the existing agreement. Instead, the union only argued that the arbitrator's suggested clarification of the existing language and his proposal of the additional language for consideration of the parties, which was not mandated to be incorporated into the agreement, was deficient. Consequently, because the exception did not address the award, there was no basis for finding the award deficient.

A union proposal seeking payment of travel and per diem expenses incurred by employees on official time is within the agency's duty to bargain under the Statute. However, while the agency is obligated to bargain in good faith over the disputed proposal it is under no obligation to agree to the union's formulation.

Federal Labor Relations Authority

21 FLRA No. 10

AFGE, Local 3477 and Commodity Futures Trading Commission, Case No. 0-NG-681 (Decided March 20, 1986)

DIGEST HEADINGS

- 2000. NEGOTIABILITY
    - 2011. Conditions of Employment
    - 2150. Management Rights
        - 2151.05. Budget
        - 2152.10. Direct
        - 2152.40. Assign Work
    - 2200. Subjects of Bargaining
        - 2201.05. Technology of Performing Work
        - 2201.10. Methods and Means of Performing Work
    - 2600. Conditions For Review
        - 2601. Proposal Alleged To Be Inconsistent With Federal Law
    - 2700. Petition for Review
        - 2702. Timeliness

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A) and (B)
7106(b)(1)

SUBJECT MATTER INDEX ENTRIES

- Federal Personal Manual Chap. 451
- Federal Personnel Manual Chap. 451, Subchap. 8-5
- Negotiability
    - Conditions of Employment
        - Amount of Employee Incentive Awards
            - Agency Must Bargain to Extent of its Discretion
    - Incentive Awards
        - Amounts Awarded Employees for Suggestions
    - Management Rights
        - Assign Work
            - Incentive Awards
                - Performance Based Awards Relate to Job Requirements
        - Determine Budget
            - Incentive Awards
                - Cost of Awards vs Compensating Benefit to Agency
                - Proposals Do Not Prescribe Particular Program
                - Proposals Do Not Prescribe Particular Budget Amount
        - Direct Employees
            - Incentive Awards
                - Performance Based Awards Relate to Job Requirements

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ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Mandatory Subjects of Bargaining
Extent of Agency Discretion - re Conditions of Employment
Procedure
Allegation of Nonnegotiability
Union's Right to Submit Written Request for Allegation
Timeliness
Subjects of Bargaining
At Election of Agency
Technology, Methods and Means of Performing Work
Incentive Awards for Employee Suggestions
Implementation of Suggestions Does Not Require Award
5 C.F.R. § 451.205(a)(3)(1984 Supp.)
5 U.S.C. § 4502 and 4503

DIGEST NOTES

A proposal that would establish a range of percentages of salary for the purpose of determining the amount of performance awards is nonnegotiable. Because the proposal would substantially affect the rate of a performance related award, it has the effect of establishing the rate of a monetary incentive for performance and thus, directly interferes with management's rights to direct employees and to assign work under § 7106(a)(2)(A) and (B). Performance based incentive awards relate to an employee's accomplishment with respect to his or her job requirements. Such awards are, therefore, ultimately based in management's right to determine those employee job requirements. (proposal 1)

Proposals that would determine the amount of an incentive award once an agency decides to grant the award do not interfere with management's right to determine its budget. The Authority will find a proposal inconsistent with an agency's right to determine its budget if the proposal by its terms prescribed a particular program or an amount of funds to be included in the agency's budget or if the agency made a substantial demonstration that the proposal would result in a significant unavoidable increase in costs which would not be offset by compensating benefits. The proposals neither prescribe a particular program nor an amount of funds to be included in a budget. Further, assuming that the proposals would require the agency to budget larger amounts for incentive awards, it was not demonstrated that the increase would not be offset by compensating benefits. The proposals specifically linked the amount of an award to the amount of benefits to the government which resulted from the suggestion being awarded. (proposals 1, 2 and 3)

Proposals that would determine the amount of an incentive award once an agency decides to grant the award do not interfere with management's right to determine the technology, methods and means of performing work. The agency asserted that if, because of budgetary restraints, it were unable to provide an award in the amount specified by the proposal, it would be prevented from implementing a suggestion which could involve worthwhile improvements to the technology, methods, and means of performing work. The Authority held that an employee whose suggestion is adopted has the right to be considered for an award and an agency is not bound to grant an award upon adoption of a suggestion. (proposals 2 and 3)

Proposals that would determine the amount of an incentive award once an agency decides to grant the award are not contrary to the provisions of 5 U.S.C. § 4502 and 4503, which the agency describe as reserving to the head of each agency the right to determine the amount of each incentive award. Those statutory provisions vest agencies with the discretion to determine the amount to be paid as awards for suggestions. The Authority has held that an agency has a duty to bargain to the extent of its discretion with respect to matters affecting the conditions of employment of its employees. Since there is no indication that the discretion provided the agency in 5 U.S.C. § 4502 and 4503 is intended to be sole and exclusive the agency must bargain on the subject. (proposals 1, 2 and 3)

A union has a right to request in writing that an agency serve it with a written allegation of nonnegotiability under 2424.3 of the Authority's Rules and Regulations.

[illegible]

Allegation of [illegible]

Union's Right to Submit Written Request for [illegible]

[illegible]

[illegible] salary for the purpose of determining [illegible] awards is nonnegotiable. Because the proposal would substantially affect [illegible] of establishing [illegible] and thus, directly [illegible] employees and to assign work under § 7106(a)(2)(A) and (B). Performance based incentive awards relate to an employee's accomplishment with respect to his or her job requirements. Such awards are, therefore, ultimately based on management's right to determine those employee job requirements. (proposal 1)

Proposals that would determine the amount of an incentive award once an agency decides to grant the award do not interfere with management's right to determine its budget. The Authority will find a proposal inconsistent with an agency's right to determine its budget if the proposal by its terms prescribed a particular program or an amount of funds to be included in the agency's budget or if the agency made a substantial demonstration that the proposal would result in a significant and unavoidable increase in costs which would not be offset by compensating benefits. The proposals neither prescribe a particular program nor an amount of funds to be included in a budget. Further, assuming that the proposals would require the agency to budget larger amounts for incentive awards, it has not demonstrated that the increase would not be offset by compensating benefits. The proposals specifically linked the amount of an award to the amount of benefits to the government which resulted from the suggestion being awarded. (proposals 1, 2 and 3)

Proposals that would determine the amount of an incentive award once an agency decides to grant the award do not interfere with management's right to determine the technology, methods and means of performing work. The agency asserted that if, because of budgetary constraints, it were unable to provide an award in the amount specified by the proposal, it would be prevented from implementing a suggestion which would involve worthwhile improvements in the technology, methods, and means of performing

Federal Labor Relations Authority

21 FLRA No. 19

NTEU and Dep't of Treasury, IRS, Case No. 0-NG-1021
(Decided March 20, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7103(a)(14)
2011. Conditions of Employment	7105(a)(2)(E)
2600. Conditions For Review	7131
2601. Proposal Alleged To Be Inconsistent With Federal Law	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions For Review
    - Proposal Alleged Inconsistent With Federal Law
      - 5 U.S.C. § 5701 et seq.
    - Proposal Alleged Inconsistent With Government-Wide Regulation
      - 41 C.F.R. Part 101-7
  - Conditions of Employment
    - Travel and Per Diem re Contract Negotiations
  - Travel and Per Diem
    - Employees on Official Time
    - Need Not Be Tied to § 7131 Official Time
- Official Time
  - Official Business
    - Activity Within the Primary Interest of the Government
  - Travel and Per Diem Need Not Be Tied to Official Time
- 41 C.F.R. Part 101-7 (Federal Travel Regulations)
- 5 U.S.C. § 5701 et seq. (Travel Expense Act)

DIGEST NOTES

A proposal seeking payment of travel expenses incurred while on official time concerned a condition of employment and is therefore negotiable. See 21 FLRA No. 2 (1986) (which held that such a proposal concerned a condition of employment which was within the Agency's administrative discretion, and was not inconsistent with the Travel Expense Act, 5 U.S.C. 5701 et seq., or Federal Travel Regulations).

A proposal seeking payment of travel expenses incurred while on official time and providing for case by case determinations as to the appropriateness of specific travel and per diem expenses which are necessary and proper under law and governing regulation, is not inconsistent with the Travel Expense Act, 5 U.S.C. 5701 et seq., or Federal Travel Regulations and is therefore negotiable. The Authority has found that agencies have the discretion, under the Act and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States to constitute official business for which employees may receive appropriate expenses from Federal funds. The exercise of that discretion is subject to the negotiation process.

Travel and per diem expenses need not be tied to § 7131 official time in order to be negotiable. Instead, the negotiability of travel and per diem is based on consideration of whether the travel involved is in the primary interest of Government so as to constitute "official business," without consideration of § 7151. See 21 FLRA No. 2 (1986).

Federal Labor Relations Authority

NFFE, Local 29 and U.S. Army Engineer District, Kansas City, Mo., Case No. 0-NG-467; NFFE, Local 1363, Republic of Korea and U.S. Army Garrison, Yongsan, Korea, Case No. 0-NG-450
(Decided March 20, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7117(a)
2600. Conditions for Review	
2601. Proposal Alleged To Be Inconsistent With Federal Law	
2602. Proposal Alleged Inconsistent with Government-Wide Rule or Regulations	

SUBJECT MATTER INDEX ENTRIES

Collective Bargaining Agreement
  Waiver of Interest Not Permitted By Debt Collection Act
Contract
  Defined - Debt Collection Act
    Does Not Include Collective Bargaining Agreement
Negotiability
  Conditions for Review
    Proposals Contrary to Law
      Debt Collection Act of 1982
    Proposals Contrary to Government-Wide Regulation
      4 C.F.R. 102.13(g)
  Employee Debt to Government
    Waiver of Interest and Late Payment Assessments
      Agency Discretion
      Applicability of Debt Collection Act of 1982
      Delinquent Repayment of Unused Travel Advances
  Procedure
    Motion To Strike Granted
      Agency Statement Raises Superfluous Issues
  Travel and Per Diem
    Delinquent Repayment of Unused Travel Advances
      Agency Discretion to Waive Interest and Late Charges
Pub. L. No. 97-365, 96 Stat. 1749 (1982)(Debt Collection Act)
S. Rep. No. 97-378 (1982)
Treasury Fiscal Requirements Manual
4 C.F.R. § 102.13(g)
4 C.F.R. Parts 101-105 (Federal Claims Collection Standards)
5 U.S.C. § 5514, 5514(b)(2) and (c)
5 U.S.C. § 5705
31 U.S.C. § 3717(a), (e), (g)(1) and (h)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

Proposals that provide for the waiver of interest and penalty charges on the delinquent repayment of unused travel advances are inconsistent with the Debt Collection Act of 1982 and the implementing regulations in the revised Federal Claims Collection Standards.

Prior to the issuance of the Authority's decisions in these cases but after the parties submissions had been filed, Congress enacted the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749. Motions for reconsideration were granted to consider the impact of the Act on the Authority's decisions finding negotiable union proposals relating to the conditions under which employees will reimburse the Agency for monies they have received through advances, where work-related expenses actually incurred are less than the advance. The proposals were in dispute only in so far as they provided that interest and late payment charges would not be assessed.

The requirement in 31 U.S.C. § 3717 that agencies charge interest and late payment penalties on outstanding debts owed the United States Government was intended by Congress to be mandatory and imperative. Agencies are without discretion to waive interest charges absent express exception

Section 31 U.S.C. § 3717(g), provides that the mandatory interest requirement of the Debt Collection Act does not apply where a "contract" prohibits the charging of interest or assessment of late payment charges. That section, however, does not authorize an agency to enter into a collective bargaining agreement which contains a provision waiving the application of the required interest and penalty charges. In view of the importance attached by Congress to the interest and penalty requirements of the Act, any exceptions to § 3717 should be narrowly construed so as not to frustrate the Congressional purpose.

The term "contract" in 31 U.S.C. § 3717(g)(1) refers to those contracts which specifically concern the payment of money pursuant to particular government program involving loans administered by agencies, and not to contracts in the general sense, such as collective bargaining agreements.

The major purpose of the Debt Collection Act was to facilitate collection procedures in the federal government by expanding the debt collection tools available to federal agencies. The Act's purpose was primarily to facilitate the collection of "general debts," however, its coverage was not intended to be limited solely to such "general debts," but also to include those debts such as unused travel advances for which salary offset was already authorized.

Federal Labor Relations Authority

21 FLRA No. 21

AFGE, National Council of Federal Grain Inspection Locals and Dep't of Agriculture, Federal Grain Inspection Service, Case No. 0-NG-1034 (Decided March 25, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7103(a)(14)
2011. Conditions of Employment	7105(a)(2)(D) and (E)
2600. Conditions For Review	7114(c)
2601. Proposal Alleged Inconsistent With Federal Law	7131(a) and (d)
2602. Proposal Alleged To Be Inconsistent With Government-Wide Rule or Regulations	
2650. Compelling Need Determination	

SUBJECT MATTER INDEX ENTRIES

Negotiability
- Compelling Need
  - No Compelling Need - Agency Travel and Per Diem Regulations
- Conditions for Review
  - Proposal Alleged to be Inconsistent With Federal Law
    - 5 U.S.C. § 5701 *et seq*.
  - Proposal Alleged to be Inconsistent With Government-Wide Regulations
    - 41 C.F.R., Part 101-7
- Conditions of Employment
  - Travel and Per Diem
    - Agency Discretion Under 5 U.S.C. § 5701 *et seq*.
- Travel and Per Diem
  - Employees on Official Time

Official Time
- Travel and Per Diem

41 C.F.R. Part 101-7 (Federal Travel Regulations)

5 U.S.C. § 5701 *et seq*. (Travel Expense Act)

DIGEST NOTES

A proposal seeking payment of travel expenses incurred while on official time concerned a condition of employment and is therefore negotiable. *See* 21 FLRA No. 2 (1986) (which held that such a proposal concerned a condition of employment which was within the Agency's administrative discretion, and was not inconsistent with the Travel Expense Act, 5 U.S.C. 5701 et seq., or Federal Travel Regulations).

Proposals are negotiable that provide for reimbursement of travel and per diem expenses for certain representational activity and are not inconsistent with the Travel Expense Act or its implementing regulations. Agencies have the discretion, under the Act and 41 C.F.R., Part 101-7 (Federal Travel Regulations), to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. The exercise of that discretion is subject to the negotiation process. (provisions 1, 2, and 3)

There is no compelling need for an agency regulation which provides that determinations on whether to pay travel and per diem may be made only on a case by case basis and solely by management. The regulation is not essential to comply with the Travel Expense Act or the Federal Travel Regulations. Neither the Act or its implementing regulations require that determinations as to whether travel related to labor-management relations activities is primarily in the interest of the United States be made unilaterally by management and only on a case by case basis.

Federal Labor Relations Authority

21 FLRA No. 22

AFGE, Local 2677 and HHS, Office of Community Services, Case No. 0-NG-920 (Decided March 25, 1986)

DIGEST HEADINGS	STATUTE
2000. NEGOTIABILITY	7105(a)(2)(E)
2210. Mandatory Subjects of Bargaining	7106(b)(3) 7117(a)(1)
2210.05. Appropriate Arrangements	
2600. Conditions For Review Proposal Alleged To Be Inconsistent With Federal Law	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Inconsistent With Government-Wide Regulations
      - FPM Chapter 335, Subchapter 1-4, Requirement 4
  - Fill Positions
    - Make Selections From Any Appropriate Source
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangements
      - Excessive Interference Test
      - Fill Positions With Employees Affected By RIF Actions

DIGEST NOTES

A proposal that would require an agency to fill vacancies during the period of retained-grade eligibility by selecting qualified employees who had been affected by reduction-in-force (RIF) actions involving release from competitive levels but who were in a retained-grade status, was outside the duty to bargain under § 7117(a)(1) because it was inconsistent with a government-wide regulation. The proposal conflicted with Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual, which would permit agencies to fill positions by making selections from any appropriate source. The proposal in this case would require the agency to select only those employees who are affected by RIF actions involving release from competitive levels for vacancies which it has decided to fill during the period of retained eligibility.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal that would require an agency to fill vacancies during the period of retained-grade eligibility by selecting employees who had been affected by reduction-in-force actions involving release from competitive levels but who were in a retained-grade status, constituted a negotiable appropriate arrangement under § 7106(b)(3). The proposal applied where the agency had decided to fill vacancies for which the employees were qualified.

21 FLRA No. 22

HHS, SSA and Local 3369, AFGE (Simone, Arbitrator), Case No. 0-AR-454 (Decided March 25, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7106(a)
1600. Grounds For Review	7122(a)
1601. Award Conflicts With Applicable Law	7131
1650. No Basis For Review	
1652.15 Award Ignores Collective Bargaining Agreement	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Modified
      - Payment Must Be Consistent With Federal Travel Regulations
    - Pay Travel and Per Diem Expenses of Union Official
  - Exceptions Asserted in Appeal
    - Arbitrator Exceeded His Authority
    - Award Contrary to the Statute
      - § 7106(a)
      - § 7131
    - Award Based on Nonfact
    - Award Fails to Draw Its Essence From the Collective Bargaining Agreement
  - Management Rights
    - Determine Budget
    - Determine Mission
  - Official Time
    - Travel and Per Diem
  - Travel and Per Diem
    - To Visit National Union Officers and Congressional Officials
- 41 C.F.R. Part 101-7 (Federal Travel Regulations)

DIGEST NOTES

The issue submitted to the arbitrator was whether management was justified under the parties' collective bargaining agreement or under applicable law or regulation in refusing to pay the travel and per diem expenses of the local union president for a trip involving a visit to officials of and the national union and Congress. The arbitrator found that the activity's refusal to pay travel and per diem was wholly untenable under the provisions of

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

the parties' agreement and was not supportable under any cited law or regulation. The arbitrator's award directed management to pay the expenses, stating that the refusal to pay was was not mandated by any law or regulation and violative of the parties agreement.

In its first, second and third exceptions the agency contended that the award was based on nonfact and failed to draw its essence from the collective bargaining agreement. The agency alleged that the arbitrator could not have properly interpreted the parties' collective bargaining agreement and therein, find a basis on which to award the payment of travel and per diem. The Authority concluded that the exceptions constituted nothing more than disagreement with the Arbitrator's interpretation and application of the parties' collective bargaining agreement. The arbitrator clearly interpreted the agreement to encompass travel and per diem payments. The agency in its exceptions was clearly seeking to have its interpretation of the agreement substituted for that of the arbitrator. The exceptions therefore, provided no basis for finding the award deficient.

The agency contended in its exception that the award was contrary to management's right to determine the budget of the agency. The Authority found that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activity are payable from federal funds and that the agency had not shown, beyond a bare assertion, that the proposal conflicted with the right of the agency to determine its budget under § 7106. The agency was clearly disagreeing with the arbitrator's interpretation and application of the agreement which provides no basis for finding the award deficient.

The agency contended in its exception that the award was contrary to management's right to determine the mission of the agency. The Authority found that the agency had not shown, beyond a bare assertion, that the arbitrator's award interferes with the right of the agency to determine its mission. The agency was clearly disagreeing with the arbitrator's interpretation and application of the agreement which provides no basis for finding the award deficient.

The agency contended in its exception that the award was contrary to the official time provisions of § 7131. The Authority found that the agency had not shown, beyond a bare assertion, that the arbitrator's award was contrary to the official time provisions of the Statute. The agency was clearly disagreeing with the arbitrator's interpretation and application of the agreement which provides no basis for finding the award deficient.

The arbitrator's award directing the payment of travel and per diem expenses to a union official, incurred in the performance of labor-management relations activity while on official time, was modified to provide for agency determinations regarding the propriety of the travel and per diem expenses under the Federal Travel Regulations.

21 FLRA No. 24

GSA and AFGE, Council 236 (Angelo, Arbitrator), Case No. 0-AR-727 (Decided March 25, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a)
1600. Grounds for Review	7131(d)
1601. Award Conflicts With Applicable Law	
1650. No Basis for Review	
1652.15 Award Ignores Collective Bargaining Agreement	

SUBJECT MATTER INDEX ENTRIES

Arbitration
- Exceptions Asserted in Appeal
  - Award Contrary to Applicable Law
    - 5 U.S.C. § 5701 *et seq*. [Travel Expense Act]
  - Award Contrary to FSLMR Statute
    - § 7131(d)
  - Award Does Not Draw Essence From Parties' Agreement

Negotiability
- Official Time
  - Travel and Per Diem

DIGEST NOTES

The issue submitted to arbitration was whether the agency violated § 7131(d) and the parties' agreement by failing to pay the travel and per diem expenses of a union representative when he performed certain representational activities on official time. The arbitrator found that the parties had agreed in their collective bargaining agreement that union representatives engaged in certain representational activities were entitled to reimbursement for related travel and per diem expenses. In his award he determined that the agency was obligated to pay the representative reasonable and necessary travel and per diem expenses in connection with the representational activities involved and directed the the agency reimburse the representative "in the same manner an to the same extent it would otherwise reimburse employees engaged in official agency travel, upon presentation of appropriate documentation with respect to his expenses."

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its first exception the agency contended that the arbitrator's award failed to draw its essence from the parties' collective bargaining agreement. In order for an award to be found deficient as failing to draw its essence from the parties' collective bargaining agreement, the party making the allegation must demonstrate that the award cannot in any rational way be derived from the agreement; or that the award is so unfounded in reason and fact, so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator; or that the award evidences a manifest disregard for the agreement; or that the award does not represent a plausible interpretation of the agreement. The Authority found that the agency failed to demonstrate that the arbitrator's award was deficient under any of the tests described above.

In its second exception the agency contended that the arbitrator's award was contrary to § 7131 because the agency was not obligated to pay travel and per diem expenses for union representatives on official time under that provision. The Authority held that the arbitrator interpreted a provision of the parties' agreement as requiring the agency to pay the travel and per diem expenses of union representatives performing covered labor-management relations activities on official time. While the agency was correct in stating that § 7131 does not require agencies to pay travel and per diem to union representatives on official time, in this case, the agency negotiated an agreement provision requiring it to pay such expenses. The Authority held that the arbitrator's award based on his interpretation of the agreement was not contrary to § 7131.

In its third exception the agency asserted that the arbitrator's award was deficient because travel and per diem is a subject outside the duty to bargain and that as interpreted by the arbitrator, the pertinent provision in the parties agreement is nonnegotiable as inconsistent with the Travel Expense Act since it provides for the payment of travel and per diem expenses without the mandatory agency head determination that the employee was traveling on official business and that the travel was in the primary interest of Government. The Authority found that the arbitrator's determination effectively constitutes a finding that the agency had exercised its discretion under the Travel Expense Act through negotiations and had determined that the covered activities were sufficiently within the interest of the United States so as to constitute official business. Further, the arbitrator in directing the payment of travel and per diem expenses in connection with the covered activities, expressly provided for the agency to reimburse the employee representative "in the same manner and to the extent it would otherwise reimburse employees engaged in official agency travel, upon presentation of appropriate documentation with respect to his expenses." Thus, the arbitrator effectively directed the payment of travel and per diem expenses only to the extent the expenses are consistent with the Federal Travel Regulations. The agency failed to establish that the award was deficient.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-25

Union

and Case No. 0-AR-975

BROCKTON/WEST ROXBURY
V.A. MEDICAL CENTER

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Francis T. O'Brien filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATION AWARD

The parties submitted to arbitration the issue of whether the Activity violated the parties' collective bargaining agreement when it required certain employees to work a midweek holiday. Before the Arbitrator the Activity argued that it had properly acted in accordance with its right to assign work. However, the Arbitrator stated that management's right to assign work is not absolute and may be abridged by provisions of the agreement and by past practices. In this respect, he determined that under the parties' collective bargaining agreement, there was an established practice of not requiring employees to work midweek holidays. Accordingly, the Arbitrator sustained the grievance and directed the employer to cease and desist from requiring employees to work on midweek holidays.

III. EXCEPTION

In its exception the Agency contends that the award is contrary to management's right to assign work under section 7106(a)(2)(B) of the Statute.

IV. ANALYSIS AND CONCLUSIONS

The Authority has repeatedly recognized that the plain language of section 7106(a) provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. *E.g.*, *American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York* 5 FLRA 70, 79 (1981), *aff'd sub nom. AFGE Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied* 461 U.S. 926 (1983). Therefore, the Authority has consistently held that no arbitration award may interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under that section. *E.g.*, *U.S. Department of Justice, Immigration and Naturalization Service, Western Regional Office, San Pedro, California and American Federation of Government Employees, Immigration and Naturalization Service Council, Western Region, Local 2805*, 18 FLRA No. 20 (1985). In addition, the Authority has clearly indicated that no past practice may be established regarding the rights enumerated in section 7106(a) that would bind management to the particular manner in which it had exercised such rights in the past so as to preclude management from acting otherwise in the exercise of those rights. *See, e.g.*, *Veterans Administration Medical Center, Kerrville, Texas and American Federation of Government Employees, Local 2281*, 18 FLRA No. 57 (1985); *Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana*, 9 FLRA 543, 545 (1982). Section 7106(a)(2)(B) of the Statute reserves to management officials the authority to assign work. Encompassed within this right is the right to determine without interference when work which has been assigned will be performed. *E.g.*, *National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration*, 13 FLRA 422 (1983); *New York State Nurses Association and Veterans Administration Medical Center, Bronx, New York*, 11 FLRA 578 (1983). In terms of this case, as has been noted, the Arbitrator determined that under the parties' collective bargaining agreement, there was an established practice of not requiring employees to work midweek holidays and that such practice precluded management from acting otherwise with respect to the assignment of work. Thus, the Authority finds that by effectively prohibiting the assignment of work on midweek holidays, the award has enforced the parties' agreement and practices so as to improperly deny the Agency its right under section 7106(a)(2)(B) to determine when work which has been assigned will be performed. Consequently, the Authority concludes that the award is deficient as contrary to section 7106(a)(2)(B) of the Statute.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is set aside.

Issued, Washington, D.C., March 20, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 17

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

COLORADO RIVER STORAGE PROJECT,
BUREAU OF RECLAMATION,
U.S. DEPARTMENT OF THE INTERIOR

Activity

and Case No. 0-AR-495

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2159

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the interest arbitration award of Arbitrator William E. Rentfro filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.*/

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned, among other things, the negotiation impasse of the parties over what modification, if any, should be made in the grievance procedures and what procedures should be followed by the parties in effecting final approval of agreements negotiated at the local level. Pursuant to the provisions of the parties' general agreement approved by the Federal

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*/ Contrary to the argument of the Agency that section 7122(a) of the Statute and part 2425 of the Authority's Rules do not apply to interest arbitration awards, the Authority has specifically confirmed its jurisdiction to resolve exceptions to interest arbitration awards. Department of Housing and Urban Development and American Federation of Government Employees, Local 476, AFL-CIO, 18 FLRA No. 95 (1985); Patent and Trademark Office and Patent Office Professional Association, 15 FLRA 990 (1984).

Service Impasses Panel, the impasse was referred to interest arbitration for resolution. With respect to the grievance procedures, the Arbitrator noted that the Union had proposed a change to provide travel and per diem expenses for the grievant, witnesses, and representatives while presenting a grievance. In terms of the proposal, the Arbitrator observed that traditionally, the risk or cost in processing a grievance has been borne by each party. He concluded that if each party pays its own way in pursuing a grievance, the stakes are more equitable and the parties are encouraged to settle the grievance at an early stage without resort to arbitration. Accordingly, as his award in this respect, the Arbitrator determined not to incorporate this proposal into the collective bargaining agreement.

With respect to the approval procedure, the Arbitrator noted that the Activity had proposed several amendments and that the Union had objected to the proposals because they were not within the mandatory duty to bargain and therefore were not properly before the Arbitrator. The Arbitrator agreed with the Union's characterization and concluded that the proposed changes were not appropriate amendments to the approval procedure as contained in the existing agreement. Accordingly, as his award in this respect, the Arbitrator determined not to change the approval procedure of the existing agreement. However, because of the expressed concerns of the Activity, the Arbitrator suggested that a clarification of the existing agreement might satisfy those concerns. Thus, he suggested a clarification of the existing language and proposed for consideration by the parties certain additional language to further clarify the intent of the existing agreement.

The Union has filed exceptions to the Arbitrator's resolution of both of these impasses.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Union contends that the Arbitrator's resolution of the impasse over grievance procedures by determining not to include a provision for travel and per diem is deficient as contrary to law and contrary to the evidence. In support of this exception, the Union primarily argues that the refusal to provide for travel and per diem is contrary to section 7131(d) of the Statute and ignores the evidence showing the hardships on employees of grievances and the evidence showing that it is not traditional in the Federal sector for each side to pay its own costs.

B. Analysis and Conclusion

The Authority finds that the Union fails to establish that the award is deficient as alleged. Contrary to the argument of the Union that the refusal to provide for travel and per diem is contrary to section 7131(d), the Authority stated in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), that both the Statute and the legislative history are silent on the payment from Federal funds of travel expenses incurred in the conduct of labor-management relations activities, which would include in terms of this case the processing of grievances. Id. at 3. Moreover, the Authority noted in Customs Service that the U.S. Supreme Court, in Bureau of Alcohol, Tobacco and Firearms, 464 U.S. 89 (1983), had rejected the argument that employees on official time were entitled under law to travel and per diem expenses. In reaching its decision on remand in the Customs Service case, in the light of the Supreme Court's decision in BATF, the Authority concluded that the union's proposal seeking payment of travel and per diem expenses incurred by employees on official time was within the agency's duty to bargain under the Statute. However, the Authority further concluded that while the agency was obligated to bargain in good faith over the disputed proposal it was under no obligation to agree to the union's formulation. Customs Service, at 8-9. The Authority therefore finds in this case that the Union's position that it was entitled as a matter of law to have its proposal for the payment of travel and per diem expenses included in the parties' agreement is without merit. The Authority concludes that that the Arbitrator's determination not to require that the Union's proposal be included in the agreement is not contrary to section 7131(d) of the Statute as alleged by the Union. Similarly, the Union's contention that the award is contrary to the evidence is nothing more than disagreement with the Arbitrator's evaluation of the evidence and with his reasoning and conclusions in reaching his determination not to incorporate the Union's proposal into the agreement. Consequently, this contention provides no basis for finding the award deficient. See, e.g., American Federation of Government Employees, Council 236 and General Services Administration, National Capital Region, 12 FLRA 236 (1983).

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Union contends that the Arbitrator's resolution of the impasse over the approval procedure is contrary to law and contrary to the evidence.

B. Analysis and Conclusion

The Authority finds that the Union fails to establish that the award is deficient as alleged. In support of this exception the Union does not argue that the Arbitrator's determination not to change the existing agreement is deficient or that the approval provision ofthe existing agreement is contrary to law. Instead, the Union only argues that the Arbitrator's suggested clarification of the existing language and his proposal of additional language for consideration by the parties, which the Union concedes is not mandated to be incorporated into the agreement, are deficient. Consequently, because this exception does not address the award, which as noted resolved the impasse in favor of the Union by ruling not to change the approval procedure of the existing agreement, no basis is provided for finding the award deficient.

V. DECISION

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 20, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 18

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3477

Union

and

Case No. 0-NG-681

COMMODITY FUTURES
TRADING COMMISSION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of three Union proposals.

II. Procedural Issue

The Agency contends that the Union's petition for review was untimely filed. Contrary to the Agency's contention, the Authority finds that the petition was timely submitted with respect to the Union's written request for a written allegation of nonnegotiability. Under section 2424.3 of the Authority's Rules and Regulations, a union has the right to request in writing that an agency serve it with such written allegation. American Federation of Government Employees, AFL-CIO, Local 3385 and Federal Home Loan Bank Board, District 7, Chicago, Illinois, 7 FLRA 398 (1981).

III. Union Proposal 1

Percentage of award based on the employee's salary shall range as follows:

Annual Performance Rating	Range
Outstanding	10% to 15%
Superior	5% to 10%

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable because it conflicts with management's right to determine its budget under section 7106(a)(1) of the Statute. The Agency also argues that the proposal is inconsistent with 5 U.S.C. §§ 4502 and 4503.

The Union contends that the proposal is not inconsistent with management's right to determine its budget. The Union also contends that the proposal is not inconsistent with 5 U.S.C. §§ 4502 and 4503.

B. Analysis

1. Management rights

Under existing Authority precedent, we find that the proposal is nonnegotiable for reasons other than those alleged by the Agency. In particular, Union Proposal 1 would establish a range of percentages of salary for the purpose of determining the amount of an award given for employee performance. Because this proposal would substantively affect the rate of a performance-related award, it has the same effect as Union Proposal 5 in National Treasury Employees Union and Internal Revenue Service, 14 FLRA 463 (1984), appeal docketed sub nom. National Treasury Employees Union v. FLRA, No. 84-1292 (D.C. Cir. July 9, 1984). In that case the Authority found that a proposal which would establish the rate of a monetary incentive for performance directly interfered with management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B).

Because this proposal concerns awards for employee performance, however, it is different from Union Proposals 2 and 3 in this case. Performance based incentive awards relate to an employee's accomplishment with respect to his or her job requirements. Performance awards are, therefore, ultimately based in management's right to determine those employee job requirements. Incentive awards granted for suggestions relate to an employee's voluntary participation in an agency suggestion program. See Federal Personnel Manual, Chapter 451. In determining whether a proposal prescribing the amount or range of amounts of incentive awards is negotiable, therefore, the Authority looks to see whether the award is ultimately based in the exercise of a management right, as is the case with performance awards. Compare *National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C.*, 14 FLRA 598, 601-4 (1984) (Union Proposal 2), *appeal docketed as to other matters sub nom. National Treasury Employees Union v. Federal Labor Relations Authority*, No. 84-1286 (D.C. Cir. July 6, 1984), in which the Authority held a proposal establishing the amount of a suggestion award to be within the duty to bargain.

C. Conclusion

For the reasons more fully set forth in our decision in the *Internal Revenue Service* case cited above, Union Proposal 1 is not within the duty to bargain. Moreover, for the reasons discussed below in connection with Union Proposals 2 and 3, we find that Union Proposal 1 does not interfere with management's right to determine its budget and is not inconsistent with 5 U.S.C. §§ 4502 and 4503.

IV. Union Proposals and 2 and 3

> The minimum cash award will be $37.50 for adopted suggestions resulting in tangible benefits of $250.00.
>
> . . . . . .

Benefits to Government	Amount of Award
up to $10,000	15% of benefits
$10 - 100 thousand	$1500 plus 5% over $10 thousand
over $100 thousand	$5000 plus 5% over $100 thousand

A. Positions of the Parties

In addition to the arguments raised in connection with Union Proposal 1, the parties are in dispute as to whether Union Proposals 2 and 3 are also nonnegotiable because they are inconsistent with management's right, under section 7106(b)(1), to determine the methods, means and technology of performing its work.

B. Analysis

1. Management rights

As explained by the Union, Union Proposals 2 and 3 would leave to the discretion of the Agency the decision as to whether to grant an award; however, once the decision to grant such an award was made the terms of the proposal would apply with respect to determining the amount of the award.

In *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 603 (1980), *enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982), the Authority stated generally that it would find a proposal inconsistent with an agency's right to determine its budget if the proposal by its terms prescribed a particular program or an amount of funds to be included in the agency's budget or if the agency made a substantial demonstration that the proposal would result in a significant and unavoidable increase in costs which would not be offset by compensating benefits. Union Proposals 2 and 3 prescribe neither a particular program[1] nor an amount of funds to be included in a budget. Assuming, as the Agency contends, that it would be required by the proposals to budget larger amounts for its incentive awards program, it has not demonstrated that such increase would not be offset by compensating benefits. In fact, the proposals would specifically link the amount of an award to the amount of benefits to the government which resulted from the suggestion being rewarded.

Nor can the Agency's assertion that the proposals would interfere with its right under section 7106(b)(1) to determine the technology, methods, and means of performing work be sustained. The Agency contends that if, because of budgetary restraints, it were unable to provide an award in the amount specified by the proposals, it would be prevented from implementing a suggestion which could involve worthwhile improvements to the technology, methods, and means of performing work. The Agency's assertion that its inability to provide a specified award would preclude implementation of suggested improvements to technology, methods, and means is not persuasive. An employee whose suggestion is adopted has the right to be *considered* for an award and an agency is not bound to grant an award upon adoption of a suggestion. Federal Personnel Manual, Chap. 451, Subchap. 8-5; see also *Stephen L. Kempinski v. The United States*, 164 Ct. Cl. 451 (1964), *cert. denied*, 377 U.S. 981 (1964).

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[1] Agencies are required pursuant to 5 CFR 451.205(a)(3) (1984 Supp.) to allocate "an adequate budget" to assure prompt action on incentive awards.

2. Inconsistent with Federal Law

Finally, the Agency contends that the proposals are contrary to the provisions of 5 U.S.C. §§ 4502 and 4503, which it describes as reserving to the head of each agency the right to determine the amount of each incentive award. Those statutory provisions vest agencies with the discretion to, among other things, determine the amount to be paid as awards for suggestions.[2] The Authority has held that to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain. *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 748 (1980). Absent any indication that the discretion provided to agency heads in 5 U.S.C. §§ 4502 and 4503 is intended to be sole and exclusive, the Agency's position cannot be sustained.

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[2] Those sections provide as follows:

> § 4502. General provisions
>
> (a) Except as provided by subsection (b) of this section, a cash award under this subchapter may not exceed $10,000.
>
> (b) When the head of an agency certifies to the Office of Personnel Management that the suggestion, invention, superior accomplishment, or other meritorious effort for which the award is proposed is highly exceptional and unusually outstanding, a cash award in excess of $10,000 but not in excess of $25,000 may be granted with the approval of the Office.
>
> (c) A cash award under this subchapter is in addition to the regular pay of the recipient. Acceptance of a cash award under this subchapter constitutes an agreement that the use by the Government of an idea, method, or device for which the award is made does not form the basis of a further claim of any nature against the Government by the employee, his heirs, or assigns.
>
> (d) A cash award to, and expense for the honorary recognition of, an employee may be paid from the fund or appropriation available to the activity primarily

(continued)

C. Conclusion

For the foregoing reasons we find that Union Proposals 2 and 3 do not directly interfere with management's rights to determine its budget or to determine the methods, means, or technology of performing its work. We also find that Union Proposals 2 and 3 are not inconsistent with 5 U.S.C. §§ 4502 and 4503.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed with respect to Union Proposal 1. IT IS FURTHER ORDERED

(continued)

> benefiting or the various activities benefiting. The head of the agency concerned determines the amount to be paid by each activity for an agency award under section 4503 of this title. The President determines the amount to be paid by each activity for a Presidential award under section 4504 of this title.
>
> § 4503. Agency awards
>
> The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who--
>
> (1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or
>
> (2) performs a special act or service in the public interest in connection with or related to his official employment.

that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on Union Proposals 2 and 3.[3]

Issued, Washington, D.C., March 20, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding Union Proposals 2 and 3 to be negotiable, the Authority makes no judgment as to their merits.

21 FLRA No. 19 [21 FLRA No. 19]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and Case No. 0-NG-1021

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of a single Union Proposal.

II. Union Proposal

> Employee negotiators representing the union will be compensated by the agency for all travel and per diem expenses unless the agency can demonstrate just cause for not doing so. At a minimum, cause will focus upon any disparate treatment of the management and union teams, the interest of the public, employee morale, and a viable labor management relationship.

III. Positions of the Parties

As explained by the Union, the proposal is not intended to conflict with any applicable law or regulation. Indeed, the Union states:

> This proposal permits any agency to examine the facts of each reimbursible incident and to decide after the event whether it is reimbursible. By focusing upon a "just cause" standard we have chosen a nonquantitative term of art that allows for a variety of arguments to be raised by the agency. The agency could raise the argument that reimbursement for a particular event is barred by law or regulation. The agency could argue that there is no nexus to government interests or that it is not in the best interest of the government. The arbitrator deciding this dispute would take a variety of factors into consideration and issue a decision based on a weighing of all arguments. The only argument that could standing alone bar reimbursement without consideration of the other arguments is that reimbursement would violate law and regulation.

See, Union Response at pages 8 and 9. Finally, the Union maintains that its proposal limits travel and per diem reimbursement to unit employees authorized to be at the bargaining table on official time. This number is limited to a number of employees equal to the number which represent the Agency.

The Agency contends that the proposal is not within the duty to bargain for the following reasons:

> 1. It does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;
>
> 2. it is inconsistent with Federal law or Government-wide regulation; and
>
> 3. the demand for travel and per diem to employee/negotiators is not limited to those employee/negotiators who are receiving official time.

IV. Analysis

A. "Conditions of Employment"

The Agency makes an essentially identical "conditions of employment" argument to that made by the agency in National

Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The Authority rejected that argument in *Customs Service* and it is rejected here for the same reasons set forth in that case.

B. Inconsistent with Federal law or Government-wide Rules or Regulations

The Agency contends, in essence, that under the Travel Expense Act, 5 U.S.C. §§ 5701 *et seq.*, and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, a determination as to whether an employee is on "official business" is dependent on the particular facts involved in each individual situation. Consequently, such a determination is not a matter of unlimited discretion on the part of the Agency.

In *Customs Service*, the Authority has found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. The exercise of that discretion was held to be subject to the negotiation process. The Agency here makes no specific argument that the proposal does not meet the statutory and regulatory standards discussed in *Customs Service*. Moreover, as noted in the Union's Position, the proposal envisions case by case determinations as to the appropriateness of specific travel and expenses which are necessary and proper under law and governing regulation. Given these circumstances, and for the reasons expressed in *Customs Service*, the Agency's assertion that the proposal is inconsistent with law and Government-wide regulations must be rejected.

C. Limited to those Employee/Negotiators Who Are Receiving Official Time.

The Agency contends that the proposal, on its face, would permit employee/negotiators who are not receiving official time to be entitled to travel and per diem. However, in our view the explicit language of the proposal does not require payment of travel and per diem to those employee/negotiators who are not receiving official time. Indeed, the Union, as previously noted, interprets the proposal to limit travel and per diem reimbursement to only unit employees authorized to be at the bargaining table on official time. In any event, nothing in Customs Service analysis indicates that travel and per diem must be tied to 7131 official time in order to be negotiable. Instead, negotiability of travel and per diem is based on consideration of whether travel involved is in the primary interest of the Government so as to constitute "official business" without consideration of section 7131. Consequently, we find the Agency's contention not to be supported.

V. Conclusion

Based on the foregoing analysis, the Authority finds that the proposal concerns a condition of employment which is not inconsistent with law or Government-wide regulation. Therefore, the proposal is within the duty to bargain.*/

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union Proposal.

Issued, Washington, D.C., March 20, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In deciding that the proposal is negotiable, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and Case No. 0-NG-467
10 FLRA 550

U.S. ARMY ENGINEER DISTRICT,
KANSAS CITY, MO.

Agency

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1363,
REPUBLIC OF KOREA

Union

and Case No. 0-NG-450
10 FLRA 560

U.S. ARMY GARRISON,
YONGSAN, KOREA

Agency

CONSOLIDATED DECISION ON RECONSIDERATION

I. Statement of the Case

These cases are before the Authority pursuant to the Authority's Order granting the Agency's motions for reconsideration of the Authority's December 3, 1982, decisions in National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Mo., 10 FLRA 550 (1982) and National Federation of Federal Employees, Local 1363, Republic of Korea and U.S. Army Garrison, Yongsan, Korea, 10 FLRA 560 (1982). The sole question presented is the impact that the Debt Collection Act of 1982 has upon the negotiability of the proposals herein.

In the previous decisions in these cases, the Authority found the following proposals to be within the duty to bargain:

Union Proposal (O-NG-467)

> 1. That all employees be notified, on travel orders and annually of the requirement to file travel vouchers no later than 15 days after completion of travel;
>
> 2. That employees that do not comply with paragraph 1, or who are indebted to the U.S. Government be officially notified that payment be made within 15 days of the receipt of the notice;
>
> 3. That payment becomes delinquent after 30 days from the date of the notice and payroll deductions will be initiated; unless a waiver or payment arrangements have been made;
>
> 4. That no interest charge be made. (Interest charge for delinquent unused travel advances). [Only the underscored language is in dispute.]

Union Proposal (O-NG-450)

> We propose that members of our bargaining units not be subject to late payment charges.

The proposals concern the conditions under which employees will reimburse the Agency for monies they have received through advances where the work-related expenses actually incurred are less than the advance. The proposals were in dispute only insofar as they provided that interest and late payment charges would not be assessed. The original finding of negotiability was premised upon the conclusion that an agency has discretion under the Federal Claims Collection Standards (FCCS), 4 CFR Parts 101-105,1/ and the Treasury Fiscal Requirements Manual (TFRM).

1/ The regulations in effect at the time U.S. Army Engineer District, Kansas City and U.S. Army Garrison, Yongsan, Korea

(Continued)

Prior to the issuance of the Authority's decisions but after the parties' submissions had been filed, Congress enacted the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (the Act). Accordingly, the Agency's motions for reconsideration were granted so that the Authority could consider the impact of the Act upon the negotiability of the Union's proposals. Upon careful consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

II. Motion to Strike

The Union moved that portions of the Agency's statement of position be struck because they exceeded the scope of the issue upon which the Authority granted reconsideration. The Authority's Order granting the Agency's motions for reconsideration requested the parties to submit statements of position addressing the "issue of the impact that the Debt Collection Act of 1982 has upon the negotiability of the proposals involved." The Authority finds that the Agency's statement raises issues in addition to that which the Authority's Order invited the parties to address. Accordingly, the Union's motion is granted, and the Authority will consider only those arguments which concern the impact of the Debt Collection Act upon the disputed proposals.

III. Positions of the Parties

The Agency contends that the Debt Collection Act of 1982 does not apply to these proposals.

The Union contends that the proposals are within the duty to bargain because the Debt Collection Act authorizes an agency to waive the collection of interest and late payment charges.

(Continued)

were decided have been superseded by the revised Federal Claims Collection Standards (hereinafter referred to as the revised FCCS) issued jointly by the General Accounting Office and the Department of Justice pursuant to the Debt Collection Act of 1982. The revised FCCS became effective April 9, 1984, and are codified at 4 CFR Parts 101-105.

IV. Analysis

A. Applicability of the Debt Collection Act

The major purpose of the Debt Collection Act was to facilitate collection procedures in the federal government by expanding the debt collection tools available to federal agencies.[2] The Agency contends that the Act covers only general debts owed the United States but does not apply to travel advances under 5 U.S.C. § 5705, which preceded the Act and authorizes repayment of delinquent unused travel advances through setoff against an employee's pay.[3] The legislative history of the Act shows that the Act's purpose was primarily to facilitate the collection of "general debts" owed the government, for example, by authorizing setoff against a federal employee's salary under 5 U.S.C. § 5514 for general debts such as student loans or overpayment of Veterans Administration (VA) benefits. However, contrary to the Agency's contentions, the coverage of the Act was not intended to be limited solely to such "general debts," but also to include those debts such as unused travel advances for which salary offset was already authorized. The Senate Report accompanying the Act states:

> The type of indebtedness that may be deducted would include, but is not necessarily limited

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[2] S. Rep. No. 378, 97th Cong., 2d Sess. 1-2, reprinted in 1982 U.S. Code Cong. & Ad. News 3377-78.

[3] 5 U.S.C. § 5705 provides:

> § 5705. Advancements and deductions
>
> An agency may advance, through the proper disbursing official, to an employee entitled to per diem or mileage allowances under this subchapter, a sum considered advisable with regard to the character and probable duration of the travel to be performed. A sum advanced and not used for allowable travel expenses is recoverable from the employee or his estate by--
>
> (1) setoff against accrued pay, retirement credit, or other amount due the employee;
>
> (2) deduction from an amount due from the United States; and
>
> (3) such other method as is provided by law.

> to, erroneous payments made to the employees, overpayments of benefits, salary or other allowances, travel allowances, federal loans or guaranteed or insured loans, or other indebtedness resulting from stolen property.[4/] [Emphasis added.]

Furthermore, while subsection (c) of section 5514 provides that the salary offset provisions of the Act do not modify existing statutes which provide for salary offset, that subsection does not prevent the remaining provisions of the Act from being applied to debts covered by the existing statutes. The Authority concludes that the Debt Collection Act applies to the repayment of unused travel allowances.

B. Agency Discretion to Waive Interest Under the Act

The section of the Act most relevant to the proposals in dispute, 31 U.S.C. § 3717, requires an agency to charge interest and late payment penalties on outstanding debts owed to the United States Government. Subsections (a) and (e) of section 3717 provide in relevant part:

> (a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person[.]
>
> . . . . . .
>
> (e) The head of an executive or legislative agency shall assess on a claim owed by a person--
>
> (1) a charge to cover the cost of processing and handling a delinquent claim; and
>
> (2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

[4/] S. Rep. No. 97-378 at 23, 1982 U.S. Code Cong. & Ad. News at 3399.

The word "shall" in subsections (a) and (e) was intended by Congress to be mandatory and imperative,[5] leaving agencies without discretion to waive interest and penalty charges absent express exception. The mandatory nature of the interest and penalty provisions is consistent with the numerous references in the legislative history of the Act concerning the importance of the interest provisions to the overall purpose of the Act. For example, the Senate Report accompanying the Act found the sizeable amount of delinquent debt owed the United States Government "disturbing." It cited the failure of agencies to regularly charge interest and assess late payment penalties among the reasons for this large delinquent debt.[6] In discussing the requirement that agencies assess interest and late payment charges, the Report states that:

> Generally, there is either no assessment for interest and penalties on debts owed the government or, if there is, the assessment is at rates that are considerably below market rates. This is in spite of the joint GAO/Justice Department regulations issued in the Federal Claims Collection Standards in April 1979 and subsequent Treasury regulations which require agencies to charge debtors interest on overdue payments. These include Agriculture, Labor, HUD, Interior, Defense,Health and Human Services, Veterans, and Treasury (except IRS). Other departments and agencies, such as Energy, assess interest but lack uniform department policies and procedures for doing so.
>
> In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last. The Committee has concluded that this factor

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5/ Detailed Explanation Prepared by the Office of Law Revision Counsel, accompanying Revision of Title 31, U.S.C.A., Pub. L. No. 97-452, 96 Stat. 2467, 128 Cong. Rec. H9528 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 4301, 4302.

6/ S. Rep. No. 97-378 at 3, 1982 U.S. Code Cong. & Ad. News at 3379.

> is a major contributor to the growing amount of delinquent debt owed the government.[7]

Thus, the legislative history of the Debt Collection Act indicates that Congress considered the uniform assessment of interest and late payment charges by federal agencies to be a central feature of its program to improve the government's debt collection procedures.

The Union contends that subsection (g) of section 3717,[8] which provides that the interest requirement of the Act does not apply where a "contract" prohibits the charging of interest or assessment of late payment charges, authorizes an agency to enter into a collective bargaining agreement which contains a provision waiving the application of the required interest and penalty charges. The legislative history of the Debt Collection Act does not address the question of whether the term "contract" includes a collective bargaining agreement. Section 3717(g)(1) must, therefore, be read in light of the "provisions of the whole law, and . . . its object and policy." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956) (quoting United States v. Boisdore's Heirs, 8 How. 113, 122). In view of the importance attached by Congress to the interest and penalty requirements of the Act, any exceptions to section 3717 should be narrowly construed so as not to frustrate the Congressional purpose. If section 3717(g)(1) were read to authorize an agency to negotiate with an exclusive representative concerning the waiver of interest and penalty charges, this would result in the application of such charges on a bargaining unit-by-bargaining unit basis contrary to the Congressional intent that agencies uniformly assess interest and late payment charges on delinquent debts.

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[7] S. Rep. 97-378 at 17, 1982 U.S. Code Cong. & Ad. News at 3393. In addition to the Report, testimony before Congress indicated that the government loses a substantial amount of revenue because of the failure of agencies to charge interest on delinquent debts. See, e.g., Debt Collection Act of 1981: Hearings on S. 1249 Before the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. (1981) (hereinafter Debt Collection Act), at 50 (statement of David A. Stockman, Director, OMB), and 83-84 (statement of Milton J. Socolar, Acting Comptroller General, GAO); Statement of Charles A. Bowsher, Comptroller General, Concerning Federal Departments and Agencies Failure to Collect Audit-Related Debts, before the House Comm. on Governmental Operations, Subcomm. on Legislation and National Security, at 4-5 (Feb. 24, 1982).

[8] 31 U.S.C. § 3717(g)(1) provides in relevant part:

> (g) This section does not apply--
>
> (1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges[.]

Additionally, the legislative history indicates that Congress intended provisions such as 3717(g)(1) to apply where the waiver of interest and penalty charges would further the social objectives of government programs being administered by an agency. The Senate Report accompanying the Act states in its discussion of section 3717:

> These provisions will generate an incentive for the debtor to pay while protecting the debtor and the social objective of the government programs by allowing flexibility in the assessment of the interest and penalty charges.9/

the types of government programs most often discussed in the legislative history of the Act are those involving loans administered by agencies such as the Department of Education, Veterans Administration, Small Business Administration, and Housing and Urban Development,10/ in which the "contracts" executed by the agencies are specifically concerned with the terms governing the repayment of money to the United States. The Authority finds that the term "contract" in 31 U.S.C. § 3717(g)(1) refers to those contracts which specifically concern the payment or repayment of money pursuant to a particular government program, and not to contracts in the general sense, such as collective bargaining agreements.11/ Accordingly, the Authority

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9/ S. Rep. No. 97-378 at 17, 1982 U.S. Code Cong. & Ad. News at 3393.

10/ *See* S. Rep. No. 97-378 at 3, U.S. Code Cong. & Ad. News at 3379; *Debt Collection Act*, *supra* note 9, at 40 (testimony of Hal Steinberg, OMB).

11/ Further support for this conclusion is found in the Congressional Budget Office's cost estimate with regard to

(Continued)

concludes that 31 U.S.C. § 3717(g)(1) does not authorize an agency to enter into a collective bargaining agreement which provides that the interest required by section 3717(a) and the late payment penalties required by section 3717(e) not be charged.

Furthermore, neither is this type of waiver authorized by 31 U.S.C. § 3717(h), which provides:

> (h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

The corresponding regulation, 4 CFR 102.13(g) of the revised FCCS,[12] provides in relevant part:

(Continued)

the Senate bill, which stated that "[s]ection 10 would revise procedures for interest calculations and require the assessment of other penalties on debt more than 90 days delinquent, unless specific . . . contract provisions prohibit such charges." [Emphasis added.] S. Rep. No. 287, 97th Cong., 1st Sess. 15. Additionally, in the legislative history, one example of the type of contract provision envisioned by section 3717(g)(1) makes reference to such a "specific contract." Milton J. Socolar, Acting Comptroller General, stated in his testimony before the Senate Committee on Governmental Affairs that "we think [with respect to low interest rate loans] that some agencies should provide in the contracts that they execute for those loans, upon becoming delinquent, should revert at that point to an interest rate that is commensurate with the interest rate in the commercial market." [Emphasis added.] Debt Collection Act, supra note 9, at 69.

[12] Since the revised FCCS specify criteria for the application and waiver of interest charges rather than incorporate the provisions of the TFRM as in the superseded regulations, the TFRM is no longer relevant to the negotiability of these proposals.

> [A]n agency may waive, in whole or in part, the collection of interest, penalties, and/or administrative costs assessed under this section under the criteria specified in Part 103 of this chapter relating to the compromise of claims (without regard to the amount of the debt), or if the agency determines that collection of these charges would be against equity and good conscience or not in the best interests of the United States. Waiver . . . may be exercised only in accordance with regulations issued by the agency identifying the standards and appropriate circumstances for waiver. Examples of situations which agencies may consider including in their interest waiver regulations are: (1) Waiver of interest pending consideration of a request for reconsideration, administrative review, or waiver of the underlying debt under a permissive statute, and (2) waiver of interest where the agency has accepted an installment plan under § 102.11 of this Part, there is no indication of fault or lack of good faith on the part of the debtor, and the amount of interest is large enough in relation to the size of the installments that the debtor can reasonably afford to pay that the debt will never be repaid.

Thus, an agency may waive interest and penalty charges under this provision only if the collection of those amounts is against "equity and good conscience or not in the best interest of the United States."13/ The comments accompanying the regulation state that "'equity and good conscience' is generally satisfied where the indebtedness resulted from the agency's administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the debtor."14/ The Authority finds that section 3717(h) and the implementing regulation were intended to permit an agency to waive interest and penalty charges in individual cases where the agency deemed such waiver to be appropriate in light of the standards set forth in the regulation, but were not intended to authorize

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13/ Waiver in accordance with the criteria for the compromise of claims specified in 4 CFR Part 103 is not applicable to the dispute herein.

14/ 49 Fed. Reg. 8889, 8893 (1984).

a blanket waiver of these charges as contended by the Union. Accordingly, the Authority concludes that the waiver of interest and penalty charges on the delinquent repayment of unused travel advances would not be consistent with the standards for waiver set forth in the regulation as they were intended to be interpreted and applied by their promulgators.

Finally, when Congress did intend the provisions of the Debt Collection Act to interact with the collective bargaining process, it expressed that intent by making specific reference to the Federal Service Labor-Management Relations Statute (the Statute). For example, section 5514(b)(2) provides that no regulation prescribed to carry out subsection (a)(2) of that section, which establishes procedures to be followed by an agency seeking to collect a debt through deductions from an employee's salary, shall be considered a Government-wide rule or regulation for purposes of section 7117(a) of the Statute. No similar reference to the Statute appears in 31 U.S.C. § 3717 that would indicate Congress' intent to allow the interest requirement of the Act to be subject to the collective bargaining process.

V. Conclusion

Based on the foregoing analysis, the Authority concludes that the proposals are inconsistent with the Debt Collection Act of 1982 and the implementing regulations in the revised FCCS. Since the Union proposals here are contrary to law and regulation, the Authority now finds it appropriate to vacate its prior decisions in U.S. Army Engineer District, Kansas City, 10 FLRA 550, and U.S. Army Garrison, Yongsan, Korea, 10 FLRA 560.

VI. Order

Accordingly, IT IS ORDERED that the petitions for review in 10 FLRA 550 and 10 FLRA 560 be now, and they hereby are, dismissed.

Issued, Washington, D.C. March 28, 1986

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 21

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF FEDERAL
GRAIN INSPECTION LOCALS

Union

and

Case No. 0-NG-1034

U.S. DEPARTMENT OF AGRICULTURE,
FEDERAL GRAIN INSPECTION SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case is before the Authority because of an appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of the underlined portions of the following provisions of a negotiated agreement disapproved by the Agency head under section 7114(c) of the Statute.

Provision 1

ARTICLE 7 REPRESENTATION

Section 1.

The parties acknowledge the right of bargaining unit members at all locations to have access to Union representation. The following sections provide the procedures for representation activities on official time other than bargaining and for the payment of travel expenses for Area Representatives meeting the criteria established in this Article. Employees will contact the Union representative nearest the employee's location unless the representative is not available. In that case, the Area Representative may be contacted.

Provision 2

Statement 3(B)

If travel is necessary, Area Representatives may request a reasonable amount of official time for representation duties from their supervisor. The request shall include the general nature of the representational duty, the names and location of the employee(s) involved, and the estimated time required. The requested time shall be approved unless the current work needs of the Agency cannot be met, in which case mutually agreeable arrangements will be made to approve the request as soon as possible. Each Union representative or unit employee authorized to be on official time for the representational activity shall record the item involved in the remarks section of their time card or similar document. Seventy-five hundred dollars ($7500) of travel expenses for representation duties shall be provided in accordance with applicable law and Government-wide regulations, provided that no more than $5,000 of the allocation may be expended during the first two years. Travel expenses necessary for a representative to present a case at an Arbitration or MSPB proceeding shall not be deducted from the allocation. In addition, travel expenses for participation in FLRA proceedings shall be authorized in accordance with 5 CFR 2429.13.

Provision 3

ARTICLE 14 ARBITRATION

Section 4.

Official time shall be granted to bargaining unit employees acting as the representative for employees or the Union. Official time shall be granted to bargaining unit employees who testify as witnesses. Official time for

> witnesses shall be limited to the time needed to travel to and from the proceeding and testify. Official time, transportation costs, and per diem shall be provided by the Employer for Union representatives within the area involved and all witnesses deemed necessary by mutual agreement of the Parties. If the Parties cannot agree that a witness is necessary, the matter shall be submitted to the arbitrator, whose decision shall be final and binding. Witnesses determined to be necessary by the arbitrator shall be compensated pursuant to that expressed above. Travel time and expenses and official time are not authorized for expert advisors or observers.

II. Positions of the Parties

As explained by the Union, the provisions are not intended to conflict with any applicable law or regulation. Rather, they are limited to establishing the circumstances under which travel occurring in the context of union activities will be construed to be in the primary interest of the Government and, hence, official business for purposes of payment of incidental and otherwise proper travel expenses. The Union states that under the provisions the Agency can grant or deny requests for actual travel. Thus, the Agency retains the ability to make appropriate case by case determinations regarding specific travel and/or expenses.

The Agency contends that the provisions are not within the duty to bargain for the following reasons:

a. They do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

b. they are inconsistent with Federal law and Government-wide regulation; and

c. they conflict with an agency regulation for which a compelling need exists.

III. Analysis

A. "Conditions of Employment"

The Agency involved in this case makes essentially the same "conditions of employment" argument as that made by the agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The Authority rejected that argument in Customs Service. It is rejected here for the same reasons as set forth in that case.

B. Inconsistent with Federal Law or Government-Wide Rules or Regulations

The Agency asserts that under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, as interpreted by the Comptroller General, determinations that travel expenses incurred in the context of union activity are in the primary interest of the Government and that ensuing expenses are payable from agency funds must be made by management alone on a case by case basis.

In Customs Service, the Authority found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. The exercise of that discretion was held to be subject to the negotiation process. The Agency here makes no specific argument that the provisions here concerning the circumstances under which otherwise appropriate travel expenses would be payable do not meet the statutory and regulatory standards discussed in Customs Service. Moreover, the provisions do not preclude case by case determinations as to the appropriateness of specific travel and expenses which are necessary and proper under law and governing regulation. Given these circumstances, and for the reasons expressed in Customs Service, the Agency's assertion that the provisions are inconsistent with law and Government-wide regulations must be rejected.

C. Inconsistent with an Agency Regulation for Which a Compelling Need Exists

The Agency regulation upon which the Agency relies was issued by the Department of Agriculture and purports to establish procedures for the payment of travel and per diem expenses to union representatives when official time has been granted under section 7131(a) and (d) of the Statute. The regulation provides that determinations on whether to pay travel and per diem may be made only on a case by case basis and solely by management. The Agency argues that the regulation is essential to comply with the Travel Expense Act and implementing regulations. In Customs Service the Authority has found that neither the Travel Expense Act nor the Federal Travel Regulations require that determinations as to whether travel related to labor-management relations activities is primarily in the interest of the United States be made unilaterally by management and only on a case by case basis. Therefore there is no support for the Agency's contention that its regulation is essential to compliance with the Travel Expense Act and implementing regulations. The Agency's argument that a compelling need exists for its regulation is rejected.

IV. Conclusion

Based on the foregoing analysis, the Authority finds that the provisions concern a condition of employment and are not inconsistent with law or Government-wide regulation. Nor are the provisions barred from negotiations because they are inconsistent with an agency regulation for which a compelling need exists. Therefore, they are within the duty to bargain.*/

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of Provisions 1, 2 and 3 which were bargained on and agreed to by the parties at the local level.

Issued, Washington, D.C., March 25, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these provisions within the duty to bargain the Authority makes no judgment as to their merits.

21 FLRA No. 22 [21 FLRA No. 22]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2677

Union

and Case No. O-NG-920

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, OFFICE OF COMMUNITY SERVICES

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal.

II. Union Proposal

> Employees holding retained grade rights will be selected for any vacancy which is to be filled during the period of eligibility for retained grade if the vacancy is to be filled at or below the retained grade level and the qualification requirements are otherwise met.

A. Positions of the Parties

According to the Union, the proposal would apply to employees who are affected by reduction-in-force actions involving release from competitive levels but who are in a retained-grade status, and would require the Agency to select such employees for vacancies which the Agency has decided to fill during the period of retained-grade eligibility and for which the employees are qualified. The Union argues that the proposal constitutes an "appropriate arrangement", within the meaning of section 7106(b)(3) of the Statute for employees adversely affected by the exercise of management's rights. In support of its position the Union cites the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981). The Union also contends that the proposal does not in any way conflict with Government-wide regulations.

The record does not include any evidence of the position of the Agency. The Agency failed to respond to the Union's request for an allegation of nonnegotiability and its statement of position was untimely filed.[1/]

B. Analysis

The Authority agrees with the Union, that the proposal in this case has the same effect as the proposal at issue in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), and is dispositive of the issues presented here. In that case the Authority concluded that the proposal constituted a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.[2/] However, the Authority also concluded in its Decision and Order on Remand in AFGE, Local 2782 that

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1/ The record indicates that the Agency in this case received a copy of the Union's petition for review on October 28, 1983, and that the Agency's statement of position was not received by the Authority until December 1, 1983. The record also indicates that the Agency requested, pursuant to section 2429.23(b) of the Authority's Rules and Regulations, a waiver of the expired time limit. The Authority denied the Agency's request because it failed to demonstrate extraordinary circumstances. Consequently, pursuant to section 2424.6(a) of the Authority's Rules and Regulations, the Agency's statement of position was untimely filed and was not considered in this case.

2/ Subsequent to the filings in this case the Authority issued National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), in which we specifically adopted the excessive interference test enunciated by the District of Columbia Circuit in AFGE, Local 2782, 702 F.2d 1183, as being applicable to all cases involving "appropriate arrangements" under section 7106(b)(3) of the Statute.

the proposal was nevertheless outside the duty to bargain under section 7117(a)(1) of the Statute because it was inconsistent with a Government-wide regulation. Specifically, the proposal conflicted with Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual (FPM), which would permit agencies to fill positions by making selections from any appropriate source. The proposal in this case would require the Agency to select only those employees who are affected by reduction-in-force actions involving release from competitive levels for vacancies which it has decided to fill during the period of retained-grade eligibility. By so doing, it would have the same effect as the proposal in AFGE, Local 2782 and Bureau of the Census and would prevent the Agency from making selections from any appropriate source. Thus, for the reasons stated more fully in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, the proposal in this case also violates Requirement 4 of subchapter 1-4, chapter 335 of the FPM, a Government-wide regulation, and is outside the duty to bargain.

C. Conclusion

For the reasons set forth above, the Authority finds that the proposal in this case conflicts with FPM, chapter 335, subchapter 1-4, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute even though the proposal, absent such a conflict, would constitute an appropriate arrangement and be negotiated pursuant to section 7106(b)(3) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., March 25, 1986

J. L. Calhoun

Jerry L. Calhoun — Chairman

Henry B. Frazier III

Henry B. Frazier III — Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION

Agency

and Case No. O-AR-454

LOCAL 3369, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Jesse Simons filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The parties submitted to arbitration the issue of whether management was justified under the parties' collective bargaining agreement or under applicable law or regulation in refusing to pay travel and per diem expenses of the local union president in the amount of $116.00 for a one-day trip to Washington, D.C., to visit officials of the National Union and Congress. The Arbitrator sustained the grievance finding that the Activity's refusal to pay travel and per diem was wholly untenable under the provisions of the parties' agreement and was not supportable under any cited law or regulation. Accordingly, as his award, the

Arbitrator ruled that the refusal of management to pay the disputed expenses was violative of the parties' agreement and that the refusal was not mandated by any law or regulation, and he therefore directed management to pay the local union president the sum of $116.00.

III. FIRST, SECOND, AND THIRD EXCEPTIONS

A. Contentions

In its initial exceptions, the Agency contends that the award is based on a nonfact and fails to draw its essence from the collective bargaining agreement and that the Arbitrator exceeded his authority. The Agency's arguments in support of these exceptions are essentially the same. The Agency essentially argues that the award is deficient in these respects because the Arbitrator erroneously interpreted the parties' collective bargaining agreement as providing a basis on which to award the payment of travel and per diem. The Agency's position is that the Arbitrator could not properly have interpreted the provisions of the parties' agreement to find that the Agency violated the agreement in refusing to pay the disputed travel and per diem expenses.

B. Analysis and Conclusions

The Authority concludes that these exceptions constitute nothing more than disagreement with the Arbitrator's interpretation and application of the parties' collective bargaining agreement. The Arbitrator clearly interpreted the parties' agreement to encompass travel and per diem payments. Thus, the Agency in these exceptions is clearly seeking to have its own interpretation of the parties' collective bargaining agreement substituted for that of the Arbitrator and the Authority has uniformly held that such exceptions provide no basis for finding an arbitration award deficient. E.g., National Federation of Federal Employees, Local 1418 and U.S. International Communication Agency, Voice of America, 9 FLRA 980 (1982). Accordingly, these exceptions are denied.

IV. FINAL EXCEPTION

A. Contentions

In its final exception the Agency contends that the award is contrary to the Statute. Specifically, the Agency maintains that the award is contrary to management's right to determine the mission and budget of the agency under section 7106(a) and is contrary to the official time provisions of section 7131. However, the sole argument of the Agency in support of this exception is again that the Arbitrator has erroneously interpreted the parties' collective bargaining agreement as providing a basis on which to award the payment of travel and per diem.

B. Analysis and Conclusions

The Authority concludes that this exception fails to establish that the award is deficient as alleged by the Agency. In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), the Authority found the following proposal to be within the duty to bargain:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In finding the proposal to be within the duty to bargain, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activity are payable from federal funds and that the proposal did not conflict with the right of the agency to determine its budget under section 7106 because there was no substantial demonstration that the proposal would result in a significant and unavoidable increase in costs. *Id.* at 3, 7-8. In this case, the Authority similarly concludes that the Arbitrator's interpretation of the parties' agreement to find management's refusal to pay the disputed travel and per diem expenses to be unjustified has not been shown to be contrary to the right of the Agency to determine its mission or budget under section 7106 or to be contrary to the official time provisions of section 7131. Moreover, other than its bare assertion, the Agency has made no showing that the award interferes in any way with the Agency's right to determine its mission. Rather, in arguing that the Arbitrator erroneously interpreted the parties' agreement, the Agency is again clearly disagreeing with the Arbitrator's interpretation and application of that agreement which provides no basis for finding the award deficient.

Additionally, in finding the proposal in U.S. Customs Service to be within the duty to bargain, the Authority concluded that the proposal would not require the agency to authorize the payment of expenses which do not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion upon the union's acknowledgment that payment of any travel expenses flowing from the proposal, if agreed upon, would be subject to the provisions of the Federal Travel Regulations (FTRs).*/ In this case, the Arbitrator in directing the payment of travel and per diem expenses in the amount of $116.00 has not expressly provided for agency determinations regarding the propriety under the FTRs of travel and per diem expenses in that amount. Consequently, the Authority must modify the award to assure that it is consistent with the requirements of the FTRs.

V. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, that portion of the award directing the payment of $116.00 is modified to provide as follows:

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

> The local union president is entitled to payment of his travel and per diem expenses for his representational activities in question insofar as consistent with applicable requirements of the Federal Travel Regulations.

Issued, Washington, D.C., March 25, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and Case No. 0-AR-727

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Thomas Angelo filed by the Agency pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The substantive issue submitted to arbitration was whether the Agency violated section 7131(d) of the Statute and Article 27, Section 10 of the parties' negotiated agreement by failing to pay the travel and per diem expenses of the Union's Regional Vice President when he performed certain representational activities on official time. Article 27, Section 10 provided that travel would be paid in accordance with the Federal Service Labor-Management Relations Statute. The Arbitrator found that the parties had agreed in that provision that union representatives engaged in the activities set forth elsewhere in the parties' agreement (Article 6, which pertained to official time) were entitled to reimbursement for related travel and per diem expenses. In his award, the Arbitrator determined that the

Agency was obligated under Article 27, Section 10 of the parties' agreement to pay the individual representative in this case reasonable and necessary travel and per diem expenses in connection with the representational activities involved. As a remedy, the Arbitrator directed the Agency to reimburse the representative "in the same manner and to the same extent it would otherwise reimburse employees engaged in official Agency travel, upon presentation of appropriate documentation with respect to his expenses."

III. FIRST EXCEPTION

A. Contention

In its first exception, the Agency contends that the Arbitrator's award fails to draw its essence from the parties' collective bargaining agreement. In support of this contention, the Agency argues that it did not agree to pay travel and per diem expenses for union representatives on official time, but merely agreed to abide by any obligation it might have under the Federal Service Labor-Management Relations Statute to pay such expenses.

B. Analysis and Conclusion

It is well-established that in order for an award to be found deficient as failing to draw its essence from the parties' agreement, the party making the allegation must demonstrate that the award cannot in any rational way be derived from the agreement; or that the award is so unfounded in reason and fact, so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator; or that the award evidences a manifest disregard for the agreement; or that the award does not represent a plausible interpretation of the agreement. E.g., American Federation of Government Employees, National Border Patrol Council and U.S. Immigration and Naturalization Service, Southern Region, Dallas, Texas, 3 FLRA 540, 543 (1980). In this case, the Authority finds that the Agency has failed to demonstrate that the Arbitrator's award does not draw its essence from the parties' agreement under any of the tests described in INS, Southern Region. Rather, the exception merely constitutes disagreement with the Arbitrator's interpretation of the agreement and therefore does not provide any basis for finding the award deficient. E.g., The Philadelphia Regional Office, District Office Operations, Social Security Administration and American Federation of Government Employee Employees, AFL-CIO, Local 3186, 15 FLRA 211 (1984).

IV. SECOND EXCEPTION

A. Contention

In its second exception, the Agency in effect contends that the Arbitrator's award is contrary to section 7131 of the Statute because, as interpreted by the U.S. Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), the Agency is not obligated to pay travel and per diem expenses for union representatives on official time under that provision.

B. Analysis and Conclusion

As indicated above, the Arbitrator in this case interpreted Article 27, Section 10 of the parties' agreement as requiring the Agency to pay the travel and per diem expenses of union representatives performing covered labor-management relations activities on official time. The Authority therefore finds that while the Agency is correct in stating that section 7131 of the Statute does not require agencies to pay travel and per diem to union representatives on official time, in this case, as determined by the Arbitrator, the Agency negotiated an agreement provision requiring it to pay such expenses. Further in that regard, the provision involved, Article 27, Section 10, is essentially to the same effect as the proposal found by the Authority to be within the duty to bargain in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The proposal in that case provided:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In finding the proposal to be within the duty to bargain, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activities are payable from Federal funds. Id. at 3. In this case, the Authority concludes that the Arbitrator's award based upon his interpretation of the parties' agreement is not contrary to section 7131 of the Statute as alleged by the Agency in its exception.

V. THIRD EXCEPTION

A. Contentions

In its third exception, the Agency contends that the Arbitrator's award is deficient because travel and per diem is a subject outside the duty to bargain under the Statute. More specifically, the Agency argues that as interpreted by the Arbitrator the pertinent provision in the parties' agreement is nonnegotiable as inconsistent with the Travel Expense Act, 5 U.S.C. § 5701 et seq., since it requires payment of travel and per diem expenses without the mandatory agency head determination that the employee was traveling on official business and that the travel was in the primary interest of the Government.

B. Analysis and Conclusions

As indicated above in the analysis and conclusion concerning the Agency's second exception, the Authority expressly found in U.S. Customs Service that a proposal essentially to the same effect as the agreement provision here involved was within the duty to bargain under the Statute. Moreover, the Authority further found that the proposal was not inconsistent with the Travel Expense Act because that Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses. Id. at 6. In this case, the Arbitrator determined that the Agency agreed to pay the travel and per diem expenses related to the labor-management relations activities covered by the official time provision of the parties' agreement. The Authority finds that the Arbitrator's determination effectively constitutes, in terms of U.S. Customs Service, a finding that the Agency had exercised its discretion under the Travel Expense Act through negotiations and had determined that the covered activities were sufficiently within the interest of the United States so as to constitute official business.

Additionally, in finding the proposal in U.S. Customs Service to be within the duty to bargain, the Authority concluded that the disputed proposal would not require the agency to authorize the payment of expenses which did not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowledgment that the payment of any travel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the Federal Travel Regulations (FTRs).*/ In this case, the Arbitrator in directing the payment of travel and per diem expenses in connection with the covered activities expressly provided for the Agency to reimburse the employee representative here involved "in the same manner and to the same extent it would otherwise reimburse employees engaged in official Agency travel, upon presentation of approporiate documentation with respect to his expenses." Thus, the Arbitrator effectively directed the payment of travel and per diem expenses only to the extent the expenses are consistent with the FTRs. Accordingly, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient as alleged in this exception.

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

VI. DECISION

Based on the foregoing analysis and conclusions, the Agency's exceptions are denied.

Issued, Washington, D.C., March 25, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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9/Case 354

Federal Labor Relations Authority

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NEGOTIABILITY CASE

21 FLRA No. 28 (March 27, 1986)

American Federation of Government Employees, Local 1923, AFL CIO and Department of Health and Human Services, Office of the Secretary, Headquarters, Office of the General Counsel, Social Security Division, Case No. 0-NG-557

ARBITRATION CASES

21 FLRA No. 24 (March 25, 1986)

General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236 (Angelo, Arbitrator), Case No. 0-AR-727

21 FLRA No. 25 (March 25, 1986)

Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO (Florey, Arbitrator), Case No. 0-AR-897

21 FLRA No. 26 (March 25, 1986)

National Association of Air Traffic Specialists and Federal Aviation Administration, Washington Flight Service Station (Applewhaite, Arbitrator), Case No. 0-AR-1029

21 FLRA No. 27 (March 27, 1986)

General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236 (Aronin, Arbitrator), Case No. 0-AR-583

21 FLRA No. 29 (March 27, 1986)

National Park Service, National Capitol Region, U.S. Department of Interior and Police Association of the District of Columbia, (Feigenbaum, Arbitrator), Case No. 0-AR-755

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21 FLRA No. 25

Federal Labor Relations Authority

Naval Air Development Center, Dep't of the Navy and AFGE, Local 1928 (Florey, Arbitrator), Case No. 0-AR-897 (Decided March 25, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7121
1600. Grounds for Review	7122(a)
1601. Award Conflicts with Applicable Law	
1750. Remedies	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Exceptions Asserted in Appeal
    - Award Conflicts with Applicable Law
      - 5 U.S.C. § 5596 (Back Pay Act)
      - 5 U.S.C. § 7701(g) (Civil Service Reform Act of 1978)
  - Award
    - Arbitrator's Clarification and Interpretation of Award
    - Attorney Fees
      - Arbitrator's Authority
        - 5 U.S.C. § 5596(b)(1)(A)(ii)
        - 5 U.S.C. § 5596(b)(3)
      - Determination of
        - Lodestar Concept
        - 5 U.S.C. § 504 (Equal Access to Justice Act)
      - Modified
        - Photocopying Expenses Deleted from Attorney Fees Award
      - MSPB Attorney Fee Standards
        - Adverse Action (5 U.S.C. § 7512)
        - Unacceptable Performance (5 U.S.C. § 4303)
      - Role of the Authority
      - Sovereign Immunity
        - American Rule
      - Standards Governing Award
        - 5 U.S.C. § 5596 (Back Pay Act)
        - 5 U.S.C. § 7701(g)(1) (Civil Service Reform Act)
        - 5 U.S.C. § 7701(g)(2) (Civil Service Reform Act)
          - 5 U.S.C. § 2302(b)(1)
          - 42 U.S.C. § 2000e-5(k)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Environmental Differential
    Asbestos - FPM Supplement 532-1, Appendix J
Remedy
    Attorney Fees
Safety
    Asbestos Exposure
Legislative History of the Civil Service Reform Act of 1978
    § 7105 and § 7105(h) of H.R. 11280
    § 7701(g)(1), 124 Cong. Rec. 29,229 (1978)
    Conference Report on the Civil Service Reform Act of 1978,
        H.R. 95-1717, 95th Cong., 2d Sess. (1978)

DIGEST NOTES

In separate concurring opinions, the Members of the Authority set forth standards to be considered in making and/or reviewing attorney fee determinations under the Back Pay Act [5 U.S.C. § 5596] and applicable provisions of the Civil Service Reform Act of 1978 [5 U.S.C. § 7710(g)]. Once an award of backpay has been properly made under the Back Pay Act for the correction of an unjustified or unwarranted personnel action, the following criteria must be met in order for a party to be eligible for an award of attorney fees in unfair labor practice cases and in grievance arbitration awards: (1) Fees must have been incurred for services of an attorney; (2) Fees may be sought only by the prevailing party; (3) The award of fees must be warranted "in the interest of justice"; (4) The amount claimed for attorney fees must be reasonable; (5) The award of fees must be set out in a fully articulated, reasoned decision. The separate concurring opinions of both Members discussed in detail the above criteria and its application.

An arbitrator's reference to one party's brief as support for a finding of attorney fees, or a cursory statement that the arbitrator considered the necessary elements of analysis does not meet the requirement under 5 U.S.C. § 7701(g) for a fully articulated, reasoned decision. An arbitrator's award of attorney fees must draw its essence from a demonstrable, pragmatic analysis of the factors set out in the applicable statutes.

The grievance at issue in this case concerned entitlement to environmental differential pay and involved questions of health and safety related to asbestos exposure. In a supplemental award, the arbitrator, among other things, approved the union counsel's request for attorney fees. Thereafter, the Authority, responding to the agency's exceptions, remanded (14 FLRA 782 (1984)) the award of attorney fees to the parties. The parties were directed to submit to the arbitrator the award for the limited purpose of clarifying and interpreting his award of attorney fees in order to articulate fully specific findings on all pertinent statutory provisions. The remand cited a then recent Authority decision (14 FLRA 680) in which the Authority ruled that an award of attorney fees under the Back Pay Act (5 U.S.C. § 5596) must be made "in accordance with standards established under 5 U.S.C. § 7701(g)." In his clarification, the arbitrator found that attorney fees were payable in the case under the Back Pay Act and the Civil Service Reform Act [5 U.S.C. § 7701(b)]; that the amount of the attorney fees was "reasonable"; the award of attorney fees was "in the interest of justice". As support, however, the arbitrator primarily referred to the union's brief. In its exceptions to the arbitrator's award as clarified, the agency contended that the award was deficient as contrary to the Back Pay Act and not in accordance with the governing standards under 5 U.S.C. § 7701(g) because the arbitrator failed to provide a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis on which the reasonableness of the amount was determined. In separate concurring opinions, the Members of the Authority set forth standards to be considered in making and/or reviewing attorney fee determinations. Based on these separate concurring opinions, the Authority denied the agency's exceptions and modified the award of attorney fees by striking from the amount awarded all compensation for photocopying expenses.

Federal Labor Relations Authority

21 FLRA No. 26

Nat'l Assoc. of Air Traffic Specialists and FAA, Washington Flight Service Station, Case No. 0-AR-1029 (Decided March 25, 1986) (Reconsideration of 20 FLRA No. 87)

DIGEST HEADINGS

1000. ARBITRATION
    1500. Review or Arbitration Awards
    1750. Remedies
        1754. Back Pay

STATUTE

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award
    Attorney Fees
      Standards Governing Awards
      5 U.S.C. § 7701(g)
    Back Pay
      5 U.S.C. § 5596
    Reconsideration
      Granted for Lack of Prior Explicit Instructions
    Remanded to Parties
      Arbitrator Failed to Provide Fully Reasoned and
        Articulated Decision
  Remedy
    Case Remanded to Parties to Seek Clarification of Award
    Set Aside Rescinded
5 U.S.C. § 5596 (Back Pay Act)
5 U.S.C. § 7701(g)

DIGEST NOTES

In all future cases, consistent with its general practice concerning deficient arbitration awards, if the the Authority finds that an award granting attorney fees is deficient because it is not fully supported as required, the Authority will set aside or modify the award as appropriate.

A threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant had been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Further the Act indicates that an award of attorney fees must be in conjunction with an award of

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

backpay to the grievant on correction of the unwarranted or unjustified personnel action. The award of attorney fees must be reasonable and related to the personnel action, and in accordance with the standards established under 5 U.S.C. § 7701(g). Section 7701(g) prescribes that for an employee to be eligible for an award of attorney fees, the employee must be the prevailing party. Section 7701(g)(1), applicable to all cases except those of discrimination, requires that and award of attorney fees must be warranted "in the interest of justice," that the amount must be reasonable, and that the fees must have been incurred by the employee. The standards established under § 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded.

A request was filed seeking reconsideration of the Authority's decision setting aside an arbitrator's award of attorney fees. The arbitrator determined that there was not just cause to suspend the grievant and awarded him backpay and benefits for the period of the suspension. The grievant subsequently requested and was granted an award of attorney fees. The Authority, however, found that the the Arbitrator failed to provide a fully articulated, reasoned decision setting forth his specific findings supporting the determination on each pertinent statutory requirement (see 5 U.S.C. § 7701(g)) including the bases on which he had determined the the amount of the award was a reasonable amount of attorney fees. The Authority concluded that the award of attorney fees was deficient as contrary to the Back Pay Act and therefore set aside the award.

In its request for reconsideration, the union contended, on legal and equitable grounds, that rather than set the award aside the Authority should have remanded the case to the parties and directed them to seek a fully articulated determination from the arbitrator as to his basis for the award. The union's request was consistent with the Authority's decision in 14 FLRA 680 (1984) (which sets out the statutory requirements regarding awards of attorney fees). In considering the request for reconsideration of this case, the Authority noted that it did not explicitly announce in 14 FLRA 680 that deficient awards of attorney fees issued thereafter despite the benefit of the guidance of that case, would be set aside rather than remanded. The Authority therefore found that the Arbitrator and parties in this case, were not explicitly apprised by the FLRA in any of its decisions that it would set aside an award of attorney fees that was not fully supported as required. Nor were the parties fully apprised by the Authority of their responsibility and interest in ensuring that arbitrators make the requisite determinations. The Authority therefore concluded that reconsideration was warranted and that this case should be remanded to the parties for the purpose of having the arbitrator clarify the award.

Federal Labor Relations Authority

21 FLRA No. 27

GSA and AFGE, Council 236 (Aronin, Arbitrator), Case No. 0-AR-583 (Decided March 27, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a)
1600. Grounds For Review	7131(a) and (d)
1601. Award Conflicts With Applicable Law	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Modified
      - Payment Must Be Consistent With Federal Travel Regulations
    - Pay Travel and Per Diem Expenses to Union Representatives
  - Exceptions Asserted in Appeal
    - Award Contrary to Applicable Law
      - 5 U.S.C. § 5701 *et seq*. (Travel Expense Act)
    - Award Contrary to the FSLMR Statute
      - § 7131
- Official Time
  - Travel and Per Diem
- 41 C.F.R. Part 101-7 (Federal Travel Regulations)

DIGEST NOTES

The issue submitted to arbitration was whether the agency had violated the parties collective bargaining agreement and § 7131(a) and (d) of the Statute by denying payment of travel for union representatives negotiating term and/or mid-term agreements and performing other representational functions. Provisions in the parties' agreement provided that official time would be provided employees for representational activity and that travel would be provided in accordance with the Statute. The arbitrator found that by agreeing to the provisions, the agency had agreed to pay travel and per diem expenses for employees on official time for labor-management relations activity. His award sustained the grievance and directed the agency to pay travel and per diem expenses.

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In its exceptions the agency contended that the award was contrary to law and that it was not obligated under § 7131 to pay travel and per diem expenses for union representatives on official time and that the award was not authorized under the Travel Expense Act. The Authority held, relying on 21 FLRA No. 2 (1986), that while § 7131 does not require agencies to pay travel and per diem expenses, the agency negotiated and agreed to a provision requiring it to pay. Further, the Travel Expense Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses. The Authority found that the arbitrator's determination effectively constitutes a finding that the agency had exercised its discretion under the Act through negotiations and had thereby determined that the covered activities were sufficiently within the interest to the United States so as to constitute official business.

The arbitrator's award directing the payment of travel and per diem expenses in connection with the labor-management relations activities was modified to expressly provide that the agency determine the propriety of particular travel and per diem expenses under the Federal Travel Regulations.

Federal
Labor Relations
Authority

21 FLRA No. 28

AFGE, Local 1923 and HHS, Office of the Secretary, HQ, Office of the General Counsel, Social Security Division, Case No. 0-NG-557

(Decided March 27, 1986)

DIGEST HEADINGS

- 2000. NEGOTIABILITY
  - 2150. Management Rights
    - 2151.01. Mission
    - 2152.10. Direct
    - 2152.25. Suspend or Remove
    - 2152.30. Reduce in Pay or Grade
    - 2152.40. Assign Work
  - 2210. Mandatory Subjects of Bargaining
    - 2210.01. Procedures
    - 2210.05. Appropriate Arrangements
  - 2650. Compelling Need Determination

STATUTE

7105(a)(2)(D)
7106(a)(2)(A) and (B)
7106(b)(2) and (3)
7117(a)(2) and (c)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Agency Regulations
      - Governing Standards
  - Critical Elements
    - Adhere to Requirements Affecting Identified Elements
  - Management Rights
    - Mission
      - Performance Evaluation Form
    - Remove or Reduce in Grade
      - Reassignment of Employee Prior to Termination or Demotion
  - Performance Appraisal Systems
    - Adhere to Requirements Affecting Identified Critical Elements
    - Performance Evaluation Form
    - Prescribing Periodic Appraisal of Employees on Annual Basis
    - Procedures for Implementation of Performance Standards and Critical Elements
  - Procedure
    - Designation of Agent to File Appeal

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A proposal requiring that the agency's performance appraisal system recognize applicable provisions of law, regulation and the parties' agreement was negotiable where the agency failed to identify the specific provision of internal agency rule or regulation for which it asserted a compelling need and compelling need was the sole reason for alleging that the proposal was nonnegotiable. The compelling need provisions of the Statute are meant to insure that otherwise negotiable bargaining proposals are taken outside the duty to bargain only if the agency involved demonstrates and justifies an overriding need for the policies reflected in the rules or regulations to be uniformly applied throughout the agency. An agency must (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in § 2424.11 of its regulations. (proposal 1)

A proposal incorporating specific restrictions from a Government-wide regulation directly interferes with a management right because it imposes the provisions of the regulation as substantive contractual limitations without regard to the regulation's possible subsequent revision or elimination.

Proposals requiring the use of a negotiated performance evaluation form were negotiable. There was no compelling need for an agency's regulatory requirement that there be uniform agency-wide use of its performance evaluation form. An agency must demonstrate that the rule or regulation upon which it relies is "essential as distinguished from helpful or desirable" to achieve certain ends.The agency's contention that its requirement to use a standard form was essential to the accomplishment of its mission or execution of its functions in a manner consistent with the requirements of an effective and efficient government could not be sustained since the negotiated performance evaluation form would contain essentially the same information as the agency's own form. (proposals 2 and 3)

Proposals requiring the use of a negotiated performance evaluation form are not inconsistent with management's right to direct employees and assign work under § 7106(a)(2)(A) and B). Nothing in the disputed language of the proposals nor in the union's statements in the record lends support to the agency's contention that the proposal's requirement that a negotiated performance evaluation form be used amounts to negotiation on the definitions of its performance standards. Since the union is not attempting to negotiate on those definitions, the agency's argument that definitions are nonnegotiable is inapplicable to bar negotiations. (proposals 2 and 3)

Proposals which are otherwise consistent with law and regulation and relate only to particular aspects of performance appraisal systems, apart from the identification of critical elements and the establishment of performance standards, are within the duty to bargain. Similarly, proposals which establish procedures for the development and implementation of performance standards and critical elements, or which establish appropriate arrangements for employees adversely affected by the application of performance standards and critical elements to them, are within the duty to bargain under § 7106(b)(2) and (3).

Proposals prescribing periodic appraisal of employees on an annual basis were consistent with law and Government-wide rules and regulations and within the duty to bargain. The union did not intend to require anything other than annual performance appraisals and did not link the term "annually" in the proposals to any specific month when the annual appraisals should occur. The Authority concluded that the proposals did not conflict with the Agency's Instruction requiring that annual performance appraisals occur in January or October of each year. (proposals 4 and 5)

A proposal which required the agency to reassign an employee prior to terminating or demoting that employee substantially interfered to an excessive degree with management's rights under § 7106(a)(2)(A) to remove employees or reduce them in grade or pay. Additionally, the term "should" in the proposal did not make the proposal discretionary rather than mandatory. Instead the plain language of the proposal would require the the agency in virtually all instances to reassign an employee prior to terminating or demoting that employee for unacceptable performance. (proposal 6)

Under § 7117(c) of the Statute and § 2424.2 of the Authority's Rules and Regulations a negotiability appeal must be filed by an exclusive representative. Nothing in either the Regulations or the Statute precludes the exclusive representative from designating an agent to file an appeal on its behalf. The designation of a representative for purpose of an appeal is strictly for the union to decide.

21 FLRA No. 29

Federal Labor Relations Authority

Nat'l Park Police, National Capitol Region, Dep't of Interior and Police Association of the District of Columbia (Feigenbaum, Arbitrator), Case No. 0-AR-755 (Decided March 27, 1986)

DIGEST HEADINGS	STATUTE
1000. ARBITRATION	7122(a)

- 1600. Grounds for Review
  - 1601. Award Conflicts with Applicable Law
- 1650. No Basis for Review
  - 1652.01. Disagreement with Arbitrator's Reasoning
- 1750. Remedies
  - 1754. Backpay

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Modified
      - Strike Backpay
  - Exceptions Asserted in Appeal
    - Arbitrator Exceeded His Authority - Decided Issue Not Raised
    - Award Based on Nonfact
    - Award Contrary to Law
      - 5 U.S.C. § 5596 (Back Pay Act)
      - 5 U.S.C. § 5911(e)
    - Award Fails to Draw Essence From Agreement
  - No Basis For Review
    - Disagreement with Arbitrator's Reasoning and Conclusions
  - Detail
    - Termination Unjustified
      - Refusal to Share Room - Government-Furnished Lodging
  - Travel and Per Diem
    - Government-Furnished Lodging
      - Required Double-Occupancy
        - 5 U.S.C. § 5911(e)
- FTR Chap. 1-1.3a
- FTR Chap. 1-8.3b

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The issue in the grievances were whether the agency violated law, regulation, or the parties collective bargaining agreement by requiring the grievants to share a room and by terminating their details when they refused to do so. The Arbitrator determined that 5 U.S.C. § 5911(e), which prohibits requiring an employee to stay in rental quarters unless certain conditions are met, also precludes requiring employees to share hotel rooms unless the same conditions are met. The Arbitrator found that hotel rooms contracted for or reserved by an agency are considered to be Government-furnished quarters and therefore that provision applies to such rooms as well. He further concluded that the intent of the provision was to afford employees in a temporary or travel duty status some degree of freedom to choose their own accomodations and to protect them against being forced into inadequate quarters. The provisions of § 5911(e) require that an employee exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business and subject also to the conditions set forth in § 5911(e). The Arbitrator found that the grievant's had not acted imprudently and that the conditions in § 5911(e), which might have permitted the employer to require the grievants to share a room in certain circumstances, had not been met in this case. The arbitrator, therefore determined that the agency acted improperly when it attempted to require the grievants to share a room and that their refusal to double up was not a legitimate reason for terminating their details. He determined the agency could not require the employees to double up in hotel rooms while in travel status unless the requirements of 5 U.S.C. 5911(e) are met. He also awarded one grievant backpay for 41 hours of overtime he estimated the grievant would have worked if his detail had not been terminated.

In its first exception the agency alleged that the award was contrary to law because the arbitrator misapplied 5 U.S.C. § 5911(e). The Authority found that the agency did not establish that the arbitrator erred by applying 5 U.S.C. § 5911(e) or that the award is contrary to that the provision. The agency was merely disagreeing with the arbitrator's reasoning and conclusions which was no basis for finding the award deficient.

In its second third and and fourth exceptions the agency contended respectively: that the arbitrator's award failed to draw its essence from the parties' agreement because the arbitrator did not expressly find that management violated the parties' agreement; that the arbitrator exceeded his authority by deciding an issue that was not raised in the grievance or by the parties; and that the award was based on a nonfact because even assuming that 5 U.S.C. § 5911(e) applies, the arbitrator erroneously concluded that portions of that provision, which coul have warranted requiring the employees to share a room had not been met. The Authority held that the exceptions constituted nothing more than disagreement with the arbitrator's reasoning and conclusions in resolving the dispute which was no basis for finding the arbitrator's award deficient.

In its fifth exception the agency alleged that the award of 41 hours retroactive overtime pay to one of the grievants was contrary to the Back Pay Act, 5 U.S.C. 5596. The Authority found that the arbitrator determined that the agency acted improperly when it attempted to require the grievants to share a room and terminated their detail when they refused. However, the arbitrator also found that overtime was not certain. He did not expressly find both that the unjustified termination of the detail directly resulted in the loss of overtime pay and that but for this unjustified action the grievant would have received such pay. The Authority therefore found that there was insufficient legal basis for an award of backpay and the award of overtime pay was contrary to the Back Pay Act.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR DEVELOPMENT CENTER,
DEPARTMENT OF THE NAVY

Activity

and

Case No. 0-AR-897

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1928, AFL-CIO

Union

DECISION

This matter is before the Authority on an exception to the award, as clarified, of Arbitrator Peter Florey filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Based on the separate concurring opinions below, the Agency's exception to the Arbitrator's award, as clarified, is denied and the award of attorney fees is modified by striking from the amount awarded all compensation for photocopying expenses.

Issued, Washington, D.C. March 25, 1986

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

OPINION OF CHAIRMAN CALHOUN:

I. STATEMENT OF THE CASE

This case presents the question of the propriety of the Arbitrator's award of attorney fees pursuant to the Back Pay Act (5 U.S.C. § 5596) and requires an articulation of the standards arbitrators should apply in rendering a decision to grant or deny attorney fees and in determining the amount of fees to be granted where warranted.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance at issue concerned entitlement to environmental differential pay and involved questions of health and safety related to asbestos exposure. The Arbitrator issued his original Opinion and Award in the underlying matter on July 1, 1982. He found the grievance arbitrable; compliance with the Agency's regulation concerning asbestos hazards "generally satisfactory . . . but not uniformly implemented,"; and returned the case to the parties for computation of backpay. In a Supplemental Award dated March 15, 1983, the Arbitrator selected a computation of backpay favorable to the Union's position and approved the Union counsel's submission requesting payment of his attorney fees. The Agency timely filed an exception contesting only the award of attorney fees. In reviewing that exception, the Authority concluded in 14 FLRA 782 (1984) that remand was appropriate and ordered:

> [T]he award is remanded to the parties with the direction that they request, jointly or separately, that the Arbitrator clarify the award. The submission to the Arbitrator is for the limited purpose of having the Arbitrator clarify and interpret his award of attorney fees to articulate fully specific findings on all pertinent statutory provisions.

This short remand decision cited the Authority's decision in International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680 (1984). In that case the Authority ruled that an award of attorney fees under the Back Pay Act, 5 U.S.C. § 5596 (see Appendix), must be made "in accordance with the standards established under 5 U.S.C. § 7701(g)." The Authority cited with approval existing decisional precedent of the U.S. Merit Systems Protection Board (MSPB)[1] and held that in ruling on an attorney fee request, the arbitrator must issue a "fully articulated, reasoned decision setting forth the specific findings supporting the determination." Id. at 684.

In his clarification, the Arbitrator in the present case found that "[a]ttorney fees are payable in this case under the Back Pay Act [5 U.S.C. § 5596] and the Civil Service Reform Act [5 U.S.C. § 7701(g)]" and that the amount of attorney fees was "reasonable." In support of these findings, the Arbitrator noted that the Union's grievance concerning entitlement to an environmental pay differential for exposure to asbestos involved the health and safety of a number of employees; was of the highest priority; and was sincerely pursued by the Union with considerable justification. He affirmatively found that the Activity knew of asbestos exposure exceeding the standards of the National Institute of Occupational Safety and Health and that such knowledge required "greater attention" by Agency officials. The Arbitrator concluded that the matter involved a continuing struggle for safety in the workplace under conditions endangering the health of employees and constituted a situation warranting an award of attorney fees "in the interest of justice."[2]

III. POSITIONS OF THE PARTIES

The Agency contends that the award of attorney fees is deficient as contrary to the Back Pay Act, as amended. Specifically, it maintains that the award is not in accordance with the governing standards established under section 7701(g) because the Arbitrator failed to provide a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis on which the reasonableness of the amount was determined.

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[1] See, e.g., Allen v. U.S. Postal Service, 2 MSPB 582 (1980); Kling v. Department of Justice, 2 MSPB 620 (1980).

[2] Arbitrator's Report to the Authority, dated December 5, 1984.

In its opposition to the Agency's exception, the Union argues that the award of attorney fees is warranted "in the interest of justice" because of the complex health and safety issues involved; that the Activity's unwillingness to grant any portion of the remedy resulted in the expensive arbitration proceeding; and that considerations of the Union's duty of fair representation and lack of resources warrant the award of fees. The Union further maintains that the circumstances of this case support the award of attorney fees under the standards identified by the Merit Systems Protection Board (MSPB) in Allen v. U.S. Postal Service, 2 MSPB 582 (1980).

IV. ANALYSIS AND CONCLUSIONS

A. Relevant Precedents and Statutory Provisions

In its earlier decisions, the Authority determined that a review of an arbitrator's award of fees must be within its original subject matter jurisdiction[3] and that the arbitrator must possess the statutory authority to award attorney fees.[4] Attorney fees may be awarded by arbitrators in a variety of unjustified and unwarranted personnel actions, including, but not limited to, actions subject to the negotiated grievance procedure or relating to an unfair labor practice.[5] In addition, the broad category of personnel actions covered by the Back Pay Act includes the omission or failure to take an action or confer a benefit.[6]

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[3] National Weather Service Employees Organization (MEBA AFL-CIO) and National Weather Service, Western Region, 17 FLRA No. 91 (1985).

[4] U.S. Army Corps of Engineers and National Federation of Federal Employees, Local 639, 17 FLRA No. 67 (1985).

[5] 5 U.S.C. § 5596(b)(1)(A)(ii).

[6] 5 U.S.C. § 5596(b)(3).

Further, as set forth in *Army Support Command, Hawaii*, the Back Pay Act requires that the award of fees be in conjunction with an award of backpay to the grievant on correction of the unwarranted personnel action,[7] that the award of fees must be reasonable and related to the personnel action, and that the award of attorney fees must be in accordance with the standards established under section 7701(g).

Subsection (1) of section 7701(g), which applies to all cases except those involving complaints of discrimination,[8] requires that the employee must be the prevailing party, that the fees must have been incurred by the employee, that the award of attorney fees must be warranted "in the interest of justice," and that the amount must be reasonable.

While the MSPB has had numerous cases in which to address fee awards for attorneys under the applicable provisions of 5 U.S.C. § 7701(g), to date there has been a paucity of opportunities for the Authority to review appeals of arbitration awards contesting attorney fee findings. The jurisdiction of arbitrators (as well as other "appropriate authorities") under the Back Pay Act, however, extends to a significantly wider range of matters than those within the jurisdiction of the MSPB. As in the instant case, many questions heard by arbitrators involve situations where an employee or group of employees affirmatively initiate the grievance procedure to seek a benefit allegedly improperly withheld by management.[9]

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[7] *See also Audie L. Murphy VA Hospital, San Antonio, Texas and American Federation of Government Employees, AFL-CIO, Local No. 3511*, 16 FLRA 1079 (1984).

[8] Section 7701(g)(2), pertaining to cases of discrimination prohibited by 5 U.S.C. § 2302(b)(1), requires as to such cases that the award of attorney fees must be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

[9] *See Simmons v. MSPB*, 768 F.2d 323 (Fed. Cir. 1985) and *Scarborough v. OPM*, 723 F.2d 801 (11th Cir. 1984) (attorney fees awarded in connection with disability retirement applications under 5 U.S.C. § 8347).

Because of the experience of the MSPB in this area and the many similarities between the two agencies with respect to the types of matters that come before them, the Authority has in the past reviewed MSPB attorney fee standards and, where applicable, has adopted MSPB rationale. This inclination by the Authority to cite Board precedents should not, however, in my judgment, be interpreted by parties to future proceedings as an absolute adoption by the Authority of MSPB case law. Likewise, I would not limit or restrict the Authority or arbitrators to awarding attorney fees only in those cases that are analogous to MSPB appeals.

In this opinion, it is my intent to provide further guidance to advocates and arbitrators with regard to the standards to be considered in making attorney fee determinations under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1).

B. The Analytical Framework

As stated above, five distinct requirements must be met for an arbitrator's award of attorney fees to be supportable under the provisions of section 7701(g)(1):

1. Fees must be incurred for the services of an attorney.

2. Fees may be sought only by the prevailing party.

3. The award of fees must be warranted "in the interest of justice."

4. The amount claimed for attorney fees must be reasonable.

5. The award of fees must be set out in a fully articulated, reasoned decision.

A detailed analysis of each of these requirements follows.

1. Incurrence of Attorney Fees: An attorney - client relationship must exist and the attorney must have rendered legal services on behalf of the appellant. O'Donnell v. Department of Interior, 2 MSPB 604 (1980).

2. Prevailing Party: An appellant is the prevailing party for the purposes of a fee award if he or she has obtained all or a significant part of the relief sought. Sterner v. Department of the Army, 711 F.2d 1563, 1566-67 (Fed. Cir. 1983). The party need not prevail on all issues; rather, it is sufficient to prevail on a significant, separable claim on the merits. Hanrahan v. Hampton, 446 U.S. 754 (1980); Bradley v. Richmond School Board, 416 U.S. 696 (1974). In reviewing a request for attorney fees one should look to the "substance of the litigation" to determine whether a party has substantially prevailed in its position, and not merely to the "technical disposition of the case or motion." Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984).

3. Interest of Justice: The MSPB in Allen held that the interest of justice standard includes, but is not limited to, cases involving prohibited personnel practices, agency actions clearly without merit, agency actions taken in bad faith to harass or exert improper pressure on an employee, agency gross procedural error which prolonged the proceeding or severely prejudiced the employee, and cases where the agency knew or should have known it would not prevail on the merits when it brought the proceeding. I believe that in defining and applying the parameters of the "interest of justice" standard, arbitrators should consider these factors as further clarified and augmented below. This compilation of factors, however, is not intended to be all-inclusive; rather, additional considerations should be applied where relevant and appropriate to individual cases and arbitrators are to be guided by both equity and logic. Illustrative examples gleaned from MSPB and court cases are as follows:

a. Instances where the agency presents little or no evidence to support its actions or demonstrates either a lack of or negligent preparation of the case.10/ This includes instances where the agency's action lacks substantial justification or is totally unfounded and clearly without merit. For example, a situation where the agency's careful reading of the relevant statutes and regulations would have promptly shown that its interpretation was erroneous.

10/ Compton v. Department of Energy, 9 MSPB 91 (1982); Trowell v. United States Postal Service, 3 MSPB 117 (1980).

b. Instances where agency ill will, or negligence, tainted the action against the employee to an unconscionable degree. This may be inferred from agency action or inaction throughout the proceedings.[11]

c. Instances where the agency initiated action against an employee in disregard of prevailing law, regulations, or negotiated agreement provisions on federal policy. Examples include actions based on improper denial of overtime, environmental differential pay, shift differentials, hazardous duty pay, annual leave, administrative leave, or official time for representational functions.

d. Instances where the employee is ultimately found to be substantially innocent of the charges brought by the agency. This determination is made on the basis of the result of the appeal rather than on the evidence and information available to the agency at the time the agency effected the action.[12] This standard is not met, however, where the employee believes that he or she is substantially innocent, can prove his or her innocence, and deliberately does not communicate all of the facts to the agency deciding official where the employee's disclosure would reasonably have caused the agency official to modify or overturn the action. Such an employee deliberately and improperly prolongs the agency's legal proceedings and cannot be regarded as an innocent victim who is entitled to attorney fees in the interest of justice.[13]

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[11] O'Donnell v. Department of Interior, 2 MSPB 604 (1980).

[12] See Boese v. Department of the Air Force, No. 85-2327 (Fed. Cir. Feb. 19, 1986); Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454 (Fed. Cir. 1984).

[13] Wise v. MSPB, No. 85-1974 (Fed. Cir. Dec. 30, 1985).

e. Instances where the agency fails to inquire into facts presented by the employee or fails to conduct a prudent inquiry into the employee's contradictory evidence.[14] For example, had an agency inquired into the facts presented by the employee, the agency would or should have ascertained at the outset that the charges against the employee were without merit or that the grievance should have been sustained.

f. Instances where there is either a service rendered to the federal work force or there is a benefit to the public derived from maintaining the action.[15] For example, situations where an employee's grievance leads to correction of workplace problems affecting a segment of the workforce, as in the instant case.

4. Reasonableness of the fee: The reasonableness of the fee is to be considered after entitlement has been established.[16] In calculating what constitutes a reasonable fee, courts have applied a variety of methods and multifactor analyses. An example of a method of computation acceptable to administrative adjudicatory bodies and most courts is the "lodestar" concept, wherein the attorney's customary hourly billing rate is multiplied by the number of hours reasonably devoted to the case. Careful review of the hourly rate and the number of hours claimed to have been expended is required prior to computing the lodestar. See Mitchell v. Department of Health and Human Services, 19 MSPR 206 (1984). Reduction of the hourly rate or the number of hours must, however, be justified by detailed findings. See Crumbaker v. MSPB, No. 85-1982 (Fed. Cir. Jan. 28, 1986), slip op. at 3-9.

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[14] Steger v. Defense Investigative Service, 717 F.2d 1402 (D.C. Cir. 1983).

[15] Wells v. Harris, 2 MSPB 572 (1980).

[16] Sterner v. Department of the Army, 711 F.2d 1563, 1568-69 (Fed. Cir. 1983).

The lodestar figure becomes the starting point for the setting of the fee and may be adjusted upward or downward for factors including, but not limited to, contingency fee arrangements where there was a risk of nonpayment or partial payment, extreme difficulty of the case, and extensive expertise of counsel which is not reflected in the hourly rate. The burden of justifying any adjustment to the lodestar figure falls on the party proposing the change. Copeland v. Marshall, 641 F.2d 800 (D.C. Cir. 1980); Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Mitchell, 19 MSPR 206. An award of attorney fees should not, however, be reduced simply because a party failed to prevail on every contention raised. See Hensley v. Eckerhart, 461 U.S. 424 (1983); Boese v. Department of the Air Force, No. 85-2357 (Fed. Cir. February 19, 1986), slip op. at 7.

The computation of reasonable attorney fees differs where the award will ultimately be received by a union rather than a law firm. In such cases, the fee must be computed based upon actual expenses rather than the market value of the services rendered. Further, a legal fund created by the union for fees does not alter the limitation to actual expenses for union attorneys. Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied 105 S. Ct. 958 (1985); NTEU v. Department of Treasury, 656 F.2d 848 (D.C. Cir. 1981).

5. Fully articulated, reasoned decision for fees: In the application of the standards set out under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g), the arbitrator is to provide a fully articulated, reasoned decision granting or denying the request for attorney fees. Army Support Command, Hawaii, at 684. The decision must contain independent and specific analysis, findings, and conclusions on each pertinent statutory requirement including the reasonableness of the amount of fees when fees are awarded.

An arbitrator's reference to one party's brief as support for a finding of attorney fees, or a cursory statement that the arbitrator considered the necessary elements of analysis does not meet this test. Rather, such defects create an analytical void which serves to confuse the parties, the public and the reviewing bodies. As an arbitrator's award must draw its essence from the parties' collective bargaining agreement,[17] so too must an arbitrator's award of attorney fees draw its essence from a demonstrable, pragmatic analysis of the factors set out in the applicable statutes.[18]

V. THE ANALYTIC FRAMEWORK APPLIED TO THIS CASE

Having clarified the analytic framework I believe should be applied in attorney fee cases under the Back Pay Act, the question to be addressed is whether the award of attorney fees in the instant case is consistent with the requirements of the Back Pay Act. Based upon the following analysis, I conclude as follows:

1. Incurrence of Fees: The record shows that an obligation to pay attorney fees was incurred by the Union on the employees' behalf.

2. Prevailing Party: There is no dispute that the employees in this case were prevailing parties.

3. Interest of Justice: A careful review of the initial decision by Arbitrator Florey establishing rights and remedies under the collective bargaining agreement, and his subsequent Report to the Authority, supports a finding that the award of attorney fees is in the "interest of justice." The Arbitrator specifically found that "in an installation striving for zero asbestos exposure, forty full

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[17] E.g., American Federation of Government Employees, National Border Patrol Council and U.S. Immigration and Naturalization Service, Southern Region, Dallas, Texas, 3 FLRA 540 (1980).

[18] I note the Authority's concurrent action in rescinding its decision setting aside the award of attorney fees in 20 FLRA No. 87 and remanding the case to the parties with direction that they request the arbitrator to clarify his award by providing the requisite fully articulated, reasoned decision setting forth specific findings on all pertinent statutory requirements.

days each year of exposure exceeding NIOSH standards (in the case of pipefitters) reflected hazardous conditions requiring greater attention" on the part of the Agency. Further, he noted the "complexity and magnitude" of the case and the "feigned cooperation" of the Agency. He specifically noted that the asbestos problem is clear cut and thoroughly documented and presents a continuing struggle for safety in the workplace"; and that the "health and safety of the employees . . . was pursued by the Union . . . as reflected in the decision, with considerable justification." Finally, the Arbitrator concluded that "the case presented by the Union in the present proceedings, particularly the evidence of pipefitters and other craftsmen, contained . . . elements damning justifiably the professed sincerity, competence and good faith of operating supervisors below the Command Level".19/ These statements by the Arbitrator are construed to be tantamount to a finding that the Agency should have known of the hazard and should have taken affirmative action to remedy the hazard. It is further concluded that the record supports findings that the magnitude of the injustice done to the employees in exposing them to asbestos and the public benefit derived from maintaining the action are substantial.

4. Reasonableness of the Amount of the Award:

The hourly billing rate of $65 requested by the Union's attorney is well within the range routinely approved by MSPB and the courts and is not challenged by the Agency. It is less than the rather conservative rate allowed under the Equal Access to Justice Act, 5 U.S.C. § 504. The detailed time records submitted to the Arbitrator conform to the requirements of MSPB decisions and established practice in personnel cases. See, e.g., Mitchell, 19 MSPR 206. One necessary adjustment must be made, however. Counsel's fee statement includes photocopying expenses. MSPB and the courts no longer permit photocopying expenses to be awarded as attorney fees under section 7701(g)(1). Bennett v. Department of the Navy, 699 F.2d 1140, 1144 (Fed. Cir. 1983); Koch v. Department of Commerce, MSPB Docket No. DC03518110733ADD (Jan. 25, 1984).

19/ Arbitrator's Report to the Authority, December 5, 1984, at 3-7.

5. Fully articulated, reasoned decision: The Arbitrator's clarification was rendered pursuant to the Authority's order that he "articulate fully specific findings on all pertinent statutory provisions." The Arbitrator's decision primarily incorporates by reference the arguments of the Union and does not meet the requirement for a fully articulated and reasoned decision containing independent analysis, findings and conclusions. Because of the extended proceedings in this matter and because the record adequately permits resolution of the Agency's exception, the decision in this case is not to remand for further proceedings. This decision, however, in no manner sanctions the practice of incorporation of a party's arguments by reference as a means of setting forth the specific findings supporting the determination of attorney fees as required by 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g).

Dated, Washington, D.C., March 25, 1986

Jerry L. Calhoun, Chairman
FEDERAL LABOR RELATIONS AUTHORITY

MEMBER FRAZIER CONCURRING:

I concur in the Chairman's decision that the arbitrator's award of attorney fees herein meets the basic statutory requirements under the Back Pay Act[20] and I agree with his conclusion that the amount of fees must be modified for the reasons he gives.

However, I feel that it is incumbent upon me to explain the manner in which I reached my conclusion that the arbitrator's award of attorney fees in this case meets the requirement for a "fully articulated, reasoned decision" setting forth the specific findings supporting the determination on each pertinent statutory requirement for an award of attorney fees and hence is not deficient in this regard. Further, I believe it is necessary to explicate the manner in which I have reached my conclusion that the arbitrator's award establishes that an award of attorney fees in this case is "warranted in the interest of justice" and hence is not deficient in this regard.

I. BACKGROUND AND SUMMARY OF THE ARBITRATION AWARD

The arbitrator, in his initial opinion and award in this case, stated that the grievance was filed on behalf of pipefitters who were alleged to be "assigned duties which expose them to a Category 16 hazard as set forth in Appendix 'J' of the FPM Supplement 532-1, i.e., Asbestos Dust and Article XVIII, Section 'G' of the Negotiated Agreement . . . ." Management had denied the requested 8% payment because, as stated by the arbitrator in his initial opinion and award, "[m]anagement was providing protective equipment and that, in Management's opinion, the protective equipment was practically eliminating the potential for personal illness and injury." The reference to the elimination of the potential for personal illness and injury was a reference to the provisions of FPM Supplement 532-1, Appendix J, which provides for a differential pay rate of 8% to employees "[w]orking in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

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[20] Back Pay Act of 1966, P.L. 89-380, 80 Stat. 94 (codified as amended at 5 U.S.C. § 5596 (1982)). See Appendix.

The arbitrator went on to say in his initial opinion and award, that:

> . . . the parties have incorporated Navy regulations into their negotiated agreement with respect to the payment of Appendix J hazard allowances, and OPNAVINST 6260 deals specifically with the control of asbestos exposure. The wording of the contract does not permit an inquiry into the reasonableness of the regulation in the grievance procedure, but the Center's compliance with the regulation is at issue and determines its liability for payment of the asbestos allowance.

Award at 9. The arbitrator further stated:

> [T]he question of the concentration of asbestos which exposes employees to potential illness has been pre-empted by Naval regulations which the parties have incorporated in their negotiated agreement. The Center itself has stated without reservation that it will apply safety procedures to asbestos levels below the limits set by OSHA: "Realizing that working with asbestos may be hazardous, Ref (b) [unspecified document] was written which promulgated specific procedures and equipment requirements when employees worked with asbestos exposures equal to or greater than two fibers per cubic centimeter. NADC has gone a step further in requiring these safety precautions to be taken whenever working with asbestos no matter what the airborne concentration of asbestos and these procedures are in strict compliance with Ref (b) and all equipment utilized conforms to NIOSH standards."
>
> . . . [T]he issue in this case narrows to the question of the safety precautions taken by the Center to avoid exposure to asbestos.

Award at 15-16. [Emphasis added.]

The arbitrator found that "[t]o protect the health of its employees effectively against the asbestos hazard, all the procedures mandated by OPNAVINST 6260 have to be followed." [Emphasis in original.] He also found that:

> [i]n theory, the Center has set up an admirable procedure for the protection of its employees against the asbestos hazard following the directive of OPNAVINST 6260. . . . However, the affected employees related at the hearing

> that, in practice, they encountered considerable difficulties and shortcomings such as poorly fitting respirators, ripping suits and considerable deficiency in the instructional programs.

Award at 16. The arbitrator found that "[t]his state of affairs is reflected in the NIOSH report" which he attached to his opinion and award. The arbitrator found that this report had "labeled several practical protective measures, including the wearing of respirators, as 'not at all satisfactory.'" He "stressed that providing protective gear, in and by itself, does not constitute a complete safety measure within the meaning of Article [sic] J." Award at 16. The arbitrator concluded that:

> . . . it can be reasonably expected that the parties themselves will work out the type of practical implementation of OPNAVINST 6260.1B which will eliminate the asbestos hazard within reasonable limits and, thereby, the need to pay the hazard differential. It should be noted that institution of an effective asbestos control program was treated as the terminal point of back pay in most of the cited arbitration decisions.

Award at 17. The arbitrator then made the following award: that the Center's program for coping with asbestos hazards was generally in satisfactory compliance with OPNAVINST 6260 but not uniformly implemented as a practical matter; that the case was returned to the parties for further proceedings in the light of the arbitrator's decision and for the computation of backpay; and that payment of the Union attorney fees by the Center would be triggered by retroactive payments made under the award. With respect to the award of attorney fees, the arbitrator noted that the grievance:

> . . . was pursued by the Union sincerely and, as reflected in the decision, with considerable justification. Preparation for a case of this complexity and magnitude requires considerable time and reflection, and the situation is clearly one to which the enabling legislation is addressed by awarding attorney's fees as "warranted by the interests of justice," as long as back pay becomes payable.

Award at 8.

The parties were unable to reach agreement on how to implement the initial award, and the matter was referred once more to the arbitrator. Thereafter, the arbitrator issued a Supplemental Award. In this Supplemental Award, the arbitrator made the following findings and award:

> After careful review, it appears that the positions of the parties are not far apart, but that the approach taken by the Union comes closer to effectuating the findings of the July 1, 1982 award than the proposal by the Center.
>
> For this reason, backpay shall be computed and paid as outlined in the Union's letter of December 15, 1982, and counsel fees should be adjusted accordingly.

Supplemental Award at 1.

Thereafter, pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations, the Agency filed an exception to the award of the arbitrator with the Authority. Specifically, the Agency excepted to the award of attorney fees, arguing that the award of attorney fees was contrary to the provisions of the Back Pay Act, 5 U.S.C. § 5596, and the standards established under 5 U.S.C. § 7701(g), which govern the award of attorney fees under the Back Pay Act.

The Authority, in *Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO*, 14 FLRA 782 (1984), concluded that the arbitrator's award of attorney fees in this case was not in accordance with the applicable standards and statutory requirements of the Back Pay Act and remanded the case to the parties. The remand included direction that the parties, jointly or separately, request the arbitrator to clarify and interpret his award of attorney fees so as to articulate fully specific findings on all pertinent statutory provisions. The Authority decided to remand the case because, as the Authority then pointed out, the award of attorney fees herein was issued on a date prior to the issuance by the Authority of its decision in *International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii*, 14 FLRA 680 (1984) and hence, "*the Arbitrator's determination was made without the benefit of the instruction and guidance provided by United States Army Support Command, Hawaii*." [Emphasis added.]

In Army Support Command, Hawaii, the Authority for the first time, had addressed in detail the statutory requirements regarding awards of attorney fees. In that case, the Authority said, in pertinent part:

> As previously recognized by the Authority, a threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant had been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Department of Defense Dependents Schools and Overseas Education Association, 3 FLRA 259, 263 (1980). Further, a reading of the Back Pay Act indicates that an award of attorney fees must be in conjunction with an award of backpay to the grievant on correction of the personnel action, that the award of attorney fees must be reasonable and related to the personnel action, and that the award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). Section 7701(g) prescribes that for an employee to be eligible for an award of attorney fees, the employee must be the prevailing party. Section 7701(g)(1), which applies to all cases except those of discrimination, requires that an award of attorney fees must be warranted "in the interest of justice," that the amount must be reasonable, and that the fees must have been incurred by the employee. . . .
>
> The standards established under section 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded. See, e.g., Allen v. U.S. Postal Service, 2 MSPB 582 (1980); Kling v. Department of Justice, 2 MSPB 620 (1980); see also 5 CFR § 550.806 (1983).

[Footnote omitted.]

Therefore, to summarize, because in this case the award was issued on a date prior to the issuance of Army Support Command, Hawaii, and thus without the benefit of the instruction and guidance provided by Army Support Command, Hawaii, it was determined to remand for the purpose of allowing the arbitrator to clarify and interpret his award in the light of the standards articulated by the Authority therein.[21] In the remand the attention of the parties and the arbitrator was directed to the guidance in Army Support Command, Hawaii, by a specific citation to the case.

Thereafter, the arbitrator issued a clarification and interpretation of his award of attorney fees, stating that such "fees are payable in this case under the Back Pay Act, 5 U.S.C. Para. 5596, and the Civil Service Reform Act, 5 U.S.C. Para. 7701(g) as fully explained in the Union's brief which is incorporated into this decision" and that the attorney fees being sought "are reasonable and shall be paid forthwith." [Emphasis added.] In this clarification and interpretation of his award of attorney fees the arbitrator found that "[a]ny reasonable person would agree that even one dollar of 8% Hazardous Duty Payment for asbestos exposure cries out for Attorney Fees in the interest of justice. . . ." Clarification at 5. In reaching this conclusion, in his clarification and interpretation, the arbitrator noted, *inter alia*:

> Initially, I was not prepared to defend or explain my prior decision in this case. The Union has done it brilliantly and extensively in its brief which I am incorporating into this Report as a part thereof. As [the Union's counsel's] brief points out, there is not a single standard for the payment of Attorney Fees that is not reflected in my decisions.

Clarification at 4-5. The arbitrator went on to say that:

> [t]he case presented by the Union in the present proceedings, particularly the evidence of pipefitters and other craftsmen, contained . . . elements damning justifiably the professed sincerity, competence and good faith of operating supervisors below the Command Level. . . .

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[21] In contrast, an award of attorney fees issued more than one year subsequent to the issuance of Army Support Command, Hawaii, and thus with the benefit of the instruction and guidance provided therein, which did not provide a fully articulated, reasoned decision, was found deficient by the Authority and the award was set aside. *See* National Association of Air Traffic Specialists and Federal Aviation Administration, Washington Flight Service Station, 20 FLRA No. 87 (1985). However, on this date the Authority has issued an

(Continued)

> It [the Agency] knew that, in an installation striving for zero asbestos exposure, forty full days each year of exposure exceeding NIOSH standards (in the case of pipefitters) reflected hazardous conditions requiring greater attention. . . .
>
> The asbestos problem is clear cut and thoroughly documented and presents a continuing struggle for safety in the work place.

Clarification at 6-7.

The arbitrator found that the policies of top management were not followed diligently by subordinate supervisors, leading to unwarranted exposure to asbestos hazards on the part of the employees involved in the arbitration. As noted above, the arbitrator incorporated the brief filed by the Union counsel into his report of clarification and interpretation, adopting that analysis as his own. The arbitrator affirmed the award of attorney fees.

The Agency has filed an exception to the arbitrator's award as interpreted and clarified. The Agency, in essence, again contends that the award of attorney fees is contrary to the Back Pay Act, 5 U.S.C. § 5596, and more specifically that it is not made in accordance with the standards established under 5 U.S.C. § 7701(g). In the latter regard the Agency contends that the arbitrator did not provide a fully articulated, reasoned decision setting forth specific findings that support the determination to award attorney fees. Accordingly, the issue presented to the Authority by the exceptions filed by the Agency is whether or not the award of attorney fees by the arbitrator is contrary to law.

II. ATTORNEY FEES UNDER THE CIVIL SERVICE REFORM ACT

Under the "American Rule," attorney fees are not ordinarily recoverable by the prevailing litigant in federal litigation

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Order Granting Request for Reconsideration in that case because the arbitrator and the parties were not explicitly apprised that the Authority would set aside an award of attorney fees that was not fully supported as required. In that Order parties and arbitrators were put on explicit notice that deficient awards of attorney fees issued hereafter will be set aside (or modified as appropriate) rather than being remanded.

absent statutory authorization to award such fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). Morever, an award of attorney fees against an agency of the United States Government is not permitted unless there is an explicit statutory provision authorizing such an award which may serve as a waiver of traditional sovereign immunity enjoyed by the United States. Scarborough v. Office of Personnel Management, 723 F.2d 801, 808 (11th Cir. 1984); Spencer v. NLRB, 712 F.2d 539, 543-44 (D.C. Cir. 1983). Accordingly, a careful review of an award of attorney fees against the United States is necessary to assure that it is made within the explicit terms of the statute which authorizes such award.

The Back Pay Act authorizes an appropriate authority such as the Federal Labor Relations Authority or an arbitrator to award attorney fees to an employee under certain specific circumstances.[22] Specifically, the Act requires that in order to be eligible for attorney fees, the employee must be found by appropriate authority under applicable law, rule, regulation or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials. Additionally, the fee award must be in conjunction with an award of backpay on the correction of the unjustified or unwarranted personnel action; the fee award must be reasonable and related to the personnel action; and, the fee award must be in accordance with the standards established under 5 U.S.C. § 7701(g).[23]

Section 7701(g) provides that for an employee to be eligible for an award of attorney fees in a case which does not involve discrimination, the employee must be the prevailing party; that the award must be warranted "in the interest of justice"; the amount must be reasonable and the fees must be incurred by the employee. In addition, it has been held that the standards established under section 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are

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22/ 5 U.S.C. § 5596 (1982). See Appendix.

23/ 5 U.S.C. § 7701(g) (1982). See Appendix.

awarded.[24] Thus, it is clear that in determining whether to award attorney fees under the Back Pay Act, an arbitrator must be careful to conform to the standards established under the Civil Service Reform Act (CSRA) authorizing such awards.

In resolving exceptions to awards of attorney fees, as in this case, it falls to the Authority to assure that the award is not contrary to law and hence is not deficient. In order for the Authority to properly perform its role in resolving exceptions to such awards, it is necessary to review the award under the Back Pay Act to assure that it meets the statutory requirements.

The provisions of the Back Pay Act which allow awards of attorney fees in certain specified circumstances were produced as the result of legislative compromise. The legislative history of those provisions can be instructive in their interpretation and application to the facts of the case.

S.2640, the version of the CSRA passed by the Senate, contained amendments to the Back Pay Act but made no provision for the payment of attorney fees therein. However, section 7701(j) of S.2640, respecting the appellate procedures of the Merit Systems Protection Board (MSPB), provided, for cases not involving discrimination, that the MSPB:[25]

> . . . may require payment by the agency which is the losing party to a proceeding before the Board, of reasonable attorney fees incurred by an employee, if the employee is the prevailing party and the deciding official or officials determine that payment by the agency is warranted on the grounds that the agency's action was taken in bad faith. . . .

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[24] *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980); *Kling v. Department of Justice*, 2 MSPB 620 (1980); *see also* 5 CFR § 550.806 (1985).

[25] Legislative History of the Civil Service Reform Act of 1978, Comm. on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., 1762 (Comm. Print No. 96-2 1979).

H.R. 11280, the version of the CSRA passed by the House of Representatives, in proposing to amend the Back Pay Act, provided that the affected employee was entitled on correction of the personnel action to receive:26/

> . . . reasonable attorney fees and reasonable costs and expenses of litigation related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7105(h) of this title . . . .

Section 7105 of H.R. 11280 which described the powers and duties of the Federal Labor Relations Authority would have assigned the Authority some degree of discretion in establishing the standards to be applied in determining when attorney fees should be awarded in unfair labor practice cases and grievance arbitration awards. Section 7105(h), provided as follows:27/

> The Authority shall, by regulation, establish standards which shall be applied in determining the amount and circumstances in which reasonable attorney fees and reasonable costs and expenses of litigation may be awarded under section 7118(a)(6)(C) or 5596(b)(1)(B) of this title in connection with any unfair labor practice or any grievance processed under a procedure negotiated in accordance with this chapter.

26/ Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Comm. on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess. 981 (Comm. Print No. 96-7 1979).

27/ *Id.* at 971.

The section of H.R. 11280 concerning MSPB pertinently provided, for cases not involving discrimination, that the Board may require:28/

> . . . payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee as the case may be, determines that payment by the agency is warranted.

The Conference Committee resolved these conflicting versions by a series of compromises. As one compromise, section 7105(h) in H.R. 11280 was dropped, thereby eliminating the provision which would have allowed the Authority to fashion standards to be applied in determining the amount and circumstances in which attorney fees may be awarded in unfair labor practice cases and grievance arbitration cases. Instead, the Conference Committee decided to permit the award of attorney fees in unfair labor practice cases and arbitration cases only where backpay is awarded and only under the standards set forth in 5 U.S.C. § 7701(g). Thus, at the meeting of the Conference Committee on September 18, 1978, Congressman Udall stated:29/

> My proposal is a compromise. It would adopt the Senate provision eliminating attorney's fees in the unfair labor practice area. It would allow the appropriate authority--FLRA or the arbitrator or whoever in any grievance decision--to award fees in conformity with standards to be applied in the MSPB cases. Those standards would be a middle ground between the Senate's bad faith. It would be pretty hard to prove bad faith, we think, in most cases, and the House's very loose standard which is simply "as warranted"; and when the employee wins the case on the merits and the Board finds that the fees are warranted in the interest of fairness and justice and so on.

28/ Section 7701(g)(1), 124 Cong. Rec. 29,229 (1978).

29/ As reported at page 404 of the transcript of proceedings of the House-Senate Conference on S. 2640, the Civil Service Reform Act of 1978.

The final compromise as to attorney fees for cases not involving discrimination is reflected in the Conference Report on the Civil Service Reform Act of 1978, H.R. 95-1717, 95th Cong., 2d Sess. (1978), which stated at p. 142:[30]

> The Senate bill authorizes attorneys' fees to be awarded in appeals cases by a hearing officer whenever the employee prevails and the officer determines that the agency's action was taken in bad faith . . . .
>
> The House amendment authorizes attorneys' fees in any case where the officer determines that payment "is warranted" . . . .
>
> The conference substitute (section 7701(g) and 5596(b)(1)(A)(ii)) authorizes attorneys' fees in cases where [an] employee prevails on the merits and the deciding official determines that attorneys' fees are warranted in the interest of justice, including a case involving a prohibited personnel practice or where the agency's action was clearly without merit. The reference to these two types of cases is illustrative only and does not limit the official from awarding attorneys' fees in other kinds of cases.

In light of this legislative history, it is clear that under the Civil Service Reform Act of 1978, the Federal Labor Relations Authority and arbitrators issuing awards under the provisions of section 7121 of the Statute may award attorney fees, but only in the limited, specified circumstances outlined above. Thus, in order to be eligible for the award of attorney fees in unfair labor practice cases and in grievance arbitration awards, it is not sufficient merely to be the prevailing party. There must also be an award of backpay. In an earlier case, *Department of Defense, Dependents Schools and Overseas Education Association, Inc.*, 3 FLRA 259 (1980), the Authority denied a union's exceptions to an arbitrator's denial of its request for attorney fees on the ground that in that case there had been "no determination that an unjustified or unwarranted personnel action had resulted in the withdrawal or reduction of the grievant's pay, a necessary threshold determination for entitlement to attorney fees under the Back Pay Act, as amended." 3 FLRA at 263.

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[30] Legislative History of the Federal Service Labor-Management Relations Statute, *supra* note 26, at 810.

Moreover, in cases where discrimination is not involved, prevailing in an arbitration award which calls for backpay, even the retroactive payment of environmental differentials, is not, standing alone, a sufficient basis for an award of attorney fees. It is only the first step in meeting the requirements under the Back Pay Act. The award of attorney fees must also meet the applicable requirements of 5 U.S.C. § 7701(g) and the standards established thereunder.

In Sterner v. Department of the Army, 711 F.2d 1563, 1571 (Fed. Cir. 1983), the U.S. Court of Appeals for the Federal Circuit summarized the prerequisites to an award of attorney fees under section 7701(g)(1) of CSRA as follows:

> To summarize, there are two prerequisites to an award of attorney's fees under section 7701(g)(1) which the board must address in each case: whether the employee is the prevailing party and whether an award is warranted in the interest of justice. Determination of prevailing party should be a simple task of deciding whether the employee succeeded in obtaining all or a significant part of the relief sought. The question of substantial innocence is not germane to this initial inquiry. . . .
>
> The board has considerable discretion in determining when an award is warranted in the interest of justice. The non-exclusive guidelines [established by the MSPB in its decision in Allen which is discussed infra] are a valid starting point. The board may also consider the extent of the employee's success. Economic hardship per se is not a proper consideration as it would tend to undermine the statutory intent, but the board may wish to consider extraordinary hardships in appropriate cases. . . .

Clearly then, in the context of the present case, the mere conclusions that an environmental differential is payable, and is payable retroactively, are not sufficient to "trigger" an award of attorney fees, or to support the award in the face of a challenge that the award is contrary to law. Rather, as pointed out above, it must be shown, among other things, that such award is in the interest of justice in accordance with standards established under section 7701(g).

Moreover, the Authority is without discretion to ignore this requirement, or to fashion its own standards upon which an award of attorney fees may be made. Indeed, as noted in the above discussion of the legislative history, the Authority would have had a great deal of discretion had the provisions of H.R. 11280, including especially section 7105(h), been adopted by the Congress and enacted into law. However, under the CSRA as enacted, the Authority is constrained to apply the requirements set forth in 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g), including the standards established under section 7701(g), in determining whether an award of attorney fees by an arbitrator is contrary to law.

The MSPB in Allen v. U.S. Postal Service, 2 MSPB 582 (1980), developed standards for ascertaining when an award of attorney fees "is warranted in the interest of justice" as well as other standards for such an award under 5 U.S.C. § 7701(g)(1). The Court of Appeals for the Federal Circuit has confirmed the validity of MSPB's standards for determining whether attorney fees are warranted in the interest of justice.[31] As the court stated in Sterner, 711 F.2d at 1570:

> The Allen guidelines are reasonable and are firmly based in the statute and the legislative history; we therefore have no basis for altering the Allen guidelines, noting that all they are is a set of guidelines and that Allen itself emphasized that the examples given were "not exhaustive."

As to the guidelines, the court stated in Yorkshire, 746 F.2d at 1456:

> The parties correctly cite Allen v. U.S. Postal Service, 2 M.S.P.B. 582 (1980), as embodying the MSPB's prevailing standard for interpretation of the "warranted in the interest of justice" part of § 7701(g)(1). Allen began with the proposition that the two examples in the statute concerning when an award would be warranted in the interest of justice are illustrative and not exclusive. Id. at 587. The Board then reviewed the legislative history of the statute to glean other instances in which an award would be appropriate.

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[31] Sterner v. Department of the Army, 711 F.2d 1563, 1570 (Fed. Cir. 1983); Sims v. Department of the Navy, 711 F.2d 1578, 1581 (Fed. Cir. 1983); Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454, 1456 (Fed. Cir. 1984).

The Board in Allen found very illuminating the comments of Senator Mathias, author of the "interest of justice" language and member of the Reform Act's conference committee. Senator Mathias described four situations in which the Board might appropriately award attorney's fees:

> [W]here he [the employee] is substantially innocent of the charges that are leveled against him, or where the agency acted in bad faith, or where there was some gross procedural error, or where the agency knew or should have known that it couldn't prevail on the merits when it brought the proceeding.

Id. at 589, quoting Transcript of Senate Committee on Governmental Affairs' Mark-up Session on S. 2640, 95th Cong., 2d Sess. 124-25 (1978). With the statutory examples and Senator Mathias' illustrations as a base, the Board developed a set of five broad categories of cases in which an award of attorney's fees fits within the statutory framework:

> 1. Where the agency engaged in a "prohibited personnel practice" (§ 7701(g)(1));
>
> 2. Where the agency's action was "clearly without merit" (§ 7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith," including:
>
> a. Where the agency's action was brought to "harass" the employee;
>
> b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";
>
> 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;
>
> 5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

Id. at 593 [footnotes omitted]. The Board dubbed these headings "directional markers toward 'the interest of justice'" rather than conclusive or fixed definitions. Id. We confirmed the validity of the Allen guidelines in Sterner, supra, 711 F.2d at 1570.

Thus, in determining whether an award of attorney fees is within the explicit terms of the provisions of the CSRA, both the requirements of the Back Pay Act and section 7701(g) must be assessed. To summarize, in order for an award of attorney fees to be authorized, the award of fees must be in conjunction with an award of backpay to the grievant on the correction of the unjustified or unwarranted personnel action, must be reasonable and related to the personnel action, and must be in accordance with the standards established under section 7701(g). That section prescribes that the employee must be the prevailing party and section 7701(g)(1), which applies to all cases except those of discrimination, prescribes that the award of fees must be warranted in the interest of justice, that the amount must be reasonable and that the fees must have been incurred by the employee. With respect to the interest of justice standard, the requirements and guidelines established by the Merit Systems Protection Board in the Allen case and approved by the U.S. Court of Appeals for the Federal Circuit are the starting point in determining when an award of fees is warranted in the interest of justice. Finally, there must be a "fully articulated, reasoned decision" setting forth the specific findings supporting the determination on each pertinent statutory requirement. It is the role of the Authority here to determine whether the arbitrator's award of attorney fees meets the statutory requirements noted above.

I wish to emphasize here that the Authority's function under the Statute generally is to review the awards of the arbitrators to insure that they are not deficient on the grounds described in section 7122(a). Under the Statute, grievance arbitration awards are final and binding so long as they are not contrary to law, rule, or regulation or are otherwise deficient on grounds applied by federal courts in private sector labor-management relations. The Authority does not judge the merits of the dispute before the arbitrator. Thus, with respect to exceptions to awards of attorney fees, the Authority's role is to insure that the arbitrator has met the statutory requirements. It is not the role of the Authority to substitute its judgment for that of the arbitrator.

III. APPLICATION OF THE STATUTORY REQUIREMENTS IN THIS CASE

As I indicated in the introduction to this concurring opinion, I wish to discuss my conclusions regarding two of the requirements in this case--the requirement for a fully articulated, reasoned decision and the requirement that an award of attorney fees be warranted in the interest of justice.

I will first address the Agency's contentions that the arbitrator has failed and refused to provide the parties and the Authority with a fully articulated, reasoned decision setting forth the specific findings supporting the determinations on each pertinent statutory requirement. As noted in Part I of this concurring opinion, the arbitrator, in his clarification and interpretation of the award of attorney fees, found that they were payable "as fully explained in the Union's brief which is incorporated into this decision." I cannot endorse this practice, especially where the requirements under section 7701(g) as described by the Authority in *Army Support Command, Hawaii*, call for "a fully articulated, reasoned decision setting forth the specific findings supporting the determinations on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded."

After the matter was remanded by the Authority, the counsel for the Union submitted to the arbitrator a 28-page, double-spaced typewritten brief on the issue of attorney fees. The Agency submitted a 12-page, single-spaced typewritten brief with 17 attachments. As Judge J. Skelly Wright has noted in connection with a somewhat similar circumstance, "[t]hese lawyers and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side . . . as strongly as they possibly can."32/ Moreover, where attorneys contest points of law and offer persuasive arguments on both sides of an issue, it falls to the decisionmaker to resolve those points of law and those issues. In the circumstances

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32/ Remarks of Judge J. Skelly Wright in Seminars for Newly Appointed United States District Judges (1963), p. 166. *See also United States v. El Paso Natural Gas Company*, 376 U.S. 1044, 1047 n.4 (1964).

here, a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement for an award of attorney fees calls for an analysis of the parties' differing positions and an independent, objective explanation for the arbitrator's conclusions. To instead adopt in toto the brief of one side and to incorporate that brief into his decision, and to describe the brief of the opposing side simply as "a lengthy citation of authorities which are largely inappropriate and irrelevant" comes perilously close to an abdication of this responsibility. The arbitrator said in his clarification and interpretation that "I know how to spell out justification for attorney fees, when needed." He should have done so in this case.

As the U.S. Court of Appeals for the District of Columbia Circuit recently said in addressing a somewhat similar problem:33/

> . . . [W]e wish to make clear that we cannot endorse the District Judge's action in extensively copying the proposed findings of fact and conclusions of law prepared by counsel for [one of the parties]. As the Supreme Court noted in El Paso Natural Gas Co., this practice "is an abandonment of the duty and the trust that has been placed in the judge." 376 U.S. at 657 n. 4, 84 S. Ct. at 1047 n. 4 (quoting J. Skelly Wright, Seminars for Newly Appointed United States District Judges 166 (1963)). As the present case illustrates, the parties, the public and the reviewing court can never be certain that the judge actually decided the case on the grounds given in the copied Memorandum Opinion. Confidence in the integrity of the judicial process inevitably suffers when judges succumb wholesale to this practice.

Similarly, I cannot endorse the action of the arbitrator here in merely incorporating the contentions and arguments of counsel representing one of the parties before him. A fully articulated, reasoned opinion is required by the Authority in these cases because it is a requirement for authorizing attorney fees under the Back Pay Act. If the arbitrator fails to perform his function in this regard, he fails his duty under law and fails to meet his obligation to the parties who selected him to resolve their grievance.

33/ Southern Pacific Communication Co. v. American Telephone and Telegraph Co., 740 F.2d 980, 995 (D.C. Cir. 1984), cert. denied 105 S.Ct. 1359 (1985).

Certainly, therefore, it would have been far preferable had the arbitrator not succumbed to the temptation of incorporating one side's position and instead spelled out the justification for the award himself as he admits he knows how to do. Because such a fully articulated, reasoned justification is not expressly set forth by the arbitrator, in my opinion his entire award, as supplemented and later clarified, must be examined to determine whether sufficient findings can be gleaned which would support his conclusion that an award of attorney fees is warranted in the interest of justice. In my view, it is appropriate to adopt such a course of action in this case in light of the arbitrator's explicit references to his initial and supplemental awards in his clarification here under review. I wish again to underscore that in examining the entire award, I will not be placing myself in the arbitrator's shoes to judge the merits of the dispute the parties placed before him, i.e., whether attorney fees are warranted in this case. Instead, I will, consistent with the Authority's statutory function in arbitration cases, examine the arbitrator's entire award to see whether his decision to grant fees is supported by the specific findings required by law.

As an initial matter, I would observe that in Allen the MSPB was applying the provisions of section 7701(g)(1) in an adverse action appeal under 5 U.S.C. chapter 77. Consequently, most of the MSPB's Allen guidelines relate an award of attorney fees to some action taken by an agency against an employee, which action is being overturned or modified.

In the instant case we are not examining an award of attorney fees in similar circumstances. There has been no "adverse action" taken against an employee; clearly it is not a matter covered by 5 U.S.C. § 7512.34/ We are not dealing with an action based on unacceptable performance covered by

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34/ 5 U.S.C. § 7512 provides:

> § 7512. Actions covered
> This subchapter applies to--
> (1) a removal;
> (2) a suspension for more than 14 days;
> (3) a reduction in grade;
> (4) a reduction in pay; and

(Continued)

5 U.S.C. § 4303.35/ Instead, we are here faced with a grievance arbitration award wherein the arbitrator has found in effect that employees had been improperly denied a benefit, namely, environmental differential pay, and the question is whether an award of attorney fees is warranted in the interest of justice in these circumstances.

Even though these circumstances differ from those in Allen, some of the Allen guidelines could apply to a situation wherein agency management has improperly denied benefits to an employee, e.g., where the agency's action was "clearly without merit" or where the agency "knew or should have known that it would not prevail on the merits."

(Continued)

(5) a furlough of 30 days or less;
but does not apply to--
(A) a suspension or removal under section 7532 of this title,
(B) a reduction-in-force action under section 3502 of this title,
(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
(D) a reduction in grade or removal under section 4303 of this title, or
(E) an action initiated under section 1206 or 7521 of this title.

35/ As to the types of actions covered, 5 U.S.C. § 4303 provides in pertinent part:

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(Continued)

Furthermore, the MSPB and the courts have been faced with a somewhat analogous situation, in a case in which employees' applications for disability retirement have been denied. In *Scarborough v. Office of Personnel Management*, 723 F.2d 801 (11th Cir. 1984), the U.S. Court of Appeals for the Eleventh Circuit noted that section 7701(g) provides that it applies to "any case in which a prohibited personnel practice was engaged in by the agency *or in any case in which the agency's action was clearly without merit*." In concluding that the underlined words created a "second classification" of cases in which an award of attorney fees would be warranted in the interest of justice, the court stated: "An unreasonable denial of retirement benefits could easily be encompassed under this second classification."36/ For the reasons similar to those articulated in this respect in *Scarborough*, I would conclude under the Back Pay Act that a denial of environmental

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(Continued)

. . . . .

(f) This section does not apply to--

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

36/ 723 F.2d at 814.

differential pay "could easily be encompassed" under the same classification, i.e., a case in which the agency's action was clearly without merit, if such denial of environmental differential pay were found to be "unreasonable."

Therefore, in this case, in order to decide whether the award of attorney fees is warranted in the interest of justice, I believe it is necessary to examine the arbitrator's findings to see whether there is a sufficient basis to conclude that the Agency knew or should have known it would not prevail on the merits or that the Agency's denial of environmental differential pay was unreasonable and thus clearly without merit. My analysis is thus based on relevant Allen factors and on the related approach taken in this respect in Scarborough. Since the Allen factors are guidelines and not intended to be exhaustive, I see no need to apply the other factors set forth in Allen.

I have concluded that the arbitrator's findings support a determination that management's denial of the environmental differential pay in the circumstances of this case was unreasonable and that management should have known that it would not prevail on the merits of the grievance. Therefore, the arbitrator's award of attorney fees as being warranted in the interest of justice is supported and must stand. As noted in Part I of this concurring opinion, the arbitrator found in pertinent part that:

> (A) Management had stated without reservation that it would apply safety procedures to asbestos levels below the limits set by OSHA.
>
> (B) Management had gone a step further in requiring these safety precautions to be taken whenever working with asbestos no matter what the airborne concentration of asbestos and that all equipment utilized must conform to NIOSH standards.
>
> (C) While the procedure which management had set up was, in theory, admirable for the protection of employees against the hazard involved, a NIOSH report, introduced at the hearing and attached to the arbitrator's initial award, "labeled several practical protective measures, including the wearing of respirators, as 'not at all satisfactory.'"

> (D) Management knew that, in an installation striving for zero asbestos exposure, forty full days each year of exposure exceeding NIOSH standards (in the case of pipefitters) reflected hazardous conditions requiring greater attention.
>
> (E) The asbestos problem was clear cut and thoroughly documented and presented a continuing struggle for safety in the workplace.

Therefore, the arbitrator rejected management's contention that it was providing protective equipment which was practically eliminating the potential for personal illness and injury. As a result the affected employees were awarded environmental differential pay for "[w]orking in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

In light of the arbitrator's findings concerning the high standards that management had set for itself, the documented failure to meet those standards and to provide satisfactory practical protective measures, and management's knowledge of forty full days each year of employee exposure exceeding NIOSH standards, it was unreasonable for management to take the position that it was providing protective equipment which was practically eliminating the potential for personal illness and injury and for that reason to deny the employees the benefit of environmental differential pay. Furthermore, because management knew that its measures did not provide satisfactory protection and because it knew that it had failed to meet the standards which it set for itself, management should have known that it would not prevail on the merits in this grievance. Therefore, I conclude that the arbitrator made sufficient findings to support the conclusion that attorney fees were warranted in the interest of justice.

In summary on this point, in these circumstances, in my opinion, it is clear that the arbitrator's award contains a sufficient basis to conclude that the Agency's denial of the environmental differential pay was unreasonable and hence without merit and that the Agency knew or should have known they would not prevail on the merits of the grievance/arbitration proceeding, and that the award of attorney fees in this case therefore is "warranted in the interest of justice."

Dated, Washington, D.C., March 25, 1986

Henry B. Frazier III

Henry B. Frazier III, Member

APPENDIX

5 U.S.C. § 5596 (1982) pertinently provides:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title[.]

5 U.S.C. § 7701(g) (1982) provides:

> (1) Except as provided in paragraph (2) of his subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.
>
> (2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

21 FLRA No. 26

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
AIR TRAFFIC SPECIALISTS

Union

and

FEDERAL AVIATION ADMINISTRATION,
WASHINGTON FLIGHT SERVICE STATION

Activity

Case No. 0-AR-1029
(20 FLRA No. 87)

ORDER GRANTING REQUEST FOR RECONSIDERATION

I. STATEMENT OF THE CASE

This matter is before the Authority on a request filed by the Union seeking reconsideration of the Authority's decision of November 25, 1985, setting aside the Arbitrator's award of attorney fees.

II. BACKGROUND

The Arbitrator determined that there was not just cause to suspend the grievant and awarded him backpay and benefits for the period of the suspension. The grievant subsequently requested an award of attorney fees and the Arbitrator, after quoting the relevant provisions of the Back Pay Act, 5 U.S.C. § 5596, summarily concluded that application of the statutory requirements resulted in a determination that the grievant was entitled to the fees requested. The Arbitrator therefore awarded the grievant attorney fees in the amount of $6,790. In its exceptions to the award of attorney fees, the Agency contended, among other things, that the award was contrary to the Back Pay Act because it was not in accordance with the standards established under 5 U.S.C. § 7701(g). Specifically, the Agency argued on the basis of the Authority's decision in _International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii_, 14 FLRA 680 (1984), that the Arbitrator failed to provide a fully articulated, reasoned decision as required. The Authority agreed with the Agency. The Authority found that the Arbitrator's decision and award of fees was not in accordance with the standards established under section 7701(g) as expressly required by the Back Pay Act. The Authority found that the Arbitrator failed to provide a fully articulated, reasoned decision setting forth his specific findings supporting the determination on each pertinent statutory requirement, including the bases on which he had determined that $6,790 was a reasonable amount of attorney fees. Accordingly, the Authority concluded that the award of attorney fees was deficient as contrary to the Back Pay Act and therefore set aside the award. The Authority also found that it was not necessary to address the Agency's other exceptions to the attorney fees award.

III. REQUEST FOR RECONSIDERATION

In its request for reconsideration, the Union essentially contends, on legal and equitable grounds, that rather than set the award aside the Authority should have remanded the case to the parties and directed them to seek a fully articulated determination from the Arbitrator as to the basis for his award. In support of its contention that a remand order was appropriate, the Union argues that in Army Support Command, Hawaii, where the Authority also found that the award of attorney fees was not properly supported, the Authority remanded that case to the parties. The Union further argues that while the Arbitrator's award of attorney fees in this case was rendered subsequent to the Army Support Command decision, that fact alone does not provide a sufficient basis for a different result in the essentially similar circumstances of this case. The Agency filed an opposition to the Union's request for reconsideration, contending that the Union had not demonstrated extraordinary circumstances.

IV. ANALYSIS AND CONCLUSIONS

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a final decision of the Authority. Upon careful consideration of the Union's request and the Agency's opposition, the Authority concludes that reconsideration is warranted.

In Army Support Command, Hawaii, the Authority, for the first time, had addressed in detail the statutory requirements regarding awards of attorney fees. In that case, the Authority said, in pertinent part:

> As previously recognized by the Authority, a threshold requirement for entitlement to attorney fees under the Back Pay Act is a finding that the grievant had been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Department of Defense Dependents Schools and Overseas Education Association, 3 FLRA 259, 263 (1980). Further, a reading of the Back Pay Act indicates that an award of attorney fees must be in conjunction with an award of backpay to the grievant on correction of the personnel action, that the award of attorney fees must be reasonable and related to the personnel action, and the award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). Section 7701(g) prescribes that for an employee to be eligible for an award of attorney fees, the employee must be the prevailing party. Section 7701(g)(1), which applies to all cases except those of discrimination, requires that an award of attorney fees must be warranted "in the interest of justice," that the amount must be reasonable, and that the fees must have been incurred by the employee. . . .
>
> The standards established under section 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded. See, e.g., Allen v. U.S. Postal Service, 2 MSPB 582 (1980); Kling v. Department of Justice, 2 MSPB 620 (1980); see also 5 CFR § 550.806 (1983).

[Footnote omitted.]

The Authority found that the arbitrator in *Army Support Command, Hawaii* had failed to provide such an articulated decision and remanded the award to the parties with the direction that they request, jointly or separately, that the arbitrator clarify and interpret his award and to articulate fully specific findings on all pertinent statutory provisions. Likewise, in several subsequent decisions in which the Authority found that the arbitrator's determinations were not properly supported, tne Authority remanded the cases to the parties and in each case directed them to request the arbitrator to articulate fully specific findings on all pertinent statutory requirements. *E.g.*, *Naval Air Development Center, Department of the Navy and American Federation of Goverment Employees, Local 1928, AFL-CIO*, 14 FLRA 782 (1984); *Audie L. Murphy Veterans Administration Hospital, San Antonio, Texas and American Federation of Government Employees, AFL-CIO, Local No. 3511*, 15 FLRA 276 (1984); *American Federation of Government Employees, Local 2667 and Equal Employment Opportunity Commission*, 15 FLRA 281 (1984); *U.S. Army Missile Readiness Command and American Federation of Government Employees, Local 1858*, 15 FLRA 286 (1984).

In each of those cases the award had been issued on a date prior to the issuance of *Army Support Command, Hawaii*, and as specifically noted in each decision "without the benefit of the instruction and guidance provided by *Army Support Command, Hawaii*." For that reason, the Authority remanded each of those awards to the parties for the limited purpose of having the arbitrator clarify and interpret his award regarding attorney fees to articulate fully specific findings on all pertinent statutory provisions relating thereto.

In contrast, the award of attorney fees in this case was issued more than one year subsequent to the issuance of *Army Support Command, Hawaii*, and thus with the benefit of the instruction and guidance provided therein. Since it did not provide a fully articulated, reasoned decision, it was found deficient by the Authority and the award was set aside. In considering the request for reconsideration of this case, we note that the Authority did not *explicitly* announce in *Army Support Command, Hawaii*, or in the subsequent remands of awards of attorney fees which were issued prior to *Army*

Support Command, Hawaii, that deficient awards of attorney fees issued thereafter despite the benefit of that guidance would be set aside rather than remanded. The Authority finds that arbitrators and parties, including the Arbitrator and parties in this case, were not explicitly apprised by the Authority in any of its published decisions that the Authority would set aside an award of attorney fees that was not fully supported as required. Nor were parties fully apprised by the Authority of their responsibility and interest in ensuring that arbitrators make the requisite determinations. In these specific circumstances, the Authority has concluded that reconsideration of the decision of November 25, 1985, in this case is warranted and that this case should also be remanded to the parties for the purpose of having the arbitrator clarify his award.

In the future, however, consistent with our general practice concerning deficient arbitration awards, if the Authority finds that an award granting attorney fees is deficient because it is not fully supported as required, the Authority will set aside or modify the award as appropriate.

V. ORDER

Accordingly, for the reasons set forth above, the Union's request for reconsideration is granted. The Authority's decision of November 25, 1985, setting aside the Arbitrator's award of attorney fees is therefore rescinded. The case is hereby remanded to the parties and they are directed to request, jointly or separately, the Arbitrator to clarify and interpret his award of attorney fees to articulate fully specific findings on all pertinent statutory requirements. It should be noted that this Order is without prejudice to the Agency to renew any of the arguments it previously raised in its exceptions to the Arbitrator's award which were not considered by the Authority. Such arguments may be renewed before the Arbitrator or in any duly filed exceptions to the Arbitrator's interpretation and clarification of his award pursuant to this Order.

Issued, Washington, D.C., March 25, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 27

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. O-AR-583

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on exceptions to the award of Arbitrator Louis Aronin under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The issues submitted to arbitration essentially were whether the Agency violated Article 6, Sections 3A and 3B and Article 27, Section 10 of the parties' collective bargaining agreement and section 7131(a) and (d) of the Statute by denying payment of travel and per diem expenses for union representatives negotiating term and/or mid-term agreements and performing other representational functions. Article 6, Sections 3A and 3B provided that union representatives would be granted official time for various labor-management relations activities and Article 27, Section 10 provided that travel would be provided in accordance with the Federal Service Labor-Management Relations Statute. The Arbitrator found that by agreeing to the provisions involved, the Agency had agreed to pay travel and per diem expenses for employees on official time for the labor-management relations activities set forth in the agreement. Accordingly, as his award, the Arbitrator sustained the grievance and directed the Agency to pay travel and per diem expenses to employees who perform the representational functions set forth in the agreement.

III. EXCEPTIONS

In its exceptions, the Agency contends that the award is contrary to law. In support of its exceptions, the Agency argues, in effect, that the Agency is not obligated under section 7131 of the Statute to pay travel and per diem expenses for union representatives on official time and that the award is not authorized under the Travel Expense Act, 5 U.S.C. §§ 5701, *et seq*.

IV. ANALYSIS AND CONCLUSION

The Arbitrator found that by agreeing to Article 27, Section 10, the Agency had agreed to pay travel and per diem expenses for employees on official time for the covered activities. Therefore, while the Agency is correct in stating that section 7131 of the Statute does not require agencies to pay such expenses, the Agency in this case, as determined by the Arbitrator, negotiated and agreed to a provision requiring it to pay. Article 27, Section 10 of the parties' agreement, as interpreted by the Arbitrator to require the payment of travel and per diem expenses for union representatives performing the labor-management relations activities set forth in Article 6, Section 3 pertaining to official time, is essentially to the same effect as the proposal found by the Authority to be within the duty to bargain in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986). The proposal in that case provided:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In finding the proposal to be within the duty to bargain, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activities are payable from Federal funds. *Id.* at 3. In this case, the Authority concludes that the Arbitrator's award based upon his interpretation of the parties' agreement is not contrary to section 7131(a) and (d) of the Statute as alleged by the Agency in its exceptions.

Moreover, the Authority also ruled in *U.S. Customs Service* that the proposal in dispute was not inconsistent with the Travel Expense Act because that Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses. Id. at 6. In this case, the Arbitrator determined that the Agency agreed to pay the travel and per diem expenses related to the labor-management relations activities covered by the official time provision of the parties' agreement. The Authority finds that the Arbitrator's determination effectively constitutes, in terms of U.S. Customs Service, a finding that the Agency had exercised its discretion under the Travel Expense Act through negotiations and had thereby determined that the covered activities were sufficiently within the interest of the United States so as to constitute official business.

However, in U.S. Customs Service, the Authority concluded that the disputed proposal would not require the agency to authorize the payment of expenses which do not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowledgment that payment of any travel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the Federal Travel Regulations (FTRs).*/ In this case, the Arbitrator in directing the payment of travel and per diem expenses in connection with the covered activities did not expressly provide for the Agency to determine the propriety of particular travel and per diem expenses under the FTRs. Consequently, the Authority must modify the award to assure that it is consistent with requirements of the FTRs.

V. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, that portion of the award directing the payment of travel and per diem expenses is modified to provide as follows:

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

> The Employer shall pay travel and per diem pursuant to Article 27, Section 10, to employees who perform the representational functions on "official time" as set forth in Article 6, Sections 3A and 3B of the parties' agreement insofar as consistent with applicable requirements of the Federal Travel Regulations.

Issued, Washington, D.C., March 27, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 28

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Union

and

Case No. 0-NG-557

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, OFFICE OF THE SECRETARY
HEADQUARTERS, OFFICE OF THE GENERAL
COUNSEL, SOCIAL SECURITY DIVISION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of six Union proposals.[1] The proposals concern various aspects of performance appraisal systems.

II. Procedural Issue

The Agency moved that the Union's petition be dismissed because it was filed by the national office of the Union (AFGE) and not by a representative of the local Union (AFGE, Local 1923). Under section 7117(c) of the Statute and section 2424.2 of the Authority's Regulations a negotiability appeal must be filed by an exclusive representative. Nothing in either the Authority's Regulations or the Statute precludes the exclusive representative from designating an agent to file an appeal on its behalf. The designation of a representative for purpose of appeal to the Authority is strictly a matter for the Union to decide. American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service, 13 FLRA 697 (1984). The Agency's motion to dismiss is denied.

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[1] This case originally involved eight proposals. The Union has withdrawn its petition for review as to one, proposed section 7.C, and the parties have reached agreement as to a second, proposed section 8.2. These proposals will not be considered further here.

III. Union Proposal 1

Section 2.A

> The Administration has the right to establish critical elements, non-critical elements, and performance standards, subject to law, regulation and this Agreement.

A. Positions of the Parties

The Agency contends that Union Proposal 1 is outside the duty to bargain under section 7117(a)(2) of the Statute because the Authority has not determined that there is no compelling need for a conflicting agency regulation.

The Union contends that the proposal merely establishes that the Agency's performance appraisal system will recognize applicable provisions of the parties' agreement, and does not conflict with internal agency regulations for which there is a compelling need.

B. Analysis and Conclusion

As a general matter, the Authority has consistently held that general provisions requiring management to exercise its statutory rights under section 7106 in compliance with law are within the duty to bargain. See National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colo., 9 FLRA 151 (1982) (Union Proposal 2). See also American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (Union Proposal 1), *enforced sub nom.* Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 744 F.2d 842 (D.C. Cir. 1984), *cert. granted*, 105 S.Ct. 3497 (1985). The Authority has also held that management's identification of critical elements and the establishment of performance standards constitute exercises of the rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982). Further, the Authority has held that a proposal incorporating specific restrictions from a Government-wide regulation directly interfered with a management right because it imposed the provisions of the regulation as substantive contractual limitations without regard to the regulation's possible subsequent revision or elimination. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) (Proposal 2), affirmed as to other matters sub nom. NFFE, Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982). However, this proposal would not limit management or impose substantive contractual limitations but would only require the Agency to adhere to any requirements which are in effect at the time the Agency identifies critical elements and establishes performance standards.

The Agency's sole contention is that the duty to bargain in good faith extends to matters like this one covered by Department-level rule or regulation only if the Authority has determined that no compelling need exists for the rule or regulation. The compelling need provisions of the Statute are meant to insure that otherwise negotiable bargaining proposals are taken outside the duty to bargain only if the agency involved demonstrates and justifies an overriding need for the policies reflected in the rules or regulations to be uniformly applied throughout the agency. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 220 (1981). Therefore, an agency must (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in section 2424.11 of its Regulations. See American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 450, 454 (1980).

The Agency here has failed to identify or submit to the Authority the specific provision of internal agency rule or regulation upon which it relies. It contends only that its Personnel Manual generally bars negotiation over this proposal. The Authority finds that the Agency has failed to support its implicit allegation that the Union's proposal is barred from negotiations because it conflicts with an internal agency rule or regulation for which a compelling need exists. *Id.* at 454-55. The Authority concludes that Union Proposal 1 is within the duty to bargain.

IV. Union Proposals 2 & 3

Union Proposal 2: Section 2.B, Step 5

The critical and non-critical elements and individual performance standards will be communicated to bargaining unit employees on the negotiated performance evaluation form, prior to the appraisal period.

Union Proposal 3: Section 4.C

In addition to assessing the employee's performance on individual elements, as in "A" above, *the supervisor will evaluate the employee's overall job performance by summarizing the performance on the negotiated form*, using one of the following five summary ratings:

1. *Unsatisfactory*. This appraisal applies if the employee failed to meet one or more critical job elements regardless of performance on non-critical job elements.

2. *Minimally Satisfactory*. This appraisal applies if the employee only partially met one or more critical job elements *or* if the employee fully met all critical job elements but failed to fully meet a substantial number of non-critical job elements.

3. *Fully Satisfactory*. This appraisal applies if the employee, at a minimum, fully met all critical job elements and virtually all non-critical job elements *or* if the employee exceeded all of the critical job elements and fully met a substantial number of non-critical job elements.

> 4. Excellent. This summary appraisal applies if the employee exceeded all of the critical elements and virtually all of the non-critical job elements or if the employee substantially exceeded all critical job elements and fully met a substantial number of non-critical job elements.
>
> 5. Outstanding. This summary appraisal applies if the employee substantially exceeded all critical job elements and virtually all non-critical job elements.

[All of Proposal 2 and the underscored portion of Proposal 3 are in dispute.]

A. Positions of the Parties

The Agency contends that Union Proposals 2 and 3 conflict with an internal agency regulation which requires the use of a standard form by requiring the use of a negotiated performance evaluation form instead. It argues that a compelling need exists for this regulation and that the proposals are, therefore, outside the duty to bargain under section 7117(a)(2) of the Statute. In addition, the Agency contends that by requiring a "negotiated form" the proposals in essence require negotiation on performance standards and are outside the duty to bargain for that reason also.

The Union contends that Proposals 2 and 3 constitute negotiable procedures that do not conflict with the Agency's regulation. It further argues that even if there was a conflict the Agency has not established a compelling need for its regulation.

B. Analysis

1. Compelling Need

The Agency bears the burden of demonstrating a compelling need for its regulatory requirement that there be uniform Agency-wide use of its evaluation form. See discussion of Union Proposal 1. The Authority's illustrative standard for determining compelling need in section 2424.11(a) of its Regulations requires an agency to demonstrate that the rule or regulation upon which it relies is "essential as distinguished from helpful or desirable" to achieve certain ends. See American Federation of Government Employees, AFL-CIO, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441 (1981).

The Agency asserts that its requirement to use a standard form is essential to accomplishment of its mission or execution of its functions in a manner consistent with the requirements of an effective and efficient government. Its arguments in this regard all relate to its need to maintain control of the content and format of performance evaluation forms. It claims this control can only be achieved through uniform use of the form designated as 430-4-B set forth in HHS Instruction 430-4. The Union states that the information claimed by the Agency to be necessary is to be included on any negotiated appraisal form. Union Reply Brief at 4. The Agency itself indicates that the negotiated form would not be substantively different from and would contain the "same information" as its own form. Agency Statement of Position at 3. Since the negotiated performance evaluation form will contain essentially the same information as the Agency's own form, the Agency's assertion that use of its form is essential cannot be sustained.

2. Management Rights

Turning to the Agency's argument that the proposals violate management rights because they would in essence require bargaining on performance standards, the Authority has held as a general matter that proposals which are otherwise consistent with law and regulation and relate only to particular aspects of performance appraisal systems, apart from the identification of critical elements and the establishment of performance standards, are within the duty to bargain. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769, 780 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982). Similarly, proposals which establish procedures for the development and implementation of performance standards and critical elements, or which establish appropriate arrangements for employees adversely affected by the application of performance standards and critical elements to them, are within the duty to bargain under section 7106(b)(2) and (3) of the Statute. Id.

If the Union proposals did require the Agency to negotiate concerning the definitions of its performance standards they would, of course, be outside the duty to bargain under section 7106(a)(2)(A) and (B) of the Statute. See discussion of Union Proposal 1. However, nothing in the disputed language of the proposals nor in Union statements in the record lends support to the Agency's contention that the proposal's requirement that a negotiated form be used amounts to negotiation on the definitions of its performance standards. The Union specifically states that the definitions contained in the Agency's form would not be affected by these proposals. Union Reply Brief at 4-5. Since the Union is not attempting to negotiate on those definitions, the Agency's argument that the definitions are nonnegotiable is inapplicable to bar negotiations on Union Proposals 2 and 3.

C. Conclusion

Because the Agency has not demonstrated that its regulation is supported by a compelling need, it does not bar negotiation on Union Proposals 2 and 3. Further, the disputed portions of these proposals are not inconsistent with management rights under section 7106(a)(2) of the Statute. Union Proposals 2 and 3 establish procedures relating to the implementation of performance standards and critical elements. They are within the duty to bargain under section 7106(b)(2) of the Statute.

V. Union Proposals 4 & 5

Union Proposal 4: Section 6

> Performance appraisals will whenever possible be prepared annually based on employee performance expectations established for the 12 preceding months.

Union Proposal 5: Section 6.B

> Appraisals are generally due on a regular schedule annually but may be postponed under [certain] circumstances[.]

A. Positions of the Parties

The Agency contends that Union Proposals 4 and 5 are inconsistent with an Agency regulation which provides for performance appraisals to occur in January or October of each year and for which a compelling need exists.

The Union contends that its proposals do not conflict with the cited regulation.

B. Analysis and Conclusion

The Authority has held that prescribing periodic appraisal of employees on an annual basis is consistent with law and Government-wide rules or regulations and within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981) (Proposal 2), affirmed as to other matters sub nom. AFGE, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). The Union here clearly did not intend to require anything other than annual performance appraisals and did not link the term "annually" in the proposal to any specific month when the annual appraisals should occur. Union Reply Brief at 6. The Authority concludes that the proposals do not conflict with the Agency's Instruction requiring that annual performance appraisals occur in January or October of each year. In the absence of a conflict between the proposals and the Instruction, it is unnecessary to decide whether the Agency has demonstrated a compelling need for its regulation. See discussion of Union Proposal 1. The Authority finds that Union Proposals 4 and 5 are within the duty to bargain.

VI. Union Proposal 6

> Section 9.C
>
> Should remedial action fail and the employee's performance continue to be unacceptable after a reasonable opportunity to demonstrate improvement, the employee may be liable for adverse action under 5 U.S.C. 43. The appropriate personnel action will depend on the following considerations:
>
> 1. when the employee is capable of performing another position of the same grade, the supervisor should propose to reassign the employee to such a position;
>
> 2. when the employee is not capable of performing a position at the same grade but is capable of performing a position at a lesser grade, the supervisor should

propose a demotion to a position at the next lower grade;

3. a proposal of separation should only be proposed when the employee is determined to be incapable of the performance of any other position reasonably available.

A. Positions of the Parties

The Agency contends that Union Proposal 6 would prohibit it from demoting an employee for unacceptable performance until he or she had been given a chance to perform in similar positions of equal grade or removing an employee for unacceptable performance until he or she had been given a chance to perform in similar positions of a lower grade. The Agency argues that the Union's proposal is contrary to management's rights under section 7106(a)(2)(A) of the Statute, including the rights to remove or reduce in grade or pay employees in the Agency.

The Union argues that the proposal preserves the Agency's discretion to exercise its rights under section 7106(a)(2)(A). It contends that the proposal is a procedure under section 7106(b)(2) of the Statute which management will observe in exercising those rights and an appropriate arrangement under section 7106(b)(3) of the Statute for employees adversely affected by the exercise of management's right to take adverse action against employees for unacceptable performance.

B. Analysis and Conclusion

The Authority finds that Union Proposal 6 is substantially identical to the proposal which the Authority held to be outside the duty to bargain in National Labor Relations Board Union and National Labor Relations Board, Office of the General Counsel, 18 FLRA No. 42 (1985). In the NLRB case, the Authority found that a proposal which similarly would have required the agency to reassign an employee prior to terminating or demoting that employee substantively interfered to an excessive degree with management's rights under section 7106(a)(2)(A) to remove employees or reduce them in grade or pay.[2]

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[2] In its recent decision in National Association of Government Employees, Local R14-87 and Kansas Army National

(Continued)

Additionally, the use of the term "should" in Proposal 6 does not make the proposal discretionary rather than mandatory. Instead, the plain language of the proposal would require the Agency in virtually all instances to reassign an employee prior to terminating or demoting that employee for unacceptable performance contrary to management's rights under section 7106(a)(2)(A) of the Statute. See American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446, 450-52 (1983) (rejecting union's contention that the phrase "to the extent practicable" removes substantive limitation that proposal would have placed on agency's right to identify critical elements) and American Federation of Government Employees, AFL-CIO, National Border Patrol Council and Department of Justice, Immigration and Naturalization Service, 16 FLRA 251, 252 (1984) (rejecting union's contention that the phrase "to the maximum extent possible" leaves the agency with discretion to exercise its right to assign work "without inhibition").

The Authority finds that the Agency has provided insufficient support in the record to decide whether Union Proposal 6 violates additional management rights under section 7106(a)(2)(A) of the Statute. However, for the reasons set forth in the NLRB case, we find that Union Proposal 6 is contrary to the Agency's right under section 7106(a)(2)(A) of the Statute to remove employees or reduce them in grade or pay for unacceptable performance. We further find that the proposal constitutes neither a negotiable procedure under section 7106(b)(2) nor an appropriate arrangement under section 7106(b)(3) of the

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(Continued)

Guard, 21 FLRA No. 4 (1986), the Authority specifically adopted the rationale of the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981). Thus, as we stated in the Kansas Army National Guard decision, we will henceforth determine whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute by determining whether the proposal excessively interferes with the exercise of management's rights.

Statute and conclude that Union Proposal 6 is outside the duty to bargain.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1-5.[3] IT IS FURTHER ORDERED that the Union's petition for review as to Union Proposal 6 be, and it hereby is, dismissed.

Issued, Washington, D.C., March 27, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding Union Proposals 1-5 to be within the duty to bargain, the Authority makes no judgment as to their merits.

21 FLRA No. 29

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL PARK SERVICE,
NATIONAL CAPITOL REGION,
U.S. DEPARTMENT OF INTERIOR

Agency

Case No. 0-AR-755

and

POLICE ASSOCIATION OF THE
DISTRICT OF COLUMBIA

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Charles Feigenbaum filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievants in this case, two Park Police officers, volunteered for a temporary detail to New York City. In its request for volunteers, the Agency had informed interested officers that Government-furnished lodging would be provided and that two officers would be assigned to each room. The grievants indicated that they would stay in lodging provided by the Agency. They also received travel authorizations which authorized payment of expenses not to exceed $75 per day. The grievants testified that when they arrived at the designated hotel in New York they were informed that no rooms had been reserved for the Park Police. The grievants then made their own separate arrangements for single occupancy rooms at $39 per day for each room because the single room rate was within the limit set by their travel authorizations. However, the double occupancy rate would have been about half the single occupancy rate for each of the grievants.

When supervisory personnel became aware of the grievants' arrangements, they were informed that while they might be technically in compliance with their travel authorizations, they could not continue to stay in single rooms but had to double up. The grievants refused, their details were terminated and they filed the grievances which were eventually submitted to the Arbitrator. The grievants were, however, also reimbursed for their hotel expenses at the single room rate.

The Arbitrator framed the issue in the grievances as whether the Agency violated law, regulation, or the parties' collective bargaining agreement by requiring the grievants to share a room and by terminating their details when they refused to do so. He determined that there did not appear to be any authority which addressed the question of the number of employees that can be assigned to a hotel room. The Arbitrator found, however, that 5 U.S.C. § 5911(e), which prohibits requiring an employee to stay in rental quarters unless certain conditions are met,*/ also precludes requiring employees to share hotel rooms unless the same conditions are met. The Arbitrator found that it was reasonable to conclude that hotel rooms contracted for or reserved by an agency are considered to be Government-furnished quarters and therefore that the provision applies to such rooms as well. He further concluded that the intent of that provision was to afford employees in a temporary duty or travel status some degree of freedom to choose their own accommodations and to protect them against being forced into inadequate quarters. The Arbitrator added that the benefits of § 5911(e) were subject to a requirement that an employee must exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business and subject also to the conditions set forth in 5 U.S.C. § 5911(e). The Arbitrator found that the grievants had not acted imprudently and that the conditions in 5 U.S.C. § 5911(e), which might have permitted the employer to require the grievants to share a room in certain circumstances, had not been met in this case. The Arbitrator therefore determined that the Agency acted improperly when it attempted to require the grievants to share a room and that their refusal to double up was not a legitimate reason for terminating their details. He held that the Agency could not require employees to double up in hotel rooms while in travel status unless the requirements of 5 U.S.C. § 5911(e) are met. He also awarded one grievant backpay for 41 hours of overtime he estimated the grievant would have worked if his detail had not been terminated.

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*/ 5 U.S.C. § 5911(e) provides:

> (e) The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise.

III. FIRST EXCEPTION

A. Contention

In its first exception, the Agency alleges that the award is contrary to law because the Arbitrator misapplied 5 U.S.C. § 5911(e). The Agency argues that the Arbitrator erred by equating hotel rooms reserved by the Agency with "quarters" as used in 5 U.S.C. § 5911(e) and by failing to recognize that the grievants were not required to stay at the hotel but had the option to stay elsewhere or to stay in single rooms in the hotel and pay the extra cost. The Agency further argues that requiring employees to share rooms is not the same as requiring them to stay at a specific place and that there was no basis for the Arbitrator to determine that the lodgings were inadequate when employees were required to double up as there was no testimony or evidence in the record to support such a determination.

B. Analysis and Conclusion

The Authority finds that the Agency has not established that the Arbitrator erred by applying 5 U.S.C. § 5911(e) or that his award is contrary to that statutory provision. Rather, the Agency is merely disagreeing with the Arbitrator's reasoning and conclusions. In the absence of a showing that the award is contrary to law, this exception provides no basis for finding the award deficient. Southeastern Program Service Center, Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 2206, 7 FLRA 418 (1981).

The Authority notes that the Federal Travel Regulations (FTRs), which govern official travel, require that an employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business. FTR Chap. 1-1.3a. The FTRs also provide that heads of agencies are responsible for ensuring that expenses incurred by travelers are allowable subsistence expenses that were necessarily incurred in connection with the specific travel assignment. FTR Chap. 1-8.3b. The grievants were authorized a maximum actual expense subsistence of $75 per day. Their expense claims did not exceed that amount with single occupancy rooms. The Agency was responsible under the FTRs for determining whether the grievants' expenses were allowable and necessary and whether the grievants acted prudently in incurring those expenses. The Agency's determination is reflected in the fact that the grievants were reimbursed for their single room expenses. Such action further supports the conclusion that the Arbitrator's determination is not inconsistent with authorities governing employee travel on official business.

IV. SECOND, THIRD AND FOURTH EXCEPTIONS

A. Contentions

In its second, third and fourth exceptions, the Agency contends respectively: that the Arbitrator's award fails to draw its essence from the parties' agreement because the Arbitrator did not expressly find that management violated the parties' agreement; that the Arbitrator exceeded his authority by deciding an issue that was not raised in the grievance or by the parties; and that the award is based on a nonfact because even assuming that

5 U.S.C. § 5911(e) applies, the Arbitrator erroneously concluded that portions of that provision, which could have warranted requiring the employees to share a room, had not been met.

B. Analysis and Conclusion

As already noted it is well-established that exceptions which constitute nothing more than disagreement with an arbitrator's reasoning and conclusions in resolving a dispute do not provide a basis for finding an award deficient under the Statute. E.g., Defense Logistics Agency, Defense Depot Memphis, Memphis, Tennessee and American Federation of Government Employees, Local 2501, 13 FLRA 5 (1983); U.S. Army Corps of Engineers, New Orleans District and National Federation of Federal Employees, Local No. 1124, 13 FLRA 70, 71 (1983). The Authority finds that the Agency's contentions in support of its second, third and fourth exceptions constitute nothing more than disagreement with the Arbitrator's reasoning and conclusions in resolving the dispute before him. Consequently, the Authority concludes that these exceptions provide no basis for finding the Arbitrator's award deficient.

V. FIFTH EXCEPTION

A. Contention

In its fifth exception, the Agency principally alleges the award of 41 hours retroactive overtime pay to one of the grievants is contrary to the Back Pay Act, 5 U.S.C. § 5596.

B. Analysis and Conclusion

The Authority has held that the Back Pay Act requires that for an award of backpay to be authorized, the arbitrator must find that an agency personnel action was unjustified or unwarranted, that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction. American Federation of Government Employees, Local 3553, AFL-CIO and Veterans Administration Medical Center, New Orleans, Louisiana, 18 FLRA No. 65 (1985).

The Arbitrator determined that the Agency acted improperly when it attempted to require the grievants to share a room and terminated their detail when they refused. However, the Arbitrator also found that "overtime was not certain." The Arbitrator did not expressly find both that the unjustified termination of the detail directly resulted in the loss of overtime pay and that but for this unjustified action the grievant would have received such pay. The Authority, therefore, finds that there is an insufficient legal basis for an award of backpay in this case and that the Arbitrator's award of overtime pay is contrary to the Back Pay Act.

VI. DECISION

Based on the foregoing, the Agency's exceptions numbered one through four are denied, and the award is modified by striking the award of backpay.

Issued, Washington, D.C., March 27, 1986

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Federal
Labor Relations
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NUMBER 355 **REPORT OF CASE DECISIONS** **April 11, 1986**

NEGOTIABILITY CASES

21 FLRA No. 31 (March 31, 1986)

National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, Corps of Engineers, Case No. 0-NG-501

21 FLRA No. 32 (March 31, 1986)

National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, Case No. 0-NG-731

21 FLRA No. 34 (April 8, 1986)

American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-759

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 30 (March 31, 1986)

Department of the Navy and Department of the Navy, Portsmouth Naval Shipyard, (Portsmouth, New Hampshire) and Richard Pearl and Victor Porro and Portsmouth Federal Employees Metal Trades Council, AFL-CIO, Case Nos. 1-CA-30303, 1-CA-30305 and 1-CA-30306

21 FLRA No. 33 (April 7, 1986)

U.S. Immigration and Naturalization Service, San Diego, California and American Federation of Government Employees, AFL-CIO, Local 2544, Case No. 8-CA-1195

Y 3.F31/21-3:

ARBITRATION CASES

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

March 31, 1986

0-AR-1087 0-AR-1092 0-AR-1093

April 7, 1986

0-AR-1086

Federal Labor Relations Authority

21 FLRA No. 30

Dep't of the Navy and Dep't of the Navy, Portsmouth Naval Shipyard, (Portsmouth, N.H.) and Richard Pearl and Victor Porro and Portsmouth Federal Employees Metal Trades Council, Case Nos. 1-CA-30303, 1-CA-30305 and 1-CA-30306 (Dec. March 31, 1986)

DIGEST HEADINGS	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	
4800. Otherwise Refuse to Comply with the Statute.	7116(a)(1), (5) and (8) 7118(a)(4)(A)
6810. Remedies for Agency Violation	7118(a)(7) 7122(a) and (b)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Enforcement of Award
    - Authority's Remedy
      - Comply with Award in accordance with FMP Sup 532-1, App J
      - Backpay - Environmental Differential
    - Where the Authority had Dismissed Exceptions to the Award
  - Finality of Award
    - Request for Clarification from Arbitrator
- Compensation
  - Backpay
    - "But For" Test of Back Pay Act (5 U.S.C.§ 5596)
  - Environmental Differential Pay
- Safety and Health
  - Asbestos Exposure on Submarines
  - Joint Asbestos Safety Committee
    - Arbitration Award Ordering Establishment of
- Unfair Labor Practice
  - Actions of Higher Level Agency Management
    - Preventing Activity from Complying with Arbitration Award
  - Agency Violations
    - Otherwise Refuse to Comply with the Statute
      - § 7122(b)
  - Procedure
    - Time Limits for Filing a Charge [7118(a)(4)(A)]
      - Failure to Comply with an Arbitration Award is a Continuing Violation
  - Remedy
    - Arbitration Award Enforced
    - ALJ's Recommended Order Modified
      - Compliance with FPM Ordered In Lieu of FLRA Investigation

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A failure to comply with an arbitration award to which no timely exceptions had been filed under § 7122(a) constituted a violation of § 7116(a)(1) and (8). Retention of jurisdiction by the arbitrator did not serve to extend the statutory time limit [7122(b)] for filing exceptions to the award or render the award interlocutory. Thus when the agency refused to establish a joint asbestos safety committee; pay employees environmental differential pay; and take other actions required by an arbitration award, it violated the Statute.

The Authority modified the ALJ's recommended order regarding the determination of the amount of environmental differential pay (EDP) due certain employees. Because, in the Judge's view, the record did not clearly establish all periods of the agency's liability for payment of EDP, the Judge ordered the respondents to make available to the Authority or its agents, upon request, those records and documents necessary to analyze the amount of backpay to be awarded. In the Authority's view, an order which requires the respondents to fully comply with the arbitration award and pay EDP to the affected employees in accordance with the regulatory requirements pertaining to such payments contained in FPM Supplement 532-1, Appendix J, as referenced in both the parties' collective bargaining agreement and the arbitrator's award, would effectuate the purposes and policies of the Statute. The determination as to which employees are eligible for such payment and for what periods of time is appropriately resolved through compliance procedures.

The acts and conduct of higher level agency management may constitute an unfair labor practice where such conduct prevents agency management at the level of exclusive recognition from fulfilling its obligation to comply with a final and binding arbitration award. (ALJ footnote 1)

Failure to comply with an arbitration award constitutes a continuing violation of the Statute; thus, the six month limitation in which to file a charge under the Statute cannot bar an action against an agency that continues to fail to comply with a final and binding arbitration award. (ALJ footnote 1)

Federal Labor Relations Authority

21 FLRA No. 31

NFFE, Local 29 and Dep't of the Army, Kansas City District, Corps of Engineers, Case No. 0-NG-501
(Decided March 31, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
  2600. Conditions for Review
    2602. Proposal Alleged to be Inconsistent with Government-wide Reg.

STATUTE

7106(a)(2)(A) and (C)
7106(b)(2) and (3)
7117

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Alleged to be Inconsistent with Government-wide Reg.
      5 CFR Part 351 (reduction-in-force)
      FPM Chapter 351 (reduction-in-force)
  Positions
    Transfer of Function to Another Competitive Area
      Employee's Election Not to Transfer
        Mandatory RIFs in Losing Area vs. Adverse Action Proceedings
Mandatory Subjects of Bargaining
  Appropriate Arrangements [§ 7106(b)(3)]
    Not Applicable to proposals that conflict with a Government-wide Rule or Regulation
  Procedures [§ 7106 (b)(2)]
    Not Applicable to proposals that conflict with a Government-wide Rule or Regulation
5 U.S.C. § 3502

DIGEST NOTES

A proposal is nonnegotiable that would require that when an employee elects not to transfer to another district when his job function is transferred, the employee would be subject to RIF procedures within his current district. Under such a proposal, the employee would not be terminated at his current job location by adverse action procedures. Nor would the employee be subjected to RIF procedures in the district to which his job function is transferred. Applicable Government-wide rules and regulations require that before a RIF is conducted in connection with a transfer of function from one competitive area to another, each competing employee in a position identified with the transferring function shall be transferred to the continuing competitive area. 5 C.F.R. § 351.302(a). Employees who refuse to transfer with their position or function may be subject to separation through adverse action procedures. FPM, Chapter 351, Subchap. 5-3.c.(2). Under certain circumstances, however, the OPM regulations allow for use of RIF procedures for purposes of assigning or separating, as appropriate, employees who decline to transfer with their function. The regulations require, among other things, that there is agreement between the two areas that the movement of employees is not essential to the continuity and efficiency of the function. FPM, Chapter 351, Subchap.5-3.c.(3) The union proposal, however, would effectively require that RIF procedures be instituted in the losing competitive area based solely on an employee's desire not to transfer with the function and without any consideration being given to preserving the continuity and efficiency of the function. Thus the proposal is inconsistent with a Government-wide rule or regulation and is outside the duty to bargain under § 7117.

21 FLRA No. 27

NFFE, Local 29 and Dep't of the Army, Kansas City District, Army Corps of Engineers, Kansas City, Mo., Case No. 0-NG-731 (Decided March 31, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS

2000. NEGOTIABILITY
    2150. Management Rights
        2151.20 Internal Security Practices
        2152.10 Direct Employees
        2152.35 Discipline Employees
        2152.40 Assign Work
    2210. Mandatory Subjects of Bargaining
        2210.01 Procedures

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A)
7106(b)(2)

SUBJECT MATTER INDEX ENTRIES

Negotiability
    Conditions for Review
        Proposal Alleged to be Inconsistent with Federal Law
            Federal Claims Collection Act of 1966 Pub. L. No. 89-508, 80 Stat. 309 (1966)
    Management Rights
        Assign Work
            Right to Remain Silent
        Direct Employees
            Right to Remain Silent
        Discipline Employees
            Preclusion where Employee Held Financially Liable for Loss
            Right to Remain Silent
        Internal Security Practices
            Application of Practice vs. Determination of Practice
                Discipline preclusion where Employee Held Financially Liable for Loss
            Monetary Liability Limit
    Mandatory Subjects of Bargaining
        Procedures [§ 7106(b)(2)]
            Discipline preclusion where Employee Held Financially Liable for Loss
10 U.S.C. § 4831, *et seq.*

DIGEST NOTES

A proposal is nonnegotiable that limits an employee's liability for the loss, damage to or destruction of Government property to $150.00. The agency's applicable regulation provides a higher limit of one month's pay and, according to the agency, is intended to cause employees to exercise due care when dealing with Government property. The proposal violates the agency's right to establish its internal security practices under § 7106(a)(1). An agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. The union's argument that the agency's regulation is not effective is beside the point. It is not appropriate for the Authority to adjudge the relative merits of an agency's determination to adopt one practice from among various possible internal security practices, where the Statute vests the agency with authority to make that choice. However, the proposal is not inconsistent with the Federal Claims Collection Act of 1966 because the agency was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted. (proposal 1)

A proposal is nonnegotiable that would require the agency to choose between holding an employee financially liable or imposing disciplinary action for loss, damage or destruction of property caused by the employee, but not both. The proposal would interfere with management's right under § 7106(a)(2)(A) to take disciplinary action against its employees by conditioning the exercise of this right upon the agency's relinquishment of its right to impose financial liability. Contrary to the union's contention, the proposal is not merely procedural in nature. Also, contrary to the agency's contention, the decision to hold an employee financially liable concerns only the application of the agency's internal security practices. It does not affect the determination of what the practices will be and would not directly interfere with management's right to determine its internal security practices under § 7106(a)(1). (proposal 2)

A proposal is nonnegotiable that would give an employee the right to remain silent during any discussion with management in which the employee believes disciplinary action may be taken against him or her. The proposal would prevent management from acting at all with regard to its substantive rights under § 7106(a)(2)(A) and (B) to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance. (proposal 3)

21 FLRA No. 33

INS, San Diego, Cal. and AFGE, Local 2544, Case No. 8-CA-1195 (Decided April 7, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	**STATUTE**
4000. UNFAIR LABOR PRACTICE: AGENCY	7114(a)(2)(B)
4800. Otherwise Refuse to Comply with the Statute	7116(a)(1) and (8)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with the Statute
      § 7114(a)(2)(B)
  Decision on Remand
  Union Representation
    Investigatory Examinations
      "Reasonable Belief" [§ 7114(a)(2)(B)(i)]
        Where Management Grants Immunity

DIGEST NOTES

An employee had "reasonable belief" that disciplinary action might result from an investigatory interview despite the agency having granted him immunity, the U.S. Court of Appeals for the District of Columbia held in American Federation of Government Employees, Local 2544 v. FLRA, 779 F.2d 219. The Authority, accepting the Court's opinion as the law of the case, held that the agency by denying the request of a unit employee for union representation at an investigatory interview, and by conducting the interview despite the denial of the employee's request, failed to comply with § 7114(a)(2)(B) and thus violated § 7116(a)(1) and (8).

property or damage; the agency's applicable regulation provides a higher limit of one month's pay and, according to the agency, is intended to ensure employees exercise due care when dealing with Government property. The proposal violates the agency's right to determine its internal security practices under § 7106(a)(1). The agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. The union's argument that the agency's regulation is not effective in making the point. It is not appropriate for the Authority to examine the relative merits of an agency's determination to adopt one practice from among various possible internal security practices, [illegible] with [illegible] that [illegible] is not inconsistent with the Federal Claims Collection Act of 1966 because the agency was vested with the existing authority to compromise, settle or close claims when [illegible] enacted. (Proposal 1)

A proposal is nonnegotiable that would [illegible] to choose between holding [illegible] disciplinary action for loss, damage or destruction of property caused by the employee, but not both. The [illegible] interfere with management's right under § 7[illegible] disciplinary action against its employees [illegible] exercise of this [illegible] right to impose financial [illegible] contention, the proposal is not merely procedural in nature. Also, contrary to the agency's contention, the decision [illegible] employee financially liable concerns only the application of the [illegible] § 7106(a)(2)(A) and (B) to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance. (Proposal 3)

Federal Labor Relations Authority

21 FLRA No. 34

AFGE, Council 214 and Dep't of the Air Force, HQ Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-759 (Decided April 8, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
    2150. Management Rights
        2151.20 Internal Security Practices
    2200. Subjects of Bargaining
        2201. At Election of the Agency
            2201.10 Methods and Means of Performing Work
        2210. Mandatory Subjects of Bargaining
            2210.01 Procedures
    2600. Conditions for Review
        2601. Proposal Alleged to be Inconsistent With Federal Law

STATUTE

7105(a)(2)(D) and (E)
7106(a)(1) and (a)(2)(A)
7106(b)(1) and (2)
7121(c)(1)

SUBJECT MATTER INDEX ENTRIES

Arbitration
    Forums - Contract Interpretation
    Grievance/Arbitration Procedures
        Scope
            Legislative History
            Not Limited by Internal Agency Procedures
            Other Statutes
                Comptroller General's Jurisdiction Not Indicative of Grievance Scope
                Where Specifically Exclusive
Comptroller General Decision B-192609
Negotiability
    Conditions for Review
        Proposal Alleged to be Inconsistent With Federal Law
            10 U.S.C. § 9835
    Management Rights
        Discipline Employees
            Stay of Action Pending Final Arbitration Award
        Generally
            Delay in Implementation of Management Rights
        Internal Security Practices
            Management's Plan to Prevent Damage or Loss of Property
                Standard for Monetary Liability
                    "Gross" Negligence vs. Negligence

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Subjects of Bargaining
  Election of the Agency
    Methods and Means of Performing Work
      Standard for Monetary Liability
  Mandatory Subjects of Bargaining
    Procedures
      Stay of Discipline Pending Final Arbitration Award

H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978)
H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 56 (1978)
H.R. Rep. No. 95-1223, 77th Cong., 1st Sess. 1 (1941)

S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978)
S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978).
S. Rep. No. 602, 77th Cong., 1st Sess. 1-2 (1941).
S. Rep. No. 836, 82nd Cong., 1st Sess. 1-2 (1951)

DIGEST NOTES

A proposal is nonnegotiable that establishes a standard different from the agency's standard for determining whether or not an employee will be "pecuniarily liable" for the loss, damage or destruction of Government property. The proposal would limit an employee's monetary liability to circumstances where an employee's displayed "gross" negligence rather than mere negligence, the standard in the agency's regulations. The proposal impinges on management's plan to prevent damage to or loss of agency property through the exercise of the agency's right under § 7106(a)(1) to determine its internal security practices. However, contrary to the agency's contention, the proposal does not concern the methods and means the Agency will use to carry out its internal security policy and, therefore, it is not inconsistent with § 7106(b)(2). (proposal 1)

A proposal is negotiable that would require that action against an employee because of loss, damage or destruction of Government property to be stayed until an arbitrator issues an award. The fact that a decision of the Secretary of the Air Force as to pecuniary liability is "final" as provided by 10 U.S.C. § 9835 is not sufficient to demonstrate that Air Force procedures are exclusive so as to preclude such disputes from the negotiated grievance procedures, including binding arbitration, provided by the Statute. While the proposal would delay disciplinary action, or a collection action in the case of an assessment action of pecuniary liability, until a final resolution of the employee's grievance, the proposal would not amount to interference with management's exercise of its rights. Rather, proposals to stay final agency action pending the outcome of the grievance procedure are negotiable procedures under section 7106(b)(2) of the Statute because they do not prevent management from acting at all with respect to its reserved rights. (proposal 2)

The Authority will only decide negotiability issues which are before it under § 7105(a)(2)(D) and (E). Disputes as to whether a proposal conflicts with the parties' master agreement may be resolved under the procedures provided by that agreement.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY AND
DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
(PORTSMOUTH, NEW HAMPSHIRE)

Respondents

and

Case Nos. 1-CA-30303
1-CA-30305
1-CA-30306

RICHARD PEARL

and

VICTOR PORRO

and

PORTSMOUTH FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Charging Parties

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondents and the General Counsel. The Portsmouth Federal Employees Metal Trades Council, AFL-CIO (Union) and the General Counsel filed oppositions to the Respondents' exceptions. The consolidated complaint alleged that the Department of the Navy and the Portsmouth Naval Shipyard, Portsmouth, New Hampshire (Shipyard) violated section 7116(a)(1), (5) and (8) of the Statute by refusing to bargain in good faith with the Union and by failing and refusing to comply with the provisions of section 7122(b) of the Statute based upon noncompliance with an arbitration award.[1]

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[1] The consolidated complaint was amended at the hearing to include the Department of the Navy as a named respondent.

II. Background

On July 28, 1983, Arbitrator John P. McCrory issued an award sustaining a grievance filed by the Union based on an asserted violation of the safety provisions of the collective bargaining agreement in effect between the Shipyard and the Union. As part of the award, the arbitrator outlined several corrective measures the Shipyard could employ to practically eliminate the potential for illness due to asbestos exposure by unit employees performing various functions on submarines. The arbitrator further directed the establishment of a Joint Asbestos Safety Committee within 30 days of the award. With respect to the Union's claim for the payment of Environmental Differential Pay (EDP) to unit employees exposed to asbestos, the arbitrator ordered such payment to the extent that the Shipyard failed to practically eliminate unnecessary exposure or unnecessary potential exposure to airborne asbestos. Finally, the arbitrator retained jurisdiction of the matter for a period of 90 days for the purpose of resolving any issues arising with respect to the award. Requests for clarification of the award were filed by the Respondents and the Union. Additionally, the Department of the Navy filed exceptions to the award pursuant to section 7122 of the Statute, which exceptions were found by the Authority to be untimely filed. Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, 15 FLRA 181 (1984).

III. Judge's Decision

The Judge found that the Respondents failed to comply with the arbitration award and thus violated section 7116(a)(1) and (8) of the Statute. In reaching this result, the Judge looked to the language and intent of the award in determining that the Respondents had not taken sufficient measures to comply with it. The Judge further found it unnecessary to decide whether the Respondents' conduct also violated section 7116(a)(5) of the Statute. To remedy the unfair labor practice, the Judge ordered the Respondents to fully comply with the arbitration award and to make available to the Authority or its agents, upon request, copies of all documents necessary to determine the amount of backpay to be awarded.

IV. Positions of the Parties

The Respondent raised a number of arguments which amount to disagreement with the Judge's findings and conclusions. The findings and conclusions of the Judge are consistent with established precedent and thus the Authority finds no basis for reversing them. However, we do modify the Judge's recommended Order for the reasons indicated below, and also address an exception to the Judge's Decision filed by the General Counsel.

V. Analysis

It is a well-established principle that a failure to comply with an arbitration award to which no timely exceptions have been filed pursuant to section 7122(a) of the Statute constitutes a violation of section 7116(a)(1) and (8) of the Statute.[2] *See United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151 (1984), *aff'd sub nom. Department of the Air Force, et al. v. Federal Labor Relations Authority*, 775 F.2d 727 (6th Cir., 1985). *See also Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina*, 15 FLRA 686 (1984); *U.S. Department of Justice and*

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[2] Section 7122 of the Statute provides as follows:

> § 7122. *Exceptions to arbitral awards*
>
> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

(Continued)

Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA No. 5 (1985), petition for review filed, No. 85-4167 (2nd Cir. Nov. 5, 1985); and U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA 935 (1982). In this case, as previously noted, the Authority found that the exceptions filed by the Department of the Navy were not timely filed.[3] Accordingly, the award became final and binding pursuant to the provisions of section 7122(b) of the Statute and there was an obligation on the part of agency management to take the actions required by the award, which it failed to do.

VI. Remedy

To remedy the unfair labor practice conduct, the Judge ordered the Respondents to fully comply with the arbitration award. As to that portion of the award directing the prospective payment of EDP, the Judge found that, but for the Respondents' failure to implement the award, employees would have received such payment for those periods of time during which substandard asbestos conditions were maintained

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2/ (Continued)

> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

[3] The Authority also found in Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, 15 FLRA 181 (1984), that retention of jurisdiction by an arbitrator, as here, does not serve to extend the statutory time limit for filing exceptions to an award under section 7122 of the Statute or render such award interlocutory.

on the various submarines involved. Because, in the Judge's view, the record did not clearly establish all periods of the Respondents' liability for payment of EDP, the Judge ordered the Respondents to make available to the Authority or its agents, upon request, those records and documents necessary to analyze the amount of backpay to be awarded in whatever manner is deemed appropriate for such determination. In the Authority's view, an order which will require the Respondents to fully comply with the arbitration award of July 28, 1983,4/ and pay EDP to the affected employees in accordance with the regulatory requirements pertaining to such payment contained in Federal Personnel Manual Supplement 532-1, Appendix J, as referenced in both the parties' collective bargaining agreement and the arbitrator's award,5/ will effectuate the purposes and policies of the Statute. The determination as to which employees are eligible for such payment and for what periods of time is appropriately resolved through compliance procedures. See U.S. Army, U.S. Army Materiel Development and Readiness Command, Warren, Michigan, 8 FLRA 806, n. at 807 (1982).

4/ With respect to the General Counsel's exception to the Judge's failure to specifically pass on the Respondents' asserted noncompliance with that portion of the award directing the establishment of a Joint Asbestos Safety Committee, the Authority finds that the Judge's finding of a failure to comply with the award encompasses the failure to establish such a committee. Further, the Judge's order to fully comply with the award, which is here adopted, extends to the establishment of such a committee.

5/ Federal Personnel Manual Supplement 532-1 governing the Federal Wage System provides in Appendix J a schedule of environmental differentials to be paid for exposure to various degrees of hazards, physical hardships and working conditions of an unusual nature. Among them is Category 16 relating to asbestos exposure which provides an 8% differential for the following: "Working in an area where airborne concentrations of asbest fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, adopts the Judge's findings and conclusions, and, with the modification noted above concerning the manner in which Environmental Differential Pay will be awarded to affected employees, adopts the Judge's recommended Order. Therefore, we find that the Respondents' failure to comply with the arbitration award violated section 7116(a)(1) and (8) of the Statute.[6]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of the Navy and the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award, including the payment of environmental differential pay to affected employees in accordance with law and regulation.

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[6] The Authority finds, as did the Judge, that in view of the result reached above, it is unnecessary to decide whether the Respondents' conduct also violated section 7116(a)(5) of the Statute.

(b) Post at the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., March 31, 1986

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL fully comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award, including the payment of environmental differential pay to affected unit employees in accordance with law and regulation.

____
(Activity)

Dated: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617) 223-0920.

[21 FLRA No. 30]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE NAVY AND
DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD,
PORTSMOUTH, NEW HAMPSHIRE

Respondents

and

RICHARD PEARL

and

VICTOR PORRO

and

PORTSMOUTH FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Charging Parties

. . . .

Case Nos. 1-CA-30303
1-CA-30305
1-CA-30306

Peter F. Dow, Esq.
Richard D. Zaiger, Esq.
For the General Counsel

Steven Sharfstein, Esq.
For the Respondent

Sally M. Armstrong, Esq.
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 82 Stat. 1191, 5 U.S.C. § 7101 *et seq*. It was instituted by the issuance of a consolidated complaint on March 30, 1984. The complaint alleges that the Department of the Navy, Portsmouth Naval

Shipyard, Portsmouth, New Hampshire, hereinafter called the "shipyard," has violated and continues to violate section 7116(a)(1), (5) and (8) of the Statute by failing to comply with an arbitration award issued on July 28, 1983 and by refusing to bargain in good faith with the Portsmouth Federal Employees Metal Trades Council, AFL-CIO, hereinafter called the "union." In its answer the shipyard denied the commission of any unfair labor practice. By notice dated August 7, 1984, the General Counsel notified the parties of its intent to move to amend the complaint at the hearing to include the Department of the Navy as a party respondent.[1]

A hearing was held in this matter on August 15, 16 and 17, 1984, in Portsmouth, New Hampshire. All parties were represented and afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed by all parties.

Upon consideration of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

At all times material herein, respondents have been and are now agencies within the meaning of section 7103(a)(3) of the Statute. In addition, the shipyard and the union were parties to a collective bargaining agreement at all material times herein.

In October 1981, the union filed a grievance on behalf of certain employees performing overhaul operations on submarines, alleging unsafe working conditions due to asbestos exposure. As a remedy the union sought replacement of all asbestos and asbestos products on board the submarine, and payment of environmental differential pay (EDP) in accordance with Article 20 of the parties' collective bargaining agreement[2] and Appendix J of Supplement 532-1 of the Federal Personnel Manual.[3]

---

[1] The shipyard objects to the General Counsel's motion on the ground that section 7118(a)(4)(A) of the Statute applies to the pleading of new parties as well as issues or causes of action. The acts and conduct of higher level agency management may constitute an unfair labor practice where such conduct prevents agency management at the level of exclusive recognition from fulfilling its obligation to comply with a final and binding arbitration award. Department of Health and Human Services, Region II, 15 FLRA No. 139, 15 FLRA 710, 711, fn. 2 (1984). The record reveals that the Department of the Navy was instrumental in at least the delay in implementation of the Joint Asbestos Safety Committee. Further, the Department of the Navy filed the exceptions to the award. In view of its cognizance of the proceedings and active participation, the Navy will not be prejudiced by the General Counsel's motion. Furthermore, failure to comply with an arbitration award constitutes a continuing violation; thus, the six month statute of limitations cannot bar an action against the Department of the Navy. See Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA No. 41, 13 FLRA 239, 246, fn. 8 (1983). Hereinafter, the Department of the Navy and the shipyard will be known collectively as "respondents."

The above grievance concerned conditions existing after the "ripout" phase of the overhaul, that is, the extensive removal of equipment to be refurbished. During this phase, the submarine is also stripped of asbestos insulation and only Shop 64 employees, who wear protective equipment, including respirators, are allowed inside. After the ripout phase, asbestos exposure may result from damage to unremoved asbestos lagging and other asbestos materials, caused by contact with equipment, tools, and chains used to move equipment. In addition, employees crawl and stand on asbestos covered pipes in the course of their work. Asbestos dust also remains in inaccessible areas and may become airborne due to disturbances such as air turbulence, and movement by employees. The ripout phase is followed by reinstallation, and testing and finishing phases.

THE ARBITRATOR'S DECISION AND AWARD:

The matter was submitted to arbitration at which evidence was adduced, argument presented, and an on-site inspection made by the arbitrator. On July 28, 1983, Arbitrator John P. McCrory sustained the grievance, finding that the shipyard had not made every reasonable effort to provide and maintain safe working conditions and, thus, was in violation of Article 29, Section 1 of the agreement.[4] He found that asbestos dust, asbestos particles, broken lagging with exposed asbestos and similar potential sources of airborne asbestos were "routinely" in work areas aboard submarines. The shipyard was ordered to take appropriate corrective action with respect to all overhauls beginning after receipt of the award and "to the extent practicable" for overhauls already in progress.

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[2] Article 20 provides in relevant part:

> Section 1. The Employer shall assign environmental pay to unit employees engaged in hazardous work or work involving difficult working conditions to the extent permitted and prescribed by applicable regulations.
>
> Section 3. Cognizant supervisors, when assigning employees to work for which environmental pay is indicated, shall so inform the employee. If at any time any employee believes that environmental pay is warranted, the employee should call the matter to the attention of his immediate supervisor who will make (or obtain) a determination and advise the employee. The employee may exercise his right to be represented by a Council steward when discussing environmental pay.

[3] FPM Supplement 532-1 Appendix J prescribes those working conditions for which environmental pay may be warranted. Category 16 (Asbestos) provides for payment of an 8% differential for:

> Working in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury.

Arbitrator McCrory rejected the shipyard's contention that there is a safe level of exposure to asbestos. He stated:

> Establishing exposure "thresholds" on the assumption that there is a "safe" level of exposure demonstrates a philosophy which has caused employees to be victimized . . . The time has come to reverse the presumption and give the benefit of any doubts regarding the toxic nature of airborne asbestos to employees and their families.

Similarly, the arbitrator refused to base payment of environmental differential pay on the Occupational Safety and Health Administration (OSHA) 2 fibers/cc standard. In November 1977, Arbitrator Robert L. Stutz issued an award in a dispute between the same parties relating to environmental pay for exposure to airborne asbestos fibers. Arbitrator Stutz based payment on the OSHA standard. Arbitrator McCrory did not consider himself bound by the Stutz award.

After finding the shipyard's safety precautions to be deficient, the arbitrator made the following recommendations:

> 1) Asbestos lagging which is not removed could be clearly marked so that employees would be aware of a potential hazard. Marking would also make surveillance efforts more efficient by reducing the need to test dust and particles each time it is suspected that asbestos is present.
>
> 2) More asbestos lagging could be removed during the ripout phase of an overhaul. The Agency has not explained why lagging which is sufficiently exposed to be damaged by employees working on an overhaul could not be removed, thus removing a potential source of airborne asbestos.

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[4] Article 29 provides in relevant part:

> Section 1. Each employee has the responsibility to work safely. The Employer will make every reasonable effort to provide and maintain safe working conditions. The Council will cooperate in these efforts and encourage employees to work in a safe manner.

> 3) A more durable and effective protective covering could be placed on unremoved asbestos lagging. The tape which is now used to seal lagging tends to peal off. The use of tough protective sleeves to cover and seal asbestos lagging which cannot be removed from work areas would reduce the incidence of damage and spills.
>
> 4) More frequent surveillances could be made of areas where the potential asbestos exposure is high. In view of the fact that the lagging is routinely damaged, weekly inspections may not be adequate. A system for marking asbestos would be helpful in identifying areas which require the most attention. The high percentage of cases in which corrective action was required after weekly surveillances suggest that exposure potential could be reduced by locating problems sooner.
>
> Finally, air monitoring techniques which are in general use leave something to be desired. Attempts should be made to develop and use procedures which can reliably detect levels of asbestos concentration below .1 fibers/cc and more attention should be given to the possible harmful effects of low levels of exposure.[5]

Addressing the environmental differential pay issue, the arbitrator construed the Federal Personnel Manual requirement to "practically eliminate[d] the potential for . . . personal illness or injury." He noted that employees who work in the confined interiors of submarines which contain asbestos are exposed to a concentration of airborne asbestos greater than that present in the outside environment. He concluded:

> This exposure can not practically be eliminated, except with the use of respirators, which both parties reject as an option in this case. I am not fully satisfied that some type of respirator program would not be helpful.
>
> The circumstances and conditions described in items 1 through 4 on page 23 above unnecessarily increase the potential for exposure to airborne asbestos, over that which is inherent due to the general presence of asbestos. They are a potential source of exposure which could be controlled by measures which would not place an unreasonable burden on the Agency. I do not propose an impossible burden of cleanliness, but rather measures designed to substantially reduce, but not totally eliminate, risk. As stated by Doctor Selikoff: It would be hoped that no avoidable asbestos exposure will occur in any circumstances . . . .

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[5] These corrective actions were listed on page 23 of the award.

> For the foregoing reasons I find that the Agency has not consistently employed safety measures which would practically eliminate the potential for illness due to exposure to asbestos fibers.

Arbitrator McCrory did not order back pay because the shipyard had followed the less rigorous OSHA standard in accordance with the Stutz award. He described his new standard as focusing on the "efforts made by the Agency to eliminate unnecessary exposure, or unnecessary potential exposure, to airborne asbestos, without reference to an arbitrary threshold." Last, Arbitrator McCrory ordered the establishment of a Joint Asbestos Safety Committee within 30 days of the award:

> Unless otherwise agreed, the Committee shall consist of six members, three selected by each party. The parties may designate a neutral member, or members, if they so choose. It is anticipated that the Committee will meet regularly and conscientiously pursue its assigned task. Its deliberations may generate suggestions which can be implemented as part of the Shipyard's safety program or provide the basis for collective bargaining proposals. The Committee shall remain in existence at least until the termination of the current collective bargaining agreement.

REQUESTS FOR CLARIFICATION AND EXCEPTIONS TO THE AWARD:

Requests for clarification were filed by the union on September 14, 1983 and by the shipyard on August 26, and September 23, 1983. On October 21, 1983, the Department of the Navy filed exceptions to the award, stating: "Under the authority of 5 U.S.C. § 7122(b), the agency will not implement the arbitrator's final award until the exceptions to it discussed herein are ultimately resolved."

On October 25, 1983, Arbitrator McCrory addressed the shipyard's requests for clarification. In part, he stated that the Department of the Navy's labelling system for unremoved asbestos is ineffective and does not comply with the award. The Navy uses signs instructing employees to treat all insulation as asbestos unless marked otherwise. Additionally, he reiterated that no specific asbestos level will trigger environmental pay: "It is more compatible with the wording of Appendix J to focus on the unnecessary sources, or unnecessary potential sources, of exposure to airborne asbestos."

On October 20, 1983, Arbitrator McCrory responded to the union's request for clarification. The union had posited, in part, the following interpretations of the award:

> (1) All employees assigned to work on boats without respirators are entitled to Category 16, Environmental Pay, from July 28, 1983.

> (2) Category 16, Environmental Pay, will continue to be paid employees assigned to work on the boats without respirators until such time that the hazard no longer exists or a testing method is developed which can, shift by shift and hour by hour, clearly indicate the atmosphere in the boats [sic] as asbestos fiber free as the atmosphere outside the Shipyard.

The clarification stated:

> The statements in items (1) and (2) are not correct. The intent of the Award is that Category 16 environmental pay should be paid when circumstances or conditions which increase the potential for exposure to airborne asbestos, over that which is inherent due to the general presence of asbestos in submarines, are not corrected.
>
> The standard in Appendix J . . . does not require the total elimination of work place exposure to airborne asbestos. It does, however, specify a low threshold for environmental pay eligibility—when the potential for illness or injury is not "practically eliminated." This, I concluded, requires that employees receive environmental pay if they are exposed to conditions like those described on page 23 of the Award.
>
> The minimal increased exposure to airborne asbestos (over concentrations found in the general environment) which is caused solely by working in submarines which contain asbestos materials does not trigger entitlement to environmental pay. It is when this minimal level of exposure is jeopardized by circumstances or conditions which have the potential to increase actual exposure and the risk of illness that Category 16 environmental pay is required. The use of a respirator program, which might obviate other precautionary measures discussed in the Award, was not used as a determining factor because that option was rejected as impractical by both parties.

On July 27, 1984, the Authority found the exceptions filed by the Department of the Navy to be untimely.[6]

COMPLIANCE WITH THE AWARD:

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[6] See Portsmouth Naval Shipyard, 15 FLRA No. 28, 15 FLRA 181 (1984).

A. REMOVAL OF ASBESTOS

1) 606 Submarine

Prior to the McCrory award, workers removed only as much asbestos insulation as necessary to facilitate the equipment overhaul. Between 20 and 40% of the asbestos was removed. Joseph Belmont, production superintendent, testified that the 606 submarine, which had just entered the shipyard at the time of the award, was stripped of nearly 100% of its accessible asbestos located in the engineering spaces. According to Belmont, respondents declined to remove some of the accessible asbestos where the likelihood of damage was small. The engineering spaces include the engine room, the auxiliary machinery (AMR 2) and the auxiliary machine spaces (AMS), and contain the vast majority of asbestos found on a ship.

Further, Belmont stated that accessible asbestos remains in other areas of a ship, such as the reactor compartment, and forward spaces, which contain mainly cold system asbestos. Department of Navy policy strictly controls work done in the reactor compartment, in order to minimize exposure to radiation. The policy forbids all unnecessary work in that area.

Cold system asbestos insulation is less susceptible to damage than hot system insulation. Hot systems are designed to retain heat and prevent electrical equipment from overheating. The asbestos lagging ranges from 1 1/2 to 5 inches thick and is covered with asbestos cloth. Amosite asbestos, the type which most easily becomes airborne, is sometimes used in these systems.

Cold system insulation prevents condensation in cooling water systems. Approximately 90% of cold systems designed within the past 20 years use rubber-type, asbestos-free insulation which is covered with 1/32 inch thick asbestos cloth. These materials are then covered with water base sealer and 8 to 10 coats of paint. Respondents conducted studies over two years and concluded that the probability of cold system asbestos becoming airborne is practically nill and that protective equipment is not even necessary for its removal.

Leo Mazzuchi, general foreman insulator of Shop 64, testified that respondents removed 95% of the accessible hot system insulation in the engine room and 100% in the AMS.[7] Thirty to 40% of the total asbestos content remains in the engine room, however, and 40 to 50% remains in the AMS, which contains more inaccessible areas. According to Belmont, about 10% of the total asbestos in a ship is inaccessible.

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[7] George Weinert, an industrial hygienist, testified that almost all of the hot system asbestos in the entire submarine was removed.

In October 1983, the 606 submarine was the first ship to undergo a second ripout, in order to eliminate asbestos uncovered by equipment removal during the first ripout in July 1983. Respondents removed approximately 200 bags of insulation during the second ripout and approximately 1600 bags in total. The previous record for removal was 646 bags.

Joseph Mason, a labor-relations specialist, Paul Clark, former director of the shipyard's Office of Safety and Health, and Belmont conceded that damage continues to occur on the submarines. Union witnesses claim that damage occurs on a daily or weekly basis.

Steve Perry, chairman of the union Safety and Health Committee, examined the 606 boat in August or September 1983 and counted more than 18 areas of torn lagging and 25 exposed ends on asbestos covered pipes. At least five of the areas were pipes running directly across the footpath, and employees were kicking the loose asbestos. Perry testified: "We saw other areas where I could reach down and grab a whole handful of asbestos — chunks of asbestos fibers . . ." Perry also saw a large piece of equipment which had been removed from the 606 boat placed on the dockside for a week and a half in September or October 1983. The asbestos lagging around the equipment contained large holes and tears, apparently caused by cables used to transport it.

According to Belmont, Perry praised the condition of the 606 boat in November 1983. He allegedly stated that the removal was "the best he could imagine happening" and that "if all submarines in Portsmouth or any place they were ripped out were in that condition not only would we not have a problem with asbestos or exposure to employees but we would exceed the requirments of the McCrory award." Perry testified that Belmont asked him about the 606 boat and he responded that he was "happy that they had taken out a little more asbestos but . . . appalled at the condition . . ." Based on my observation of the witnesses' demeanor, I credit Perry.

Dennis Frost, union chief steward, toured the boat in August 1984 and observed 15 to 20 problem areas, including several exposed ends, cracked and damaged lagging, and taped ends.[8] He estimated that up to 100 feet of accessible, unremoved asbestos remained on the ship.

2) 631 Submarine

The 631 submarine entered the shipyard in January 1984. Mason testified that the asbestos removal from the 606 boat was used as a standard for subsequent overhauls. According to Mazzuchi, respondents removed from the 631 boat 95% of accessible hot system insulation, excluding very low traffic areas. In addition, respondents removed cold system insulation that was marked or in high traffic areas. About 1800 bags were removed. The configuration of the 631 boat did not necessitate a second ripout.

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[8] John Froehling, union steward, concurred with this description.

Perry toured the 631 boat on August 14, 1984 with Frost, Froehling and Joseph Luvisi, former union chief steward. Perry observed 32 exposed ends, including one end within a foot of a worker's head, loose fibers adhering to the walls of the lithium bromide plant within inches of workers' faces, large chunks of almost pure asbestos on top of the lithium bromide plant, asbestos materials on the floor by the plant, employees sitting and standing on exposed asbestos, employees stepping on unprotected lagging, and a crushed pipe at foot level surrounded by white dust and powder.

Luvisi reported insulation that had been walked on or smashed during the ripout, large chunks of asbestos on the lithium bromide plant, asbestos fibers clinging to the side of the plant, and exposed ends.[9] Froehling described asbestos "all over the engine room, loose lagging, ripped ends, debris on the deck, et cetera." Workers were sitting and standing on the lagging and loose material and holding their hands on the pipes. He estimated that a couple hundred feet of protective sleeving would be necessary to cover the accessible, unremoved lagging.

After its tour of the 631 boat, the union called in the shipyard's Asbestos Recovery Control (ARC) Team, an emergency squad formed in December 1983 to repair damaged asbestos and survey the ships. Thirteen out of 15 samples taken by the team tested positive. The General Counsel entered into evidence 12 of the positive test results. All of the tests involved areas accessible to employees; though, in general, they were low traffic areas, such as crawl spaces.

The lithium bromide plant, from which four positive samples were taken, is 10 to 12 feet tall and located 10 feet from the middle passageway, a high traffic area. Lawrence Cooper, union president, testified that heavy machinery is often moved during the overhaul in the vicinity of the plant, causing it damage. Mazzuchi, who weighs 230 pounds, can get into the inboard area around the plant. Perry testified that employees using a nearby ladder hold onto pieces of the plant as they ascend and descend and brush their clothes against the plant in locations where the samples were taken.

Steve Herman, former chief steward, who worked on the 631 boat since February 1984, testified at the hearing that accessible asbestos lagging remains everywhere on the boat.

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[9] Frost corroborated this testimony by Perry and Luvisi.

The General Counsel introduced into evidence random entries from the shipyard's spill log, dating from January to March 1984.

3) The 690 Submarine

The 690 is a new class submarine which is largely asbestos-free. Respondents tested the 690 boat, which arrived in June 1984, and found 6 or 7 samples containing asbestos, out of 1,000. All the asbestos in the non-nuclear areas was removed; any remaining asbestos is very minute.

4) The 605 and 678 Submarines

The 605 submarine has been in the shipyard since October 1982, and the 678 submarine since March 1983. The ripouts were completed before issuance of the McCrory award. The 605 boat began its testing phase on July 20, 1983 and the 678 boat on September 28, 1983. Sixty per cent fewer employees are on the ship during this phase as compared to earlier phases. The risk of damage to asbestos is greatest during the ripout phase.

Frost was on the 605 boat in August 1984 and found "various open ends of lagging, a few tears in some cloth, several areas crushed and damaged, a couple of holes, like a water injection type hole . . . ." He opined that relative to the other submarines in the shipyard, the 605 boat contains the most asbestos. According to union witnesses, at least hundreds of feet of accessible asbestos remain.

B. PROTECTIVE COVERINGS

By at least August 23, 1983, respondents began to use the mud-cloth method of repairing damage to insulation and sealing exposed ends. The exposed area is covered with cement and fiberglass cloth forming a "cap," and sealed with a water-based adhesive. Previously, respondents used cloth tape, which sometimes curled or lost its adhesiveness when exposed to heat, steam or paint. Further, asbestos material adhered to the tape when it was removed. The cement is hot and fuses into the insulation. Mazzuchi testified that the mud-cloth method "outweighs the tape a hundred times." A worker climbing on a pipe may dislodge the "cap," however.

Respondents' witnesses testified that protective coverings, such as sheet metal and plastic toboggans, have been installed on the submarines to protect unremoved asbestos insulation, particularly in the reactor compartments. Union witnesses testified that they have not seen protective coverings on the 606 boat, the 631 boat, nor the 678 boat. According to Frost and Luvisi, the 605 boat contains one piece of protective sleeving over insulation, approximately 3 or 4 feet long.

C. MARKINGS

1) 606 Submarine

Respondents' witnesses claim that 500 small tags were posted on unremoved asbestos in the 606 submarine on or about September 13, 1983.[10] Some tags were removed along with asbestos during the October 1983 second ripout. In addition, on or about August 27, 1983, respondents posted large signs on the ship's four brows, the bridges which cross from the dry dock wall under the top of the submarine. The brow signs direct workers to treat all insulation as asbestos unless otherwise identified. Minutes in evidence of meetings between the shipyard and the union indicate that the 606 boat had been equipped with brow signs and small tags by the October 3, 1983 meeting.

Luvisi and Frost conceded that the 606 boat is substantially well marked. Frost opined that about fifty additional small tags are needed in the lower level. Perry contended, however, that in October 1983, the shipyard's agents told him that they had only equipped the boat with brow signs. I do not credit Perry's statement.

2) 631 Submarine

Respondents' witnesses attested to installation of small tags on the 631 submarine after its ripout phase. Weinert testified, however, that a week after ordering workers to tag the boat, he saw five tags in the engine room and none in the AMR-2.

The shipyard ordered two employees to tag the AMR-2 in the 631 boat on August 14, 1984 and the engineering spaces on August 15, 1984. Perry and Luvisi saw the employees during their tour of the boat on August 14: "They had a big box of signs — they were marking everything as fast as they could." One of these employees testified that she posted about fifty small tags at that time. She saw two tags already hanging in the AMR-2, and "a couple" tags in the engine room that were "dirty like they had been there for a while."

According to Perry and Luvisi, they saw no small tags in the engine room on August 14. Herman testified that he had worked on the boat since February 1984 and saw no small tags until August 16, 1984. Froehling testified that he saw no small tags in early August 1984 and estimated that more than one hundred were needed.

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[10] Although Mason, Belmont and Weinert testified that the small tags were posted on or about August 29, 1983, I credit Mazzuchi on this point since he was held responsible by Belmont for the development and installation of the tags.

3) The 605 and 678 Submarines

According to respondents' witnesses, the 605 and 678 submarines were tagged in October or November 1983. Priority was given to the 606 boat, since damage was more likely to occur during the ripout phase. Frost testified that in August 1984 he saw a few small tags on the side of the 605 boat and none on the lower level. He saw three in the engine room which, in his opinion, needed several hundred, and none in the AMS, which needed 50 to 100. Luvisi was on the 605 boat on two occasions during the six months preceding the hearing and on the 678 boat within five weeks of the hearing, and claims he saw no small tags on either boat.

Tags which have been posted may be removed by painters or mechanics during the course of their work. Most of the painting occurs in between the reinstallation phase and testing phase, but some painting is completed after the ripout phase. The 631 submarine had not reached the testing phase at the time of the hearing. Mechanics are apt to work on a boat at any time after the ripout phase. Respondents attempt to replace tags that have been removed.

Some tags are also removed before sea trial during the finishing phase of the overhaul because they are not authorized by the Department of the Navy as permanent fixtures. The 605 and 678 boats have been in the finishing phase since May 1984. Employees represented by the union work on the submarines after the finishing phases.

Order forms in evidence show that respondents ordered 1,000 small tags in August 1983, 5,000 in September 1983 and 1,000 in February 1984 In addition, respondents introduced into evidence a memorandum dated February 21, 1984 in which Weinert ordered Shop 64 to tag the 631 boat.

D. SURVEILLANCE

Prior to the McCrory award, respondents surveyed work areas for asbestos damage on a weekly basis. Respondents increased surveillance to a daily basis in the spring of 1983 and to every shift, after issuance of the McCrory award. In addition, respondents attempted to involve supervisors and employees in surveillance efforts. Supervisors are required to make three surveillance tours per shift.

E. ADDITIONAL MEASURES

The Asbestos Recovery Control Team was instituted as part of the "As Low As Reasonably Achievable" (ALARA) program, the Department of the Navy program to minimize employee exposure to hazardous materials such as asbestos. ALARA was applied to asbestos in late 1980 or early 1981. After the McCrory award, the program became more formalized; for instance, in September 1983 Code 106, the shipyard Office of Health and Safety, hired a full-time manager for the asbestos ALARA program who secured a van for the ARC Team and established a hot-line. Two employees from Shop 64 are now assigned on a full-time basis to the team each month. The ARC Team needs seven to twelve minutes to respond to a call, whereas Code 106 formerly required one hour.

Employee awareness has also improved. In addition to supplying signs, posters and hard hat stickers advertising the ARC Team, respondents have presented slide shows and formal lectures. Respondents have also published several articles on the subject in the shipyard magazine. The number of reports of potential asbestos problems has increased by 400%.

Respondents developed a water-injection procedure which reduces the risk of asbestos particles remaining after a ripout.[11] Water combined with a solvent enhancing its wetting properties is injected into the insulation, thereby reducing airborne levels during the ripout.

In approximately February 1984, respondents introduced glove bags, vinyl or plastic bags used to isolate areas during "minor ripouts" conducted while unprotected workers are in the area. Last, respondents established a spill log to monitor asbestos problems.

F. AIR MONITORING TECHNIQUE

Rather than develop its own procedure for monitoring airborne asbestos, respondents requested the National Institute of Occupational Safety and Health (NIOSH) to conduct research and develop a new technique. Respondents decided that they lacked the credibility to develop a procedure which would be accepted by the community. Respondents are in the process of implementing a new method introduced by NIOSH in February 1984.

G. JOINT ASBESTOS SAFETY COMMITTEE

In approximately March 1983, the union established a Safety and Health Committee. Joe Diewicki, director of industrial relations, informed the union that respondent considered the new committee to be strictly internal union business and would not allow use of official time for its activities.

After issuance of the McCrory award, the shipyard initiated meetings with the union and employees to discuss health and safety issues. These meetings continued until January 1984. Clark told Perry that it was not the committee mandated by McCrory and that the Department of the Navy prohibited him from establishing such a committee. Captain J.F. Yurso, then shipyard commander, and Mason also told union officials that the shipyard was not allowed to establish the McCrory committee.

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[11] At the end of a ripout, a ship is also vacuumed before employees outside Shop 64 are allowed to enter.

Masruchi solicited volunteers to participate in the meetings between the shipyard, the union and employees. Minutes in evidence indicate that attendance varied generally from five to seven persons. The union was permitted to select its representatives. There were no limitations on health and safety issues to be discussed. The shipyard's Office of Health and Safety had the authority to implement recommendations submitted by Clark as a result of these deliberations.

Clark testified: "When we established the meetings, we agreed it did not meet the letter of the McCrory award. I was not allowed to do that but our full intention was to do exactly what the McCrory award asked for." He conceded that respondents did not technically comply with the McCrory award.

On July 23, 1984, the parties entered into a Memorandum of Understanding establishing the McCrory committee.

H. ENVIRONMENTAL DIFFERENTIAL PAY

Respondents have paid environmental differential pay only in cases of actual exposure.[12] For instance, one recipient was struck by a chunk of asbestos weighing three to four pounds. Another recipient was installing a flange when asbestos spilled out of the pipe. In both cases, employees standing nearby also received payment. Some employees' claims have been denied because they could not provide airborne samples taken after actual exposure.

In order to collect, an employee must follow a procedure established in the parties' collective bargaining agreement.[13] The employee files a complaint with the supervisor, who may agree that environmental pay is warranted and annotate the employee's time card accordingly. This determination is reviewed by a labor-relations specialist. If the supervisor disagrees with the employee, the employee may grieve the decision. The union may also initiate a claim for environmental differential pay on behalf of an employee.

Perry testified that respondents could monitor, with difficulty, the whereabouts of its employees. It would have to secure information from every trade. Respondents attempt to identify for the medical action surveillance program all employees exposed to asbestos.

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[12] Although Mason claimed that environmental differential pay had been paid for potential exposure, his testimony was contradicted by Perry, Luvisi, and Belmont, respondents' witness. In addition, Mason could not identify any employee who received such payment. On the basis of the entire record, I credit Perry, Luvisi and Belmont.

[13] See footnote 1.

Prior to the McCrory award, respondents were obligated to pay the environmental differential when the airborne concentration exceeded 2 fibers/cc.

Discussion and Conclusions

The General Counsel has established by a preponderance of evidence that respondents have violated section 7116(a)(1) and (8) of the Statute by failing to comply with a final and binding arbitration award, issued on July 28, 1983 by Arbitrator McCrory, directing the shipyard to improve asbestos conditions on the submarines and pay environmental pay until such steps have been taken.

As a threshold issue, respondents contend that the case should be dismissed on procedural error. It reasons that because the Authority did not rule on the October 21, 1983 exceptions to the award until June 27, 1984, the award was not "final and binding" within the meaning of section 7122 of the Statute when the General Counsel issued the consolidated complaint in this matter. The time for filing timely exceptions expired on August 31, 1983. Based on previous Authority actions when exceptions to an arbitrator's award were untimely filed, finding an agency's subsequent refusal to implement an award as violative of section 7116(a)(1) and (8) of the Statute, the General Counsel's actions clearly were appropriate. Furthermore, Respondents' reliance on U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26, 15 FLRA 139 (1984), is misplaced. In that case, the agency had not failed to comply with an arbitration award because timely exceptions were pending before the Authority. In the instant case, exceptions filed by the Department of Navy were not timely.

Respondents also assert as a defense their good faith belief that the exceptions were timely, because the arbitrator retained jurisdiction for ninety days and because clarification requests were pending before the arbitrator. An agency acts at its own peril in disregarding the thirty-day deadline.[14] Section 7122 plainly states: "If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the day of such award, the award shall be final and binding" (emphasis added).[15] The law in that area is abundantly clear; therefore, respondents' argument must be rejected.

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[14] U.S. Department of the Interior, Bureau of Land Management, Eugene District Office, 6 FLRA No. 72, 6 FLRA 401 (1981), cited by respondents in support of their good faith belief, is inapposite in that it involved a response to a clarification request which gave rise to deficiencies asserted by the agency in its exceptions.

[15] In this regard, respondents' compliance with the award will be evaluated from October 26, 1983 when the arbitrator relinquished jurisdiction, rather than from June 27, 1984, as urged by the respondents.

In addition respondents contend that the arbitration award at issue is more appropriately interpreted through the negotiated grievance procedure. Although respondents state unequivocally that they complied with the award by August 31, 1983, they argue that the "amorphous 'steps management takes' standard" precludes evaluation of compliance in an unfair labor practice proceeding. While the arbitrator did not condition compliance upon a specific level of airborne concentration, neither did he leave the parties without guidance as to the safeguards to which employees working on submarines are entitled. It is my view that a reading of the award in its entirety dispels any notion of its ambiguity. Assuming, *arguendo*, that the award were ambiguous, I would still consider the unfair labor practice proceeding to be the proper forum for this matter as it stands. Any contention that an arbitrator's award is deficient because it is contrary to law, rule or regulation must be made by invoking the procedures established by Congress in section 7122(a) of the Statute. If a party fails to file exceptions to the arbitrator's award pursuant to section 7122(a), within the 30 day period established therein, the award becomes final and binding and "(a)n agency shall take the actions required by an arbitrator's final award"[16] *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 17 FLRA No. 13, 17 FLRA 40 (1985); *Department of Defense, Department of the Navy, U.S. Marine Corps, U.S. Marine Corps Air Station, Cherry Point, North Carolina*, 15 FLRA No. 137, 15 FLRA 568 (1984). Similarly, if a party fails to assert the ambiguity of an arbitration award in timely exceptions pursuant to section 7122(a)(2),[17] or in a request to the arbitrator for clarification, it is in my opinion barred from later doing so in an unfair labor practice proceeding. A party should not benefit from its failure to invoke the procedures established in the Statute.

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[16] See section 7122(b) of the Statute.

[17] Section 7122 provides in relevant part:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration . . . If upon review the Authority finds that the award is deficient --
>
> . . . .
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules or regulations.

In the award at issue, Arbitrator McCrory clearly stated that "the circumstances and conditions described in items 1 through 4 on page 23 above unnecessarily increase the potential for exposure to airborne asbestos, over that which is inherent due to the general presence of asbestos. They are a potential source of exposure which could be controlled by measures which would not place an unreasonable burden on the Agency." On page 23 he recommended that respondent 1) mark unremoved asbestos, 2) remove more asbestos, 3) install more durable and effective protective coverings, and 4) institute more frequent surveillance. Arbitrator McCrory repeated references to "unnecessary exposure" and "unnecessary potential exposure" several times in the award and in the responses to the parties' requests for clarification. In the response to the union's request, he again stated: "This (the Federal Personnel Manual), I concluded, requires that employees receive environmental pay if they are exposed to conditions like those described on page 23 of the Award."18/

The parties read differently McCrory's directive to remove additional asbestos. On brief, respondents stated:

> General Counsel literally reads McCrory's language on page 23 to the extent he mentions lagging "which is sufficiently exposed to be damaged during the overhaul" yet concurrently overlooks other portions of the award and the overall context of the award itself. For example, on pages 22 and 23 McCrory limits his discussion to asbestos lagging left in work areas "where the risk of damage during the overhaul is substantial."

A reading in its entirety of the paragraph to which respondents refer militates against respondents' interpretation:

> The record also shows that asbestos lagging and other asbestos materials are exposed and routinely damaged while unprotected workers are engaged in the overhaul of submarines. According to Mr. Weinert, prior to a ripout, insulation is tested to determine what is and what is not asbestos. Yet, lagging which is found to be asbestos is not marked or labeled and exposed asbestos lagging is left (after a ripout) in work areas where the risk of damage

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18/ The General Counsel asserts that the only conditions which trigger entitlement to environmental pay are the presence of free asbestos material and unremoved asbestos lagging. In view of McCrory's explicit reference to "items 1 through 4 on page 23," I am in agreement with the other parties that the triggering "conditions" include all four corrective actions listed on page 23 of the award.

> during the overhaul is substantial. Conceding the accuracy of Agency's statement that it would not be practical to remove all asbestos lagging, there is no apparent justification for not removing the lagging which is sufficiently exposed to be damaged during the overhaul, thereby causing a potential hazard in the work area. (emphasis added)

Arbitrator McCrory did not emphasize that the risk of damage must be substantial; rather, he emphasized the need to remove asbestos which is at least sufficiently exposed to be damaged. Further, McCrory reiterated in the award: "The Agency has not explained why lagging which is sufficiently exposed to be damaged by employees working in an overhaul could not be removed, thus removing a potential source of airborne asbestos."

Similarly, in his response to the union's request for clarification, McCrory made it plain that some quantity of asbestos greater than that found in the general environment would no doubt remain in the submarines. He was equally emphatic in the award, however, that all asbestos which is sufficiently exposed to be damaged is an unnecessary hazard. McCrory specifically rejected the assumption that there is a "safe" level of exposure. I cannot accept as a "differing and arguable" conclusion respondents' contention that accessible asbestos must be removed only from areas where risk of damage is substantial, that is, high traffic areas.

Testimony concerning unremoved asbestos on the 606 submarine is by no means conclusive. Perry attested to the poor condition of the boat in August or September 1983; however, the second ripout did not occur until October 1983. Further, although Frost estimated that 100 feet of accessible asbestos remained on the boat, he did not specify whether the material was hot or cold system asbestos. Mazzuchi conceded that a substantial percentage of asbestos remains in both the engine room and the AMS because it is inaccessible or because it is cold system asbestos. It is uncontroverted that cold system asbestos is generally innocuous.

Spill logs in evidence, however, indicate that the boat sustained asbestos damage on numerous occasions between January and March 1984. Two out of eight entries show damage to asbestos insulation in the engine room.[19] On brief, respondents claimed that the problems reported in the spill logs were "largely in areas above things, behind things, or below things". It is particularly irrelevant under these circumstances that they were low traffic areas since they were obviously sufficiently accessible to become damaged. Once exposed, any asbestos may become airborne through the daily motion in the submarine. The spill logs, maintained as part of the shipyard's day to day operations, show that accessible asbestos remained on the 606 boat in early 1984, and that actual damage indeed occurred. Respondents were, therefore, in violation of the arbitration award with respect to the 606 boat.[20/]

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[19] G.C. Exh. S-29 involves cold system asbestos; however, the record does not show that exposed cold system asbestos is completely safe. Cold system asbestos is less dangerous partially because it is less likely to become exposed.

The 631 submarine is also the subject of numerous spill log entries. In addition, I find testimony by witnesses for the General Counsel convincing that the boat was in substandard condition as late as August 1984. Credible accounts by Perry, Frost, Froehling and Luvisi of considerable employee exposure to loose asbestos materials caused by damaged insulation can only lead to the conclusion that respondents failed to remove enough insulation during the ripout. This testimony is corroborated by results in evidence of tests taken by the ARC Team on the 631 boat after the union's inspection. It is again irrelevant that respondents' witness characterized the locations of the damage as low traffic areas. The record is devoid of evidence that exposed asbestos in low traffic areas cannot become airborne and is not dangerous. In any case, the lithium bromide plant, targeted by the General Counsel's witnesses as a problem area, does not appear to be a low traffic area.

In addition, tagging on the 631 boat was deficient. The last minute tagging admittedly ordered by respondents around August 14 and 15, 1984 indicates respondents awareness of non-compliance in that area. That the employee assigned to tag the boat saw two tags already in the AMR-2 and "a couple" in the engine room does not excuse the need to hang at least fifty. Although the evidence shows that 1,000 tags were ordered on February 7, 1984, and it reveals that Weinert directed the tagging of the 631 boat on February 21, 1984, there is no showing that this tagging actually took place. Weinert admitted that when he checked up on his order a week later he saw only five tags in the engine room and none in the AMR. He did not testify that his employees ever corrected the situation. Herman testified that the boat had no tags from February to August 1984. I credit Herman where his testimony conflicts with that of Belmont and Mazzuchi on this point.

Having found violations of the award with respect to the 606 and 631 boats, I turn to the boats which entered the shipyard prior to issuance of the award. Arbitrator McCrory ordered compliance with the award "to the extent practicable" for overhauls already in progress. The General

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[20/] The evidence is largely uncontroverted that the 606 boat was sufficiently marked. In addition, I find it unnecessary to make a credibility finding regarding the use of protective coverings on the 606 boat in view of the above conclusion.

Counsel did not attempt to prove that it would have been practicable to conduct second ripouts on the 605 and 678 boats in order to remove more asbestos insulation. The 678 was in its reinstallation phase and the 605 in its testing phase when the award was issued. To minimize risk, however, respondents were obligated to survey and tag the boats, and provide protective coverings. Respondents do not assert that these criteria are inapplicable to the 605 and 678 boats, but state that the risk of damage is minimal because fewer workers are in the boats and because damage is most likely to occur during the ripout. Nevertheless, spill log entries for these boats, recorded during their testing phases between January and March 1984, demonstrate that damage can and does occur after the ripout phase.

By respondents' own admission, the 605 and 678 boats had been devoid of tags since May 1984 because they were in the portion of the finishing stage during which unauthorized objects must be removed from the boats. Since employees work on the boats before and after the sea trial, respondents certainly are obligated in order to be in compliance with the McCrory award to provide the protections mandated by the award. Notwithstanding objections at this point, respondents did not raise this issue in timely exceptions and are, in my opinion, precluded from raising the Navy policy as a defense at this time. Department of the Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA at 687. Thus, respondents were in violation of the award with respect to all four submarines at issue.[21]

The parties disagree over the method of payment of environmental differential pay. Respondents assert that individual employees must claim EDP under Article 20, Section 3 of the collective bargaining agreement and grieve if compensation is refused. The General Counsel claims that all employees working in proximity to conditions on the ship triggering EDP are automatically entitled to payment and that the onus is on respondent to make payment.

It appears illogical that the arbitrator would award EDP, but then prolong respondents' violation of the contract by having each employee apply separately. Involvement of the negotiated grievance procedure would further complicate rather than expedite the process. Moreover, pursuant to respondents' interpretation, the award does not afford a remedy; it merely triggers the remedy already provided by the collective bargaining agreement, thereby making the entire process up to this point a futile exercise which could not resolve the already existing different interpretations of the parties.

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[21] In view of the above conclusions, I deem it unnecessary to make credibility determinations regarding the use of protective coverings on the 631, 605 and 678 submarines. In addition, respondents have complied with item 4 on McCrory's list by increasing surveillance on all the boats from a weekly to shift by shift basis.

Respondents claim that this procedure is necessary to ensure that each recipient was exposed to the unsafe conditions. This solution actually creates more problems than it solves. Since employees are entitled to EDP for potential as well as actual exposure, it is unclear how often employees who work regularly in ships would have to reapply for payment. Potential exposure is a continuous state. In this respect, work done in proximity to asbestos is similar to work done at dangerous heights. Thus, the danger is always there and the employee is being paid for the potential rather than an actual hazard. Respondents assert that in the latter situation, the collective bargaining agreement allows supervisors to initiate assignment of EDP. I find that the award cannot be reasonably construed to require each employee to seek EDP individually. Nor can it reasonably be construed to require payment only when a supervisor initials requests for payment of EDP.

In light of all the foregoing, it is found that respondents have not fulfilled their obligation pursuant to section 7122 of the Statute and, thus, have violated section 7116(a)(1) and (8) of the Statute.[22]

The Remedy

Having found that the respondents have engaged in certain unfair labor practices I will recommend that they cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Statute.

Section 7118(a)(7) of the Statute provides that backpay is an appropriate remedy where the unfair labor practice of an agency has resulted in loss of pay to its employee. Similarily, the Statute incorporates the backpay provisions at 5 U.S.C. 5596 which provides for backpay in instances where an employee has been adversely affected by an unfair labor practice. Under 5 U.S.C. 5596 the employee or employees must establish that "but for" the wrongful unilateral act of an agency, a loss of pay would not have occurred. The record in this case supports a finding that "but for" respondents unilateral act in not implementing the arbitrators award employees working on the various submarines involved would have received environmental differential pay during periods that substandard asbestos conditions were maintained aboard a particular submarine.

Although the matter has been extensively litigated, the record in my view, does not clearly establish all periods of potential liability for respondents. During the course of the hearing it was suggested that a backpay proceeding might be necessary in order to calculate the employees entitlement to environmental differential pay, if any. Preliminarily, it appears that certain employees may be entitled to compensation from October 26, 1983 until such time as respondents prove compliance with the arbitration award. If respondents are able to demonstrate compliance with the award for any submarine during any period of time after October 26, 1983, then liability should be diminished accordingly. Whether such a back pay hearing should be ordered should be left to those in charge of compliance of the instant Decision, the Authority's order or a court decree, as the case might be, to see how payment could best be carried out.

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[22] In view of this conclusion, I find it unnecessary to determine whether respondents' conduct was also in violation of section 7116(a)(5) of the Statute.

At this juncture, I would recommend however, that respondents be ordered to preserve and upon request, make available to the Authority or its agents, for examination and copying all payroll records, time cards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this order.[23]

It is recommended that the Authority adopt the following order:

ORDER

Pursuant to 5 U.S.C. § 7118 and section 2423.26 of the Final Rules and Regulations of the Federal Labor Relations Authority, U.S. Fed. Reg. 3482, 3510 (1980), its is hereby ordered that Department of the Navy and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award by maintaining substandard asbestos conditions on submarines undergoing overhaul and by refusing to pay environmental differential pay.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Fully comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award by conforming asbestos conditions on submarines undergoing overhaul to the standard established in the award, and by paying environmental differential pay until such steps have been taken.

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[23] The respondent's uncontested motion to correct transcript is granted.

(b) Preserve and upon request, make available to the Authority or its agents, for examination and copying, all payroll records, time cards, personnel record and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Post at the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 1, after being signed by an authorized representative, shall be posted immediately upon receipt thereof, and thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure said notices are not altered, defaced, or covered by other material.

(d) Notify the Regional Director for Region 1, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: April 29, 1985
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award by maintaining substandard asbestos conditions on submarines undergoing overhaul and by refusing to pay environmental differential pay.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fully comply with Arbitrator John P. McCrory's July 28, 1983 arbitration award by conforming asbestos conditions on submarines undergoing overhaul to the standard established in the award and by paying environmental differential pay until such steps have been taken.

WE WILL preserve and upon request, make available to the Authority or its agents, for examination and copying, all personnel records, time cards, reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116 and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and

Case No. 0-NG-501

DEPARTMENT OF THE ARMY,
KANSAS CITY DISTRICT,
CORPS OF ENGINEERS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of the following Union proposal.

Union Proposal

> Utilize the reduction-in-force procedures for those employees who express a desire not to transfer with the function, in accordance with FPM 351.3 paragraph 3-5b.

The Union's proposal arose in the context of a decision by the Agency to achieve a reduction in its work force by transferring its Accounting, Examination and Disbursing (F&A) function to the Omaha District of the Corps of Engineers. The consolidation would require the abolishment of 29 full-time positions in the Kansas City District and establishment of 15 new full-time positions in the Omaha District.

II. Positions of the Parties

By its express terms and as explained by the parties, the proposal would require the Agency (Kansas City District, Corps of Engineers) to use reduction-in-force (RIF) procedures where employees choose not to transfer with their function. The proposal would effectively require that where an employee elects not to transfer to the Omaha District, he/she would be subject to RIF procedures within the Kansas City District. The employee would not be terminated at that location by adverse action procedures. Nor would the employee be subjected to RIF procedures in the Omaha District after the transfer of function has been effected, should a RIF then be necessary.

The Agency asserts that the proposal is nonnegotiable because it is inconsistent with its rights under section 7106(a)(2)(A) and (C) of the Statute to layoff, retain, reduce-in-grade, assign and select employees. It also contends that the proposal conflicts with Government-wide rules and regulations and would determine conditions of employment for nonbargaining unit employees.

The Union maintains that the proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute for employees adversely affected by management's action in instituting the transfer of function as well as a procedure within the meaning of section 7106(b)(2) and, as such, is within the duty to bargain. It disputes the Agency's assertion that the proposal would determine conditions of employment for nonunit employees, contending that the proposal would be limited to unit employees. The Union also disputes the Agency's assertion that a conflict exists between the proposal and applicable Government-wide regulations.

III. Analysis

A. Government-wide Rule or Regulation

The Government-wide rules and regulations referenced by the parties are issued by the Office of Personnel Management (OPM) and are set forth at 5 CFR Part 351 and Chapter 351 of the Federal Personnel Manual. The parties do not dispute that these authorities constitute Government-wide rules and regulations within the meaning of the Statute. Under authority vested in OPM pursuant to 5 U.S.C. §3502, the provisions of 5 CFR Part 351 prescribe a system for reduction-in-force and transfer of function. Those provisions are generally applicable, with minor exceptions not relevant to this dispute, to employees in the executive branch of the Federal government. 5 CFR 351.202. Agencies are responsible for following and applying the regulations. 5 CFR 351.204.

Chapter 351 of the Federal Personnel Manual explains the system prescribed in the CFR, defining the components of the system and describing their use. Federal Personnel Manual, Chapter 351, Subchap. 1-1 and 5 CFR 351.205. The Authority agrees that the provisions of 5 CFR Part 351 and the implementing provisions of the Federal Personnel Manual are Government-wide rules and regulations. See *American Federation of Government Employees, Local 1980, AFL-CIO and U.S. Department of Agriculture, Farmers Home Administration,* 17 FLRA No. 112 (1985).

Those regulations address the use of RIF procedures in the context of a transfer of function. It is undisputed that the movement of the Kansas City District's F&A function to the Omaha District is, in fact, a transfer of function within the meaning of the regulations. The OPM regulations define a transfer of function as:

> [T]he transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, except when the function involved is virtually identical to functions already being performed in the other competitive area(s) affected; or the movement of the competitive area in which the function is performed to another commuting area. [5 CFR 351.203 (1986).]

These regulations generally require that *before* a RIF is conducted in connection with a transfer of function from one competitive area to another, each competing employee in a position identified with the transferring function shall be transferred to the continuing competitive area. 5 CFR 351.302(a). Employees who refuse to transfer with their position or function may be subject to separation through adverse action procedures. Federal Personnel Manual, Chapter 351, Subchap. 5-3.c.(2). Under certain circumstances, however, the OPM regulations allow for use of RIF procedures for purposes of assigning or separating, as appropriate, employees who decline to transfer with their function. The regulations allow use of RIF procedures in the losing competitive area when the following two conditions are satisfied:

(1) There is a RIF in process or resulting from the transfer of function in either the gaining or losing competitive area; *and*

> (2) There is agreement between the two areas that the movement of employees is not essential to the continuity and efficiency of the function.

Federal Personnel Manual, Chapter 351, Subchap. 5-3.c.(3); see also Smith v. Department of Commerce, 19 MSPR 589 (1984).

Based on the record it appears that the Union Proposal may be consistent with the first factor listed above; that is, it appears that the transfer of function may necessitate a RIF in the gaining competitive area. However, it does not appear that the Union Proposal would allow for appropriate consideration of the second factor. The proposal would effectively require that RIF procedures be instituted in the losing competitive area based solely on an employee's desire not to transfer with the function and without any consideration being given to preserving the continuity and efficiency of the function. Inasmuch as the proposal provides for utilization of RIF procedures in the losing competitive area without regard to whether the circumstances present comport with the two conditions prescribed by OPM, it is inconsistent with a Government-wide rule or regulation. See American Federation of Government Employees, AFL-CIO, Local 225 and Department of the Army, USARRADCOM, Dover, New Jersey, 15 FLRA 607 (1984), where the Authority similarly found a proposal nonnegotiable because it would require an agency to act without giving due consideration to specified factors which a Government-wide rule or regulation required be taken into account in making the type of decision addressed by the proposal.

IV. Conclusion

Based on the foregoing analysis, the Authority finds that the Union Proposal is inconsistent with a Government-wide rule or regulation. Therefore, pursuant to section 7117 of the Statute it is not within the duty to bargain. In view of this holding section 7106(b)(2) and (3) are inapplicable.*/ Further it is unnecessary to consider the effect of the proposal on nonbargaining unit employees.

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*/ See American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California, 19 FLRA 1016, 1019 (1985), appeal docketed sub nom. American Federation of Government Employees, AFL-CIO, Local 1546 v. FLRA, No. 85-1689 (D.C. Cir. Oct. 21, 1985) wherein the Authority held that section 7106(b)(2) and (3) are not applicable where a determination is made that a proposal conflicts with a Government-wide rule or regulation.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., March 31, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 32

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and

Case No. 0-NG-731

DEPARTMENT OF THE ARMY,
KANSAS CITY DISTRICT,
U.S. ARMY CORPS OF ENGINEERS,
KANSAS CITY, MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three Union proposals.

II. Union Proposal 1

> The Employer recognizes that all employees have a statutorily created right to their pay, retirement fund and annuities derived therefrom. The Employer further recognizes that charges/allegations of pecuniary liability shall not be construed to be indebtedness or arrears to the United States until the affected employee has had the opportunity to fully exercise his/her rights of due process; wherein due process shall provide equal protection to all employees and shall require a hearing before an unbiased, unprejudiced and impartial tribunal, free from any command pressure or influence. All claims by the Government for pecuniary liability shall be capped at a maximum of $150.00. (Only the underlined portion is in dispute.)

A. Positions of the Parties

Union Proposal 1 would limit an employee's liability for the loss, damage to or destruction of government property to $150.00, whereas, under the Agency's existing regulations, an employee's liability is now limited to an employee's basic monthly pay. The Agency has refused to negotiate over the proposal contending that the proposal is inconsistent with the Federal Claims Collection Act of 1966 ("Claims Act"), Pub. L. No. 89-508, 80 Stat. 309 (1966) and violates its management right to determine its internal security practices pursuant to section 7106(a)(1) of the Statute.

The Union disputes the Agency's contentions.

B. Analysis

1. Management Rights

In agreement with the Agency, the Authority finds that the proposal violates the Agency's right to establish its internal security practices pursuant to section 7106(a)(1) of the Statute. An agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. See *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 14 FLRA 6 (1984) (Union Proposal 2), *appeal docketed sub nom. Federal Labor Relations Authority v. Office of Personnel Management*, No. 84-1325 (D.C. Cir. July 18, 1984). The Agency's plan as set forth in its regulation provides that an employee's pecuniary liability will be one month's pay or the amount of the loss to the Government, whichever is less. The Agency contends that this regulation acts as a deterrent and encourages employees to exercise due care when dealing with government property. Hence, it constitutes a management plan which is intended to eliminate or minimize risks to government property by making clear the consequences of property destruction, loss or damage, and is within the Agency's right to determine its internal security practices.[1]

---

[1] See *American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region*, 2 FLRA 875 (1980), in which

(Continued)

Even if, as the Union argues, the Agency's plan is designed primarily as a means of recouping government loss, in the Authority's view the Agency's statutory authority includes determining that the plan has, also, the effect of minimizing the risk of the loss occurring in the first place. Similarily, the Union's argument that the Agency's plan is not an effective deterrent is beside the point. It is not appropriate for the Authority to adjudge the relative merits of the Agency's determination to adopt one from among various possible internal security practices, where the Statute vests the Agency with authority to make that choice. In this regard, the Union's contention that its proposal limiting liability to $150.00 is merely a procedural proposal under section 7106(b)(2) of the Statute is not persuasive. The proposal directly impinges on management's right to establish its internal security practices.

2. Inconsistent with Federal Law

The Claims Act specifically states that the Act does not diminish the existing authority of a head of an agency to litigate, settle, compromise or close claims.[2] Pursuant to 10 U.S.C. § 4831, *et seq.*, the Secretary of the Army was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted.[3]

(Continued)

the Authority found that a regulation, which directly related to and was part of the agency's plan to prevent disruption, disclosure or property destruction at its facilities, concerned the internal security practices of the agency.

[2] Section 953 of the Federal Claims Collection Act provides as follows:

> § 953. Existing agency authority to litigate, settle, compromise, or close claims
>
> Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.

[3] Section 4832 of title 10 of the U.S. Code provides as follows:

(Continued)

There is no provision in 10 U.S.C. § 4831 which limits the Secretary's right to settle, compromise or close claims in fulfilling his responsibilities under the Act. We find that insofar as the Secretary has unrestricted authority to close, settle and compromise on claims for destroyed or damaged property, the Union's proposal is not inconsistent with the Claims Act.

C. Conclusion

Based on the arguments of the parties, the Authority finds that Union Proposal 1 violates section 7106(a)(1) of the Statute and, thus, is outside the duty to bargain. We also find that the proposal is not inconsistent with the Federal Claims Collection Act.

III. Union Proposal 2

> When the Employer determines it is necessary to hold an employee(s) liable for loss, damage, or destruction of property, the Employer may take appropriate disciplinary action or charge the employee pecuniarily liable, but not both. Under either action, the Agency's allegation will only be sustained if the Agency proves its charge with a preponderance of evidence. Any disciplinary action taken will be in accordance with applicable laws and higher authority regulation and the negotiated Agreement. If the Employer decides to hold the employee pecuniarily liable, the Employer will provide the employee a hearing before an arbitrator. (Only the underlined portion is in dispute.)

A. Positions of the Parties

The Agency contends that the proposal violates management's right to discipline employees under section 7106(a)(2)(A) and/or management's right to determine its internal security practices under section 7106(a)(1).

(Continued)

> § 4832. Property accountability: regulations
>
> The Secretary of the Army may prescribe regulations for the accounting for Army property and the fixing of responsibility for that property.

The Union disputes the Agency's contentions, arguing that the proposal is a procedure.

B. Analysis

This proposal would require the Agency to choose between holding an employee financially liable or imposing disciplinary action for loss, damage or destruction of property caused by the employee, but not both. The proposal therefore expressly would condition management's right to discipline an employee upon its decision not to hold an employee financially liable. Pursuant to section 7106(a)(2)(A) of the Statute, management has the right to take disciplinary action against its employees. The disputed proposal would interfere with this right by conditioning the Agency's exercise of this right upon the Agency's relinquishment of its right to impose financial liability. Contrary to the Union's contention that this proposal is procedural in nature, the Authority finds that the proposal instead concerns the substantive exercise of management's rights. Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 FLRA 763 (1981). See also National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, 2 FLRA 775 (1980) (proposal establishing a condition upon management's ability to assign specified duties to an identified employee is inconsistent with the agency's right "to assign work").

We also find that the decision to hold an employee financially liable concerns only the application of the Agency's internal security practices. It does not affect the determination of what those practices will be. The proposal would not also directly interfere with management's right to determine its internal security practices under section 7106(a)(1).

C. Conclusion

Union Proposal 2 directly interferes with management's right to discipline employees under section 7106(a)(2)(A) and is outside the Agency's duty to bargain. Because it would infringe on the substance of the right it is not a negotiable procedure under section 7106(b)(2). The proposal would not be nonnegotiable under section 7106(a)(1).

IV. Union Proposal 3

> In any event, the Employer will apprise the employee(s), in writing, prior to the Employer's

> formal investigation, of any instance requiring a report of survey, of his/her rights. At a minimum, the Employer will inform the employee(s) of his/her right to have a representative present during the investigation, the right to remain silent, and in the event a recommendation is made to hold the employee liable, the right to review any and all evidence and statements relative to the report, and the right to an impartial hearing. The procedures for selecting an arbitrator shall be similar to those contained in the negotiated Agreement and all fees and expenses will be borne by the employer. (Only the underlined portion is in dispute.)

A. Positions of the Parties

The Agency contends that the proposal violates management's rights to discipline employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B).

The Union disputes the Agency's contentions.

B. Analysis

In agreement with the parties, the Authority finds that the issue raised by Union Proposal 3 is essentially the same as that presented in International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 and Navy Public Works Center, Honolulu, Hawaii, 4 FLRA 217 (1980), enforcement denied sub nom. Navy Public Works Center, Pearl Harbor, Honolulu, Hawaii v. Federal Labor Relations Authority, 678 F.2d 97 (9th Cir. 1982). See also Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA No. 73 (1984). In the Tidewater case, the Authority, in agreement with the 1982 decision of the 9th Circuit Court of Appeals in Navy Public Works Center, Honolulu, Hawaii, found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

C. Conclusion

Based upon our decision in the Tidewater case, we find that Union Proposal 3 directly interferes with management's rights to direct and discipline employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B).

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., March 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. IMMIGRATION AND NATURALIZATION
SERVICE, SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 8-CA-1195
(15 FLRA 383)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2544

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit, which directs the Authority to issue an appropriate order directing the Respondent agency to cease and desist from certain unfair labor practices.

II. History of the Case

A. The Authority's Decision

On July 24, 1984, the Authority issued its Decision and Order in U.S. Immigration and Naturalization Service, San Diego, California, 15 FLRA 383 (1984), adopting the Decision of its Administrative Law Judge that the Respondent had not violated the Statute by denying the request of Gregory Reed, a unit employee, for union representation at an investigatory interview, or by conducting the interview despite the denial of Reed's request. As stated by the Judge, and adopted by the Authority, the grant of immunity to Reed by the Respondent was sufficient to dispel any reasonable fear of disciplinary action.

B. The Court's Opinion

On December 24, 1985, the Court issued its opinion in American Federation of Government Employees, Local 2544 v. FLRA, 779 F.2d 719 (Judge Starr dissenting). The Court, while accepting the Authority's standard for determining "reasonable belief," found that the record evidence failed to support the conclusion adopted by the Authority that the employee could not reasonably have believed that disciplinary action might result from the interview. Thus, the Court reversed the Authority's conclusion and remanded the case for the issuance of an appropriate order.

III. Conclusion

The Authority accepts the Court's opinion as the law of the case and, consistent with that opinion, finds that the Respondent, by denying the request of unit employee Gregory Reed for union representation at an investigatory interview of the employee on April 9, 1981, and by conducting the interview despite the denial of employee Reed's request, failed to comply with section 7114(a)(2)(B) of the Statute and thus violated section 7116(a)(1) and (8) of the Statute. Accordingly, we now issue the following order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Immigration and Naturalization Service, San Diego, California, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee to take part in an examination in connection with an investigation (investigatory interview) or conducting such an examination or interview, without representation by the employee's exclusive bargaining representative, if such representation has been requested by the employee, and if the employee reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at all facilities of the U.S. Immigration and Naturalization Service, San Diego, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner responsible for such facilities, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. April 7, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee to take part in an examination in connection with an investigation (investigatory interview) or conduct such an examination or interview, if such representation has been requested by the employee, and if the employee reasonably believes that the examination or investigatory interview may result in disciplinary action against such employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 214

Union

and

Case No. 0-NG-759

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS AIR FORCE
LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals.[1]

II. Union Proposal 1

> All AFLC employees may be held pecuniarily liable for the loss, damage, or destruction of Air Force property when it results from gross negligence, willful misconduct, or deliberate unauthorized use. If doubt exists, the individual is not held liable. [Only the underscored language is in dispute.]

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[1] The Union's appeal originally involved ten proposals. In its Reply to the Agency's Statement of Position, the Union requested that eight proposals be withdrawn from its appeal. We grant the Union's request and those proposals will not be considered in this case.

A. Positions of the Parties

The Agency contends that Union Proposal 1 violates its right to determine its internal security practices under section 7106(a)(1) of the Statute. The Agency also argues that the proposal is inconsistent with its right to decide the methods and means it will use to carry out its internal security policy under section 7106(b)(1).

The Union argues that the proposal does not violate management's rights, but is a procedure governing the exercise of those rights under section 7106(b)(2) of the Statute.

B. Analysis

The Union's proposal would establish the standard to be used in determining whether an employee will be required to pay, that is, be held "pecuniarily liable," for the loss, damage, or destruction of Air Force property. The Union is proposing that an employee be required to pay only when the loss, damage, or destruction of property resulted from the employee's "gross" negligence. The Agency has adopted a regulation providing that the employee will be liable where the loss results from any negligence.

In National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA No. 32 (1986), the Authority considered a proposal which would have required an employee to pay no more than $150.00 when it was determined that the employee had caused the loss, damage, or destruction of Government property. The Authority found that limiting the amount an employee could be required to pay interfered with management's right to determine its internal security practices. We reached this conclusion because we found that the agency's policy concerning the amount an employee could be required to pay is a part of management's plan to eliminate or minimize risks of loss of or damage to Government property by making clear to employees the consequences of their actions.

For the reasons stated in U.S. Army Corps of Engineers, we find that the proposal in this case likewise impinges on management's plan to prevent damage to or loss of Agency property. The proposal, therefore, directly interferes with management's right to determine its internal security practices. See American Federation of Government Employees, AFL-CIO, Local 15 and Department of the Treasury, Internal Revenue Service, North Atlantic Region, 2 FLRA 875 (1980).

We find that the proposal concerns the establishment of the Agency's internal security practices rather than the methods and means of carrying out that internal security policy. Therefore, the Agency's contention as to section 7106(b)(1) must be rejected.

C. Conclusion

The proposal directly interferes with management's right to determine its internal security practices under section 7106(a)(1), and it is outside the Agency's duty to bargain.

III. Union Proposal 2

> If a decision is made to hold a bargaining unit employee liable for the loss, damage, or destruction of Government property and/or take disciplinary action for same, that decision(s) will be stayed until an arbitrator issues an award should it be grieved.

A. Positions of the Parties

The Agency contends that Union Proposal 2 is inconsistent with 10 U.S.C. § 9835,[2] which provides that the decision of the Secretary of the Air Force with respect to an assessment of pecuniary liability shall be final. The Agency also argues that the proposal violates its right under section 7106(a)(2)(A) to take disciplinary action against employees, its right under section 7106(a)(1) to determine its internal security practices, and its right under section 7106(b)(1) to determine the methods and means of performing work. Finally, the Agency contends that the proposal conflicts with Article 5 of the parties' Master Agreement.

---

[2] 10 U.S.C. § 9835 provides:

> § 9835. Reports of survey
>
> (a) Under such regulations as the Secretary of the Air Force may prescribe, any officer of the Air Force designated by him may act upon reports of surveys and vouchers pertaining to the loss, spoilage, unserviceability, unsuitability, or destruction of or damage to property of the United States under the control of the Department of the Air Force.
>
> (b) Action taken under subsection (a) is final, except that action holding a person pecuniarily liable for loss, spoilage, destruction, or damage is not final until approved by the Secretary or an officer of the Air Force designated by him.

The Union disputes the Agency's arguments, essentially claiming that the proposal concerns matters within the scope of the grievance procedure and that the proposal is a negotiable procedure under section 7106(b)(2).

B. Analysis

1. Inconsistent with Law

Union Proposal 2 provides that action against an employee because of loss, damage or destruction of Government property will be stayed until an arbitrator issues an award in the case. Because 10 U.S.C. § 9835 gives the Secretary of the Air Force, or his designee, final authority to decide issues of employee liability, however, the Agency claims that an arbitrator has no authority to review the Agency's action.

In International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680 (1984), the Authority ruled that 10 U.S.C. § 4835 did not preclude an arbitrator from ruling on and overturning an assessment of pecuniary liability against an employee. The law relied upon in this case, 10 U.S.C. § 9835, is essentially the same as the law involved in the Army Support Command decision. For the following reasons, we find that 10 U.S.C. § 9835 does not prevent an arbitrator from reviewing the application of management's plan to prevent loss of or damage to Agency property, i.e., particular assessments of pecuniary liability against an individual employee.

Collective bargaining agreements negotiated under section 7121 of the Statute must contain grievance procedures which are exclusive for resolving all grievances which come within their coverage.[3] That is, the negotiated grievance procedure may be invoked to settle disputes within its coverage despite the existence of internal agency appeals procedures or statutory appeals procedures which also cover the matter at issue. Specifically, as to internal agency procedures, Congress intended that the negotiated grievance procedure replace internal agency grievance procedures.[4] As to statutory procedures, section 7121(e)(1) demonstrates that Congress was aware of other statutory appeals procedures when it provided in the Statute for negotiated grievance and arbitration procedures. It is clear that Congress intended the negotiated procedures to be an alternative to those other statutory procedures.[5] Unless it can be shown that the Agency's procedures for determining pecuniary liability are intended to be the exclusive procedures for resolving that issue,[6] such matters are within the scope of the negotiated procedure.

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[3] The term "grievance" is defined in section 7103(a)(9)(C) to include any complaint concerning an alleged violation or misinterpretation of a law or regulation affecting conditions of employment. Applicable law and Agency regulation provide that employees may be required to pay for any loss to or damage of Government property which results from their negligence. Any complaint by an employee about an action taken against him or her under that law and regulation would be a "grievance" and would be covered by the negotiated grievance procedure, unless excluded by law or by the parties.

The courts and the Authority have determined that Federal law outside the Statute can limit the scope of the negotiated grievance procedure.[7] However, the fact that

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[4] See, for example, H.R. REP. No. 95-1717, 95th Cong., 2d Sess. 157 (1978); S. REP. No. 95-969, 95th Cong., 2d Sess. 110 (1978).

[5] See H.R. REP. No. 95-1403, 95th Cong., 2d Sess. 56 (1978); S. REP. No. 95-969, 95th Cong., 2d Sess. 110 (1978).

[6] Pursuant to 10 U.S.C. § 9831 *et seq.* the Air Force has established by regulation its own internal appeal system covering these matters. See Air Force Regulation 177-111 (December 21, 1978), Paragraph 31109A ff. See also DoD 7200.10-M, Department of Defense Accounting and Reporting of Government Property Lost, Damaged, or Destroyed.

[7] *See, e.g.*, *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982), *reversing* *American Federation of Government Employees, AFL-CIO, Local 3486 and New Jersey Air National Guard, 177th Fighter Interceptor Group, Pomona, New Jersey*, 5 FLRA 209 (1981); *Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard*, 14 FLRA 38 (1984) (wherein the Authority adopted the rationale of the court in *New Jersey Air National Guard*); *Veterans Administration Medical Center, Minneapolis*,

(Continued)

10 U.S.C. § 9835 provides that the decision of the Secretary of the Air Force as to pecuniary liability is "final" is not sufficient to demonstrate that the Air Force procedures are exclusive so as to overcome section 7121 of the Statute. With respect to 38 U.S.C. § 4110, which provided for the decision of the Administrator of the Veterans Administration as to certain matters to be final, the Eighth Circuit Court of Appeals, in *Veterans Administration Medical Center, supra*, note 7, stated as follows:

> Simply declaring the decision of the Administrator "final" is insufficient to produce conflict with the Civil Service Reform Act, since Congress obviously contemplated other statutory appellate procedures, which had to end somewhere, when it created alternative grievance and arbitration procedures available at the employee's option in the Civil Service Reform Act, 5 U.S.C. § 7121(e)(1)(Supp. IV 1980). Any other interpretation would render meaningless section 7121(e)(1) of the civil service reform legislation, which presupposed some nonexclusive statutory appellate procedures that could coexist with the alternative grievance and arbitration procedures made available under the Civil Service Reform Act. [Footnote omitted.]

Veterans Administration Medical Center at 956.

In those cases where the courts and the Authority have found that outside law limits the scope of the negotiated procedure there have been clear specific indications that the statutory procedures were intended to be exclusive. For example, in each instance, statutory provisions covering those procedures provided that they should take effect

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(continued)
Minnesota v. Federal Labor Relations Authority, 705 F.2d 953 (8th Cir. 1983), *reversing American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota*, 4 FLRA 391 (1980); *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Minneapolis, Minnesota and American Federation of Government Employees, Local 3669, AFL-CIO*, 15 FLRA 948 (1984) (wherein the Authority adopted the rationale of the court in *VA Medical Center, Minneapolis*); *Police Association of the District of Columbia and Department of the Interior, National Park Service, U.S. Park Police*, 18 FLRA No. 46 (1985).

"notwithstanding" any other law. New Jersey Air National Guard, note 7, supra, at 283; Veterans Administration Medical Center, Minneapolis, note 7, supra, at 958; U.S. Park Police, note 7, supra, at 3 of slip decision. In this case, 10 U.S.C. § 9835 does not provide that the decisions of the Secretary of the Air Force are final notwithstanding any other law.

Furthermore, the legislative history of those procedures indicated that they were intended as the exclusive procedures for the matters covered. New Jersey Air National Guard at 283-84; Veterans Administration Medical Center, Minneapolis at 956-57; U.S. Park Police at 3-5 of slip decision. The legislative history of 10 U.S.C. § 9835, and of 10 U.S.C. § 4835 pertaining to the Army on which § 9835 was modelled, indicates that the purpose of these provisions was primarily a matter of administrative convenience. These provisions were intended to "decentralize" final authority regarding accountability for Government property and to make the system for determining responsibility for loss or damage to that property more flexible. The objective was to expedite and facilitate settlement of such matters.8/ There is no indication that Congress intended to make these decisions unreviewable. See, e.g., Abel v. United States, 423 F.2d 339, 344 (Ct. Cl. 1970), wherein the court held that 10 U.S.C. § 9835 refers to finality within the agency and does not preclude judicial review.

As the Agency notes, the Comptroller General has held that 10 U.S.C. § 9835 prevents him from reviewing determinations by the Air Force as to pecuniary liability.9/ That holding represents the determination of the Comptroller General as to the limits of his own jurisdiction. It does not require us to conclude that 10 U.S.C. § 9835 limits the authority of an arbitrator to review such determinations.

8/ As to 10 U.S.C. § 4835, which was enacted first, see H. R. REP. No. 1224, 77th Cong., 1st Sess. 1 (1941); S. REP. No. 602, 77th Cong., 1st Sess. 1-2 (1941). As to 10 U.S.C. § 9835, see S. REP. No. 836, 82nd Cong., 1st Sess. 1-2 (1951).

9/ See Comptroller General Decision No. B-192609 (September 18, 1978); Comptroller General Decision No. B-135297 (March 28, 1958); 43 Comp. Gen. 162, 163 (1963).

In sum, 10 U.S.C. § 9835 establishes the final action authority in the Air Force for determining pecuniary liability. It does not prevent outside authorities from reviewing those determinations. Under the Statute, the negotiated grievance procedure, including binding arbitration, would be the exclusive procedure for resolving disputes as to pecuniary liability.

2. Management Rights

The Union's proposal would delay disciplinary action, or a collection action in the case of an assessment of pecuniary liability, until a final resolution of an employee's grievance. Contrary to the Agency's arguments, the proposal's delay would not amount to interference with management's exercise of its rights. Rather, the Authority has consistently held that proposals to stay final agency action pending the outcome of the grievance procedure are negotiable procedures under section 7106(b)(2) of the Statute because they do not prevent management from acting at all with respect to its reserved rights. American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 153 (1979), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981).

3. Master Agreement

The Authority has consistently held that we will only decide in a negotiability appeal issues which are before us under section 7105(a)(2)(D) and (E) of the Statute. If the parties are in dispute as to whether this proposal conflicts with the terms of their Master Agreement, they may resolve that issue under the procedures provided by that Agreement. See, e.g., Congressional Research Employees Association and Library of Congress, 18 FLRA No. 5 (1985).

C. Conclusion

Union Proposal 2 is not inconsistent with 10 U.S.C. § 9835. It is, instead, a negotiable procedure under section 7106(b)(2) which would not prevent the Agency from acting at all pursuant to its rights under section 7106(a)(1), section 7106(a)(2)(A), or section 7106(b)(1) of the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's appeal as to Union Proposal 1 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain on Union Proposal 2.[10]

Issued, Washington, D.C., April 8, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[10] In finding Union Proposal 2 to be negotiable, the Authority expresses no opinion as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 208

Union

and

Case No. 0-AR-1087

U.S. NUCLEAR REGULATORY COMMISSION

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator William M. Edgett filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 31, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, TOOELE FEDERAL
LODGE NO. 2261, AFL-CIO

Union

and

Case No. 0-AR-1092

TOOLE ARMY DEPOT, DEPARTMENT
OF THE ARMY

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert A. O'Neill filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 31, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

14

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES AIR FORCE
WARNER-ROBINS AIR LOGISTICS CENTER

Activity

and

Case No. 0-AR-1093

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator William H. Mills filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., March 31, 1986

L Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, WILKES-BARRE, PENNSYLVANIA

Activity

and

Case No. 0-AR-1086

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Eric Lawson, Jr. filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Activity has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., April 7, 1986

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Federal Labor Relations Authority

Washington, D.C. 20424

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NEGOTIABILITY CASES

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21 FLRA No. 36 (April 14, 1986)

National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., Case No. 0-NG-446

21 FLRA No. 37 (April 14, 1986)

National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Mo., Case No. 0-NG-547

21 FLRA No. 42 (April 16, 1986)

National Association of Government Employees, Local R14-87 and The Adjutant General of Kansas, Case No. 0-NG-910

UNFAIR LABOR PRACTICE CASE

21 FLRA No. 35 (April 14, 1986)

Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, New York Region and American Federation of Government Employees, AFL-CIO, Case Nos. 2-CA-40303, 2-CA-40304, 2-CA-40343 and 2-CA-40350.

ARBITRATION CASES

21 FLRA No. 38 (April 16, 1986)

The Panama Canal Commission and Maritime Metal Trades Council, AFL-CIO, Case No. 0-AR-1059

21 FLRA No. 39 (April 16, 1986)

Norfolk Naval Shipyard, Portsmouth, Virginia and the Tidewater Virginia Federal Employees Metal Trades Council (Ables, Arbitrator), Case No. 0-AR-1056

21 FLRA No. 40 (April 16, 1986)

Social Security Administration and American Federation of Government Employees, Local 2006 (Tener, Arbitrator), Case No. 0-AR-1078

Y3.F31/21-3:

21 FLRA No. 41 (April 16, 1986)

American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base (Wilcox, Arbitrator), Case No. 0-AR-1100

21 FLRA No. 35

Federal Labor Relations Authority

HHS, SSA and SSA, Field Operations, New York Region and AFGE, Case Nos. 2-CA-40303, 2-CA-40304, 2-CA-40343 and 2-CA-40350 (Decided April 14, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4500 Refusal to Negotiate	7114(b)(4)(B) 7116(a)(1), (5) and (8) 7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Information
  - Information, Union's Right
    - Grievance Proceedings, Information Required
    - Performance Appraisals, Unsanitized
    - Presumptive Relevance Rejected
    - Reasonably Available and Necessary [§ 7114(b)(4)(B)]
    - Routine Use [§ 552(a)(b)(3) of the Privacy Act]
    - Time and Attendance Records, Unsanitized

DIGEST NOTES

The union's bare assertion that it needs information does not automatically oblige the agency to supply such information under § 7114(b)(4). The Authority rejected the contention that the information sought was "presumptively relevant.' Rather, the duty to supply data under § 7114(b)(4) turns upon the nature of the request and the circumstances in each particular case. The necessity for unsanitized copies of official time and attendance records in one case and for unsanitized copies of progress reviews and performance appraisals in two other cases was not apparent from the circumstances. The union failed to divulge the reasons why it was seeking the information despite management's reasonable requests for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary. The union failed even to state that it was seeking information to determine whether to file a grievance. Accordingly, the Authority found that the agency did not violate § 7114(b)(4) in violation of § 7116(a)(1), (5) and (8) by refusing to provide the information sought.

21 FLRA No. 36

NTEU, Chapter 207 and FDIC,
Washington, D.C., Case No. 0-NG-446
(Decided April 14, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS

2000 NEGOTIABILITY
    2150 Management Rights
        2151.05 Budget
    2650 Compelling Need

STATUTE

7106(a)(1)
7117(a)(2)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Uniform Pay System [Government Corporation]
  - Compensation
    - Cost-of-Living Adjustments [Government Corporation]
  - Employee Morale
    - Pay Equity as a Critical Factor
  - Fringe Benefits
    - Cost-of-Living Adjustment Not a Fringe Benefit
    - Relocation Differential
  - Management Rights
    - Budget
      - Method of Determining Cost-of-Living Pay Adjustments

5 C.F.R. § 511.201
5 U.S.C. § 5102

DIGEST NOTES

A new agency program establishing a cost of living adjustment to employee pay based on job location did not constitute a separate and unrelated employee benefit apart from the agency's pay setting system. The agency, a Government corporation which is not limited by the restrictions applicable to the "General Schedule" in compensating its employees, alleged that its new cost-of-living adjustment was a "relocation differential" and as such an employee benefit similar to hazardous duty pay or health insurance rather than an adjustment to the basic employee pay rate. Based on the facts presented, the Authority held that the cost-of-living adjustments based on geographic location were part of salary rates rather than a fringe benefit.

The agency, a Government corporation, did not alter the compelling need for its uniform pay setting system, as previously held by the Authority, when the agency established a cost-of-living adjustment based on job location. While the adjustment modified the agency's salary structure by adding a cost-of-living adjustment, the system of determining employee salaries remained uniform. The same method or formula for computing relative cost-of-living in areas where agency offices are located is applied to all employees of the agency. The Authority had previously found that the agency's uniform salary system was essential to achieving the agency's objective of pay equity. Further, the Authority determined that pay equity was a critical factor in maintaining employee morale and productivity, which in turn facilitated the effective and efficient operation of the agency. On the other hand, the union's proposal would compensate unit employees by a different method than that used to compute the cost-of-living adjustment for non-unit employees. Such different treatment of those employees who happen to be in the unit nullifies the agency's objective of equalizing employee "buying power" throughout the agency and, consequently, undermines the incentives for employees to move as part of an agency reorganization.

A union proposal for a different method of determining cost-of-living pay adjustments for unit employees than the method established by the agency for all agency employees does not directly interfere with management's right to determine its budget under § 7106(a)(1). The proposal does not prescribe a particular program or operation which must be included in the agency's budget. Rather, it concerns an already existing item, employee salaries. Moreover, the proposal does not prescribe the amount to be allocated to that item. It simply establishes a formula for adjusting employee salaries. Further, the agency did not demonstrate that implementation of the union's proposal would result in a significant and unavoidable increase in costs. Also it was not shown that the alleged increase in costs is not outweighed by compensating benefits.

Federal Labor Relations Authority

21 FLRA No. 37

NFFE, Local 29 and U.S. Army Engineer District, Kansas City, Mo., Case No. 0-NG-547 (Decided April 14, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
    2650 Compelling Need

STATUTE

7105(a)(2)(D)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Compelling Need
    Agency Regulation Mandated by Outside Authority
      5 C.F.R. § 351.201(c) and 5 C.F.R. § 504(d)
    Essential to Maintenance of Basic Merit Principles
      Fair and Equitable Treatment [5 U.S.C. § 2301(b)(2) and (6)]
  Performance Appraisals
    Frequency
      Change of Positions
        51 Fed. Reg. 8396-8421 (1986) [OPM Performance Management]

DIGEST NOTES

A proposal is negotiable which provides that an employee whose past performance warranted an "Exceptional" or "Highly Successful" rating would retain that rating for one year from its effective date when changing positions during that year. The proposal conflicts with the agency's regulation (Army Regulation 690-400, Chapter 430) which provides that an employee's entrance rating is an automatic official rating of "Fully Successful." The agency alleged that there was a compelling need [5 C.F.R. § 2424.11(c)] for its regulation because consistent ratings throughout the agency is required to implement the requirement of 5 C.F.R.§ 351.201(c). That provision states that the requirement of 5 C.F.R. Part 351 be "uniformly and consistently applied in any one reduction-in-force and is applicable to credit for performance [5 C.F.R. § 351.504(d)]. However, both the union proposal and the agency's regulation does not specifically concern the amount of service credit which an employee will receive under OPM regulation. Moreover, the agency would be required to replace its current regulation with one similar to the union's proposal under the new OPM Performance Management System regulations (51 Fed. Reg. 8396-8421 (1986)). The new regulations require all agencies to transfer an employee's current performance rating of record to the employee's new job when an employee moves to a new position between performance appraisals. The agency also contended that there was a compelling need for its regulation because its regulation was essential to the maintenance of basic merit principles. However, the Authority held that this contention amounted to nothing more than a reassertion of its argument concerning additional service credit based on performance.

21 FLRA No. 38

Federal Labor Relations Authority

The Panama Canal Commission and Maritime Metal Trades Council, Case No. 0-AR-1059 (Decided April 16, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1550 Procedure
    1552 Time Limits
      1552.01 Extension
      1552.05 Waiver

STATUTE

7122(b)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Timeliness
    Improperly Filing with FLRA Regional Office
    Waiver
      Extraordinary Circumstances for Requests for Reconsideration

DIGEST NOTES

The Authority denied the Union's request for reconsideration as untimely because they failed to comply with the filing requirements of the Authority's rules and regulations. While recognizing the problems regarding mail delivery between Panama and the United States, the Authority concluded that no extraordinary circumstances were established to warrant waiving the time limit. Moreover, even if the union's request for reconsideration had been timely, there was no basis for granting the union's request that the time limit for filing the original exceptions to the arbitrator's award be waived. The time limits established in 5 U.S.C. § 7122(b) may not be extended or waived as provided by section 2429.23(d) of the Authority's Rules and Regulations.

Exceptions to arbitration awards cannot be filed at a FLRA Regional Office. While the union did mail exceptions in sufficient time, if properly addressed, they were incorrectly addressed to the former address of the FLRA Dallas Regional Office. Consequently, the exceptions did not arrive at the National Office of the Authority (i.e. the exceptions were not filed with the Authority) within the time limits prescribed by the Statute.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 39

Federal Labor Relations Authority

Norfolk Naval Shipyard, Portsmouth, Va. and Tidewater Virginia Federal Metals Trades Council, (Ables, Arbitrator) Case No. 0-AR-1056
(Decided April 16, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1600 Grounds for Review
    1601 Award Conflicts with Applicable Law

STATUTE

7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Set Aside
    Contrary to Back Pay Act
  Exceptions Asserted in Appeal
    Award Conflicts with Applicable Law
      Back Pay Act [5 U.S.C. § 5596]
  Overtime
    Opportunity to Work Overtime Improperly Denied
  Remedy
    Backpay for Overtime

DIGEST NOTES

The arbitrator found that the activity violated the parties' collective bargaining agreement when it failed to select the grievant for an overtime assignment. As a remedy, the arbitrator ordered the activity to pay the grievant as though she had worked 12 hours overtime. The agency, as its exception, contended that the award was contrary to the Back Pay Act [5 U.S.C. § 5596]. In setting aside the award, the Authority held that the award was contrary to the Back Pay Act because the arbitrator did not determine that but for the activity's violation of the parties' agreement, the grievant would have performed the overtime work and received overtime pay.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 40

SSA and AFGE, Local 2006 (Tener, Arbitrator), Case No. 0-AR-1078 (Decided April 16, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS

1000 ARBITRATION
    1558 Lack of Jurisdiction

STATUTE

7121(f)
7122(a)

- Arbitration
  - Procedure
    - Forums
      - Authority Lacks Jurisdiction [5 U.S.C. § 7512]
  - Removal of Employee
    - Appeals

DIGEST NOTES

Since the Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under § 7121(f) and § 7122(a), exceptions to the award may not be filed with the Authority. Review of arbitration awards relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 41

Federal Labor Relations Authority

AFGE, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base (Wilcox, Arbitrator), Case No. 0-AR-1100 (Decided April 16, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7121(f)
1558 Lack of Jurisdiction	7122(a)

Arbitration
  Procedure
    Forums
      Authority Lacks Jurisdiction [5 U.S.C. § 7512]
  Removal of Employee
    Appeals

DIGEST NOTES

Since the Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under § 7121(f) and § 7122(a), exceptions to the award may not be filed with the Authority. Review of arbitration awards relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Federal Labor Relations Authority

21 FLRA No. 42

NAGE, Local R14-87 and The Adjutant General of Kansas, Case No. 0-NG-910 (Decided April 16, 1986)

DIGEST HEADINGS

- 2000 NEGOTIABILITY
  - 2150 Management Rights
    - 2152.05 Assign Employees
    - 2152.60 Fill Positions
  - 2210 Mandatory Subjects of Bargaining
    - 2210.05 Appropriate Arrangements
  - 2650 Compelling Need

STATUTE

7105(a)(2)(D) & (E)
7106(a)(2)(A) and (C)
7106(b)(3)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Employee
      - Reemployment or Repromotion Rights Following a RIF
    - Fill Positions
      - Reemployment or Repromotion Rights Following a RIF
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangements
      - Reemployment or Repromotion Rights Following a RIF
  - Compelling Need
    - RIF Retention Standing for Civilian Technicians

DIGEST NOTES

A proposal is negotiable that provides reemployment or repromotion rights for persons removed or demoted in a RIF. The proposal would apply only when management decides to fill positions from which employees have been removed or demoted in a RIF. Also, the proposal would only require management to reemploy or promote employees who were qualified for and had previously performed acceptably in the position being filled. Therefore the proposal does not excessively interfere with management's right under § 7106(a)(2)(C) to fill vacant positions by making selections from any appropriate source. Nor does the proposal excessively interfere with management's right to assign employees under § 7106(a)(2)(A). Rather the proposal is an appropriate arrangement under § 7106(b)(3). [proposal 1]

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal is negotiable that requires the agency to abide by another contract provision [re reemployment or repromotion rights for persons removed or demoted in a RIF] in any situation where that provision conflicts with the agency's RIF regulations. Contrary to the agency's contention, the proposal would not conflict with an agency regulation [Technician Personnel Regulation 300(351)] for which the Authority found a compelling need in a prior decision. In the previous decision the Authority held that there was a compelling need only for that part of the cited regulation which requires civilian technician RIF retention standing to be based on each employee's civilian and military appraisals. (proposal 2)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION AND SOCIAL SECURITY
ADMINISTRATION, FIELD OPERATIONS
NEW YORK REGION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case Nos. 2-CA-40303
2-CA-40304
2-CA-40343
2-CA-40350

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of exceptions filed by the General Counsel and the Charging Party to the attached Decision of the Administrative Law Judge. The issue concerns whether the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to furnish the Charging Party with information it had requested pursuant to section 7114(b)(4) of the Statute.

II. Background and Judge's Conclusion

The instant case involves a consolidated complaint. In each of the cases involved in the complaint, the record reveals that the Charging Party requested the following information: (1) Case No. 2-CA-40303--unsanitized copies of the official time and attendance records for all employees in the East New York Office for the period of October 1, 1983 to March 13, 1984; (2) Case No. 2-CA-40304--unsanitized copies of progress reviews and performance appraisals for all bargaining unit employees in the Murray Hill Office for the period of January 1, 1983 to March 15, 1984; (3) Case No. 2-CA-40343--unsanitized copies of all progress reviews and performance appraisals for all Title II Claims Representatives in the Jamaica Office for the period of January 1, 1983 to March 20, 1984; and (4) Case No. 2-CA-40350--unsanitized copies of various information related to Title II Claims Representatives in the Downtown District Office (e.g., annual performance appraisals, performance improvement plans, weekly District Office Work Report (DOWR) statistics, interviewing time studies, etc.) for the period of January 7, 1983 to February 29, 1984.

The Judge observed that the record revealed that the Charging Party requested the information to use in connection with a grievance or to determine whether to file grievances; however, these reasons were never disclosed to the Respondent. When the Respondent sought more information concerning the Charging Party's requests, the Charging Party responded with "cryptic and conclusionary references" to certain provisions of the Statute. The Judge found that the necessity of the requested data was never conveyed to the Respondent by the Charging Party and that it was not apparent from the surrounding circumstances why such requested data was necessary. He therefore concluded that the obligation to establish the necessity of the data had not been met and thus the Respondent was not obligated under the Statute to furnish it.

The Judge further addressed the arguments raised by the parties in connection with the Privacy Act, particularly, the Respondent's assertion that the "presumptive relevance theory" asserted by the General Counsel was inapplicable to the information requests because of Privacy Act considerations and the General Counsel's contention that the requirements of the Privacy Act had been met. In addressing these assertions, the Judge cited the Supreme Court's decision in Detroit Edison Company v. NLRB, 440 U.S. 301 (1979), among other cases, and noted that even assuming the information requested were presumptively relevant, since the Charging Party was seeking unsanitized data of a personal nature, the Respondent's obligation to adhere to the Privacy Act had to be balanced against the Charging Party's need for the information. Considering the Respondent's obligations under the Privacy Act and the Statute, he found no merit to the General Counsel's "presumptive relevance theory" in the circumstances of this case where the necessity of the data to the Charging Party was never conveyed to the Respondent and such necessity was not apparent from the surrounding circumstances.

In view of the above, the Judge ordered that the consolidated complaint be dismissed in it entirety.

III. Positions of the Parties

The General Counsel basically argues that the information sought by the Charging Party was necessary and relevant to enable it to determine whether a grievance or EEO complaint should be filed under the parties' agreement or to take other appropriate action; that the requirement for establishing relevancy and necessity was met because the information was "presumptively relevant"; and that the Judge erred by failing to find the violations as alleged. Further, both the General Counsel and the Charging Party assert that the "routine use" exception in the Privacy Act permits the disclosure of the requested information. More specifically, the General Counsel asserts that section 552(a)(b)(3) of the Privacy Act permits the disclosure of the requested information which is contained in a system of records maintained by the Office of Personnel Management (OPM) identified as OPM/GOVT-2, "Employee Performance File System Records." Additionally, they argue that the Judge erroneously concluded that the Charging Party waived its right to data related to the DOWR statistics in Case No. 2-CA-40350.

IV. Analysis

In agreement with the Judge, the Authority finds that the General Counsel has not met the burden of proving that the Respondent failed to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it failed to furnish the requested information to the Charging Party. In reaching this conclusion, the Authority rejects the General Counsel's contention that the information sought was presumptively relevant. Rather, as the Authority has previously held, section 7114(b)(4)(B) of the Statute requires that the information requested be "reasonably available and necessary," Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, 19 FLRA No. 47 (1985), and that a union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data, but the duty to supply data under section 7114(b)(4) of the Statute turns upon the nature of the request and the circumstances in each particular case. Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624 (1985), petition for review filed sub nom. American Federation of Government Employees, Local 1345 v. FLRA, No. 85-1378 (D.C. Cir. June 21, 1985). In the instant case, the record reveals that the necessity for the requested information was not apparent from the circumstances and that the Charging Party failed to divulge the reasons why it was seeking the information despite management's reasonable requests for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes. The Charging Party failed even to state that it was seeking the information in connection with a grievance or to determine whether to file a grievance. Thus, under such circumstances, the Authority finds that the Respondent did not unlawfully refuse to furnish the data sought by the Charging Party. See Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982).*/

Additionally, the Authority finds, without passing upon the Judge's conclusion that the Charging Party waived its right to obtain DOWR statistics in Case No. 2-CA-40350, that under the circumstances the Respondent never refused to furnish such information. Rather, the evidence reveals that the Charging Party simply refused to follow through on its arrangement with the Respondent under which the DOWR statistics were made available for photocopying by the Charging Party.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order except as noted in the footnote. We therefore conclude that the Respondent did not fail to comply with section 7114(b)(4) in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the information sought by the Charging Party. Accordingly, the complaint shall be dismissed in its entirety.

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*/ In view of the finding that the information sought by the Charging Party was not shown to be necessary within the meaning of section 7114(b)(4)(B) of the Statute, the Authority finds it unnecessary to pass upon the Judge's findings pertaining to his consideration of the Privacy Act or the contention that the "routine use" exception in the Privacy Act permits the disclosure of the requested information.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 2-CA-40303, 2-CA-40304, 2-CA-40343 and 2-CA-40350 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 35]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION AND SOCIAL SECURITY
ADMINISTRATION, FIELD OPERATIONS,
NEW YORK REGION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case Nos. 2-CA-40303
2-CA-40304
2-CA-40343
2-CA-40350

Thomas H. Gabriel, Esq.
For the Respondent

Douglas Chauvin
For the Charging Party

Joel Hornstein, Esq. and
E. A. Jones, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.*

Upon an unfair labor practice charge filed by the American Federation of Government Employees, AFL-CIO (herein referred to as AFGE or the Union) against the Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New

York Region (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region II, issued a Consolidated Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1)(5) and (8) of the Statute essentially by failing and refusing to furnish the Union with various information requested by the Union.

A hearing on the Complaint was conducted in New York, New York at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. The parties submitted a Stipulation of Facts and thereafter, briefs were filed by Respondent and Counsel for the General Counsel which have been carefully considered.

Upon the entire record in this matter I make the following:

Findings of Fact[1]

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees including employees located in Respondent's East New York Branch Office, the Murray Hill Branch Office, the Jamaica District Office and the Downtown District Office. The unit employees in the four New York area offices mentioned above were, by delegation of authority, represented by AFGE Local 3369 (herein sometimes referred to as the Union). At all times material Respondent and the Union were parties to a collective bargaining agreement the terms of which applied to all unit employees represented by Local 3369.

Case No. 2-CA-40303 - East New York Office

On or about March 13, 1984 Douglas L. Chauvin, a Vice President of AFGE Local 3369, was contacted by the AFGE Local 3369 on-site union representative from Respondent's East New York Branch Office. The local representative informed Chauvin that a bargaining unit employee at the East New York Branch Office, upon returning to work from a day of sick leave, had been told by her supervisor that sick leave restrictions might be placed upon her. As a result of the discussion with the on-site representative the Union believed that a potential grievance existed regarding the imposition of sick leave restrictions at Respondent's East New York Branch Office.[2] Accordingly, on March 13, 1984 Chauvin sent the following letter to Lester Gray, Manager of Respondent's East New York Branch Office where the Union represents 36 bargaining unit employees out of a total compliment of 42 employees:

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[1] The record in this case consists solely of stipulated facts and documentary exhibits submitted in connection therewith.

[2] Article 24 of the parties' collective bargaining agreement contains a grievance procedure under which an employee, or the Union on behalf of an employee or employees, may file a grievance regarding matters concerning sick leave.

> "Pursuant to 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114, I would like unsanitized copies of the official time and attendance records for all of the employees in your office for the period October 1, 1983 through March 13, 1984. This information is necessary and relevant so Local 3369 can fairly and adequately represent the interests of the employees in your office.
>
> "Please provide me with this information at the address below on or before March 23, 1984."[3]

---

[3] Section 7103(a)(9) of the Statute sets forth the following definition:

"(9) 'grievance' means any complaint--
  "(A) by any employee concerning any matter relating to the employment of the employee;
  "(B) by any labor organization concerning any matter relating to the employment of any employee; or
  "(C) by any employee, labor organization, or agency concerning--
    "(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
    "(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]"

Section 7114 of the Statute sets forth various representation rights and duties of labor organizations and agencies and includes, inter alia, the following:

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
  "(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
  "(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
  "(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(continued)

On March 15, 1984 Gray replied to Chauvin as follows:

> "In response to your letter of March 13, 1984, I am requesting that you provide more information concerning the need for the material you seek. Before this data can be released to you, I must make a determination whether it is relevant and necessary."

Chauvin's March 22 reply to Gray stated:

> "I received your letter dated March 15, 1984 in which you refuse to provide me with the information I requested in my letter dated March 13, 1984. My letter provides the appropriate statutory references for you to make your determination. You may also want to refer to Article 24 of the national negotiated agreement.
>
> "Please provide me with the information I requested before the close of business on March 29, 1984."

The parties engaged in no other communication concerning the requested information and Respondent has never supplied the Union with the information.

Although its reasons were never communicated to Respondent, the Union requested the information to determine sick leave patterns in Respondent's East New York Branch Office, how unit employees were treated regarding excessive sick leave usage, whether such treatment conformed to the collective bargaining agreement and because the Union believed that such information would be relevant to a determination on whether to file a grievance or to take other appropriate action. In the Union's opinion the information sought was required in unsanitized form in order to permit it to fully investigate and pursue a potential grievance.

3/ (continued)

> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> "(A) which is normally maintained by the agency in the regular course of business;
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiations of subjects within the scope of collective bargaining; and
>
> "(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . ."

The information requested was not available to the Union from any other source and was normally maintained by Respondent in the regular course of business, was reasonably available to Respondent and did not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining.

Case No. 2-CA-40304 - Murray Hill Office

In or around early March 1984 Local 3369 Vice President Chauvin was contacted by the AFGE Local 3369 on-site union representative from Respondent's Murray Hill Branch Office. The local representative told Chauvin she had handled the first and second steps of a performance appraisal grievance for a bargaining unit employee but was not familiar with step 3 proceedings. As a result of the discussion with the on-site representative, the Union believed that it would need certain information relevant to the processing of the grievance at the third step. Accordingly, on March 15, 1984 Local 3369 sent the following letter to David Gold, the Manager of Respondent's Murray Hill Branch Office where the Union represents approximately 15 bargaining unit employees:

> "Pursuant to 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114, I would like unsanitized copies of progress reviews and performance appraisals for all of the bargaining unit employees in your office for the period January 1, 1983 to March 15, 1984.
>
> "I will expect your reply to this request on or before March 22, 1984. Please reply to the address below."

On March 27, 1984 Gold replied:

> "This is in response to your request for information dated March 15, 1984, received March 20, 1984, concerning 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114.
>
> "Your request is deficient in that it does not identify the issue upon which it is based, it does not explain why all job categories are required and it does not indicate why unsanitized copies are needed.
>
> "I will give your request further consideration if you clarify the deficiencies as stated above."

On or about March 27, 1984, Vice President Chauvin and Murray Hill Branch Manager Gold telephonically discussed the Union's March 15, 1984 information request. In this conversation Gold asked Chauvin the issue for which the information was being requested. He also asked Chauvin why he wanted unsanitized information and whether it was related to a grievance or grievances, Equal Employment Opportunity (EEO) complaint or any other matter. Chauvin replied that the Charging Party's letter of March 15, 1984, supra, was explicit enough for Respondent to release the information sought. He also advised Gold that he would make another request for the information.

Chauvin, on the same date, sent Gold the following letter:

> "Pursuant to 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114, I am making this second request for unsanitized copies of progress reviews and performance appraisals for all of the bargaining unit employees in your office for the period January 1, 1983 to March 15, 1984. This information is relevant and necessary for Local 3369 to fairly and adequately represent an employee(s) in your office.
>
> "Please provide this information to me at the address below on or before the close of business on April 6, 1984."

Gold's reply to Chauvin of April 2, 1984 stated:

> "Your second letter still does not identify what the issue involves or even if there is an issue! Further, you have not attempted to explain why all job categories are needed or why it must be in unsanitized form. I requested the clarification in my response to your first letter and in our telephone conversation of February 27, 1984. In our telephone conversation you stated that you are entitled to this information as the employee(s) representative and you refused to clarify further. I, however, must balance this intrusion into the personal privacy of the employee(s) vs your need of the information in the form requested by you. Consequently, I will give your request for information further consideration if you advise me of the issue, the reason for the need of unsanitized copies etc. etc."

On April 9, 1984 Chauvin sent the following letter to Gold:

> "I regret that I have to make this third request for information. My letters to you dated March 15, 1984 and March 27, 1984 provide sufficient reasons for you to release the information I requested to me.
>
> "In our phone conversation on March 27, 1984, not February 27, 1984 as you allege in your letter to me dated April 2, 1984, I referred to the right of the exclusive representative to have access to the information I requested and I gave as one example the right of the exclusive representative to monitor the employer's compliance with a collective bargaining agreement.

> "The issue and the reason for the need of the information are clearly specified in my letters dated March 15, 1984 and March 27, 1984. You might also want to refer to Article 24 of the collective bargaining agreement. In addition, the information is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.
>
> "Unless I receive the information I requested in my letters dated March 15, 1984 and March 27, 1984 on or before April 16, 1984, I will take other appropriate action with respect to my requests for the information."

On April 16, 1984 Gold sent the following reply to Chauvin:

> "This is in response to your letter of April 9, 1984. As I have stated previously, since you have not identified an issue (or even whether there is an issue), not explained why all positions are needed, and not explained why the information must be unsanitized I cannot release it to you. If and when you comply with my request for clarification I will be glad to help you."

Other than the six letters and the conversation referred to above, there were no other communications between Respondent and the Union regarding the information requested herein and Respondent never furnished the Union with the data.

Although its reasons were never communicated to Respondent, the Union requested the information to assist it in its preparation for a third step grievance. In the Union's opinion the information sought was required in unsanitized form to permit it to fully investigate and process the third step grievance.[4]

The information requested was not available to the Union from any other source and was normally maintained by Respondent in the regular course of business, was reasonably available to Respondent and did not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining.

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[4] Under Article 24, Section 9(a) of the collective bargaining agreement, a Step 2 grievance may be appealed to the Step 3 level within five (5) workdays after receipt of the Step 2 decision.

Case No. 2-CA-40343 - Jamaica Office

In or around October 1983 Local 3369 Vice President Chauvin was contacted by a bargaining unit employee who worked in Respondent's Jamaica District Office. The employee told Chauvin she was dissatisfied with her October 1983 appraisal and she suspected another unit employee had received a better appraisal because of favoritism on the part of their mutual supervisor. As a result of the discussion with the bargaining unit employee, the Union believed that, inter alia, a potential grievance existed regarding favoritism and on March 20, 1984 Local 3369 President John Riordan sent the following letter to Susan Pike, Manager of Respondent's Jamaica District Office where the Union represents approximately 104 bargaining unit employees of whom 21 or 22 are Title II Claims Representatives:

> "Pursuant to 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114, I would like unsanitized copies of all progress reviews and performance appraisals for all Title II Claims Representatives in your office for the period January 1, 1983 to March 20, 1984. This information is relevant and necessary so Local 3369 can fairly and adequately represent the employees in your office.
>
> "Please provide the information to the address below as soon as possible but no later than April 6, 1984."

On March 26, 1984 Pike replied to Riordan as follows:

> "This is in response to your request for Title II claims representative appraisals and progress review materials for the period January 1, 1983 to March 20, 1984.
>
> "This is a request for further information necessary to process your request and should not be construed as a denial of your request.
>
> "Please provide an explanation of the issue that prompted your request. Your request for these materials will be given further appropriate and responsibe consideration upon receipt of your reply."

Riordan's reply to Pike on April 2, 1984, stated:

> "I received your letter dated March 26, 1984 in which you respond to my request for information pursuant to 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7114. "y request was dated March 20, 1984.
>
> "In addition to the statutory references cited above and in my letter dated March 20, 1984, permit me to suggest that you also refer to Article 24 of the negotiated agreement.

"The information I requested is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. Please be assured that the purpose of my request does not relate to internal union business.

"Please provide me with the information I requested in my letter dated March 20, 1984 on or before the close of business on April 12, 1984."

Pike responded to Riordan on April 5, 1984, stating:

> "I have received your letter dated April 2, 1984. Regrettably, you have not furnished me with sufficient information to release in unsanitized form all 1983 progress reviews and appraisals as well as 1984 progress reviews.
>
> "As you know, we are required to supply the union, upon request, with sufficient data to enable it to bargain intelligently, including policing the agreement, as in grievance matters. However, the union is not entitled to ask for data in the abstract. Unfortunately your response did not clarify to me the specific issue that generated your request.
>
> "I would like to point out that timeframes for filing grievances, etc. on 1983 performance data have elapsed and I am not aware of any 1983 appraisal grievances at any level that were timely filed that are still pending. Therefore, I am asking you to identify the live issue(s) that generated your request for both the 1983 as well as the 1984 documents.
>
> "As you also know records of performance documentation are generally sanitized to protect the privacy of the individual employees. An exception may be made only if identification of employees is necessary and relevant to the Union's representational function. Therefore please identify specifically why in this case you require non-sanitized documents.
>
> "Finally, should it be finally determined, based on your responses to my questions, that all of the 1983 and 1984 documents will be released, I estimate that the volume will exceed 250-300 pages. Much of this material is maintained in the Regional Personnel Office, rather than the Jamaica District Office. I therefore ask that you narrow your request, perhaps to be limited to all Title II CR's within one unit.
>
> "Please be assured that I will act promptly upon receipt of your response."

Riordan replied to Pike on April 16:

"I received your letter dated April 5, 1984 about my request for information dated April 2, 1984. My letter was a second request for information. I made my initial request on March 20, 1984.

"Your "awareness" of any grievances is irrelevant to your duty to provide the information I requested.

"Sanitized documents are virtually useless to the union in performing its representational functions.

"I am not willing to make my request more narrow. However, to ease your burden, I am willing to designate someone from the union to retrieve and photocopy the documents I requested."

On April 23, 1984, Pike answered Riordan:

"I have received your letter dated April 16, 1984.

"This is to inform you that performance documentation that you requested on March 20, 1984 may not be released until I receive the information requested in my correspondence dated March 26, 1984 and April 5, 1984."

The parties engaged in no other communication concerning the requested data and Respondent has never furnished the information to the Union.

Although its reasons were never communicated to Respondent, the Union requested the information to ascertain whether favoritism existed in Respondent's Jamaica District Office and because the Union believed that such information would be relevant to a determination on whether to file a grievance or to take other appropriate action.[5] It was the Union's opinion that the information sought was required in unsanitized form in order to permit it to fully investigate and pursue a potential grievance.

The information requested was not available to the Union from any other source and was normally maintained by Respondent in the regular course of business, was reasonably available to Respondent and did not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining.

---

[5] Under Article 24, Section 9 of the collective bargaining agreement an employee, or the Union on behalf of an employee, can file a grievance concerning any matter relating to the employment of the employee.

Case No. 2-CA-40350 - Downtown Office

Shortly before February 16, 1984 Local 3369 Vice President Chauvin learned that a bargaining unit employee in Respondent's Downtown District Office (whom Chauvin was representing in an EEO complaint) had received a performance progress review which stated, inter alia, that the employee's within grade increase may be denied and termination or demotion may result if the employee's performance did not improve by August 1984. As a result of this knowledge the Union believed that a potential discrimination complaint and/or grievance existed regarding the employee's performance progress review and any adverse action that might issue as a result of the performance progress review. Accordingly, on February 16, 1984 Chauvin sent the following letter to Jefferson Woodcox, Manager of Respondent's Downtown District Office where the Union represents approximately 75 bargaining unit employees of whom 11 are Title II Claims Representatives:

> "Pursuant to 5 USC 7114, I am requesting the following information so that Local 3369 can fairly and adequately represent an employee in your office. Please provide in unsanitized form all of the information listed below for the period January 1, 1983 through February 29, 1984 for all Title II Claims Representatives in the Downtown District Office:
>
> "1. annual performance appraisals
> 2. Claims Representative desk audits
> 3. Claims Representative interview audits
> 4. performance improvement plans
> 5. interviewing time studies
> 6. quality review deficiency flags(bounces)
> 7. weekly DOWR statistics for each Title II breakdown.
>
> "I would appreciate your prompt reply to this request at the address below."

On or about February 27, 1984, Vice President Chauvin and the Assistant District Manager of Respondent's Downtown District Office, Peggy Murphy, telephonically discussed the Union's February 16, 1984 information request. In this conversation Murphy asked Chauvin for additional information so the request could be processed. Specifically, Murphy asked Chauvin to state the issue and why the Union needed the information in unsanitized form. Chauvin declined to provide further particulars on the ground that the Union's letter of February 16, 1984 stated sufficient information to warrant the release of the data sought.

Subsequent communications between the parties on this request were as follows:

- February 28, 1984 - Woodcox letter to Chauvin.

"This responds to your information request dated 2/16/84, received February 22, 1984, involving 5 USC 7114.

"Your request is deficient in that it does not identify the issue upon which it is based.

"In the telephone conversation with Peggy Murphy on 2/27/84, you refused to provide any particulars as to the case or issue related to your request.

"Should you identify an appropriate issue relevant to full & proper discussion, understanding, negotiation of subject within the scope of collective bargaining, your request will be given further appropriate responsive consideration."

- March 12, 1984 - Chauvin letter to Woodcox.

"I am writing this letter in response to your letter to me dated February 28, 1984 regarding my request for information dated February 16, 1984.

"During the phone conversation I had with Ms. Peggy Murphy I patiently pointed out to her that pursuant to 5 U.S.C. 7103(a)(9) and Article 24 of the national negotiated agreement a grievance means any complaint. Neither the statute nor the contract require the union to identify the employee or employees in your office who have a complaint.

"My request dated February 16, 1984 was not deficient and accordingly with this letter I am making the same request again.

"Unless you provide me with the information I am requesting before the close of business on March 22, 1984, I will take other appropriate action with respect to my request."

- March 15, 1984 - Woodcox letter to Chauvin.

"In response to your letter dated March 12, 1984 which was received by me on March 14, 1984 I wish to point out that at no time have I or Peggy Murphy asked you to identify the employee or employees in this office who have a complaint. What you have been asked to provide is the specific issue upon which the complaint is based. Is it a grievance involving an E.E.O. issue?

"In order for me to determine whether or not I can supply the information you require in the format you specified I still need to obtain more information from you before I can proceed.

"First, in deciding whether or not to release some or all of the information you request in an unsanitized format I must balance the intrusion into privacy of other employees against the need for the information in the form requested by you.

"Secondly, the copies you requested on all of the weekly DOWR statistics for each title II breakdown would be too burdensome to supply; however, I would consider making them available at this office for your inspection.

"Consequently, if you will advise me whether or not the complaint involves an EEO issue I will give your request further appropriate responsive consideration."

- March 22, 1984 - Chauvin letter to Woodcox.

"I received your letter dated March 15, 1984 in which you refuse to provide the union with the information it requested on February 16, 1984 and again on March 12, 1984.

"Both of my letters as well as my phone conversation with Ms. Peggy Murphy on February 27, 1984 provide sufficient information for you to make the information available to me.

"With respect to the weekly DOWR statistics, I am willing to photocopy them myself so that neither you nor your staff will be burdened by my request.

"Please provide me with the information I requested before the close of business on March 29, 1984."

- March 30, 1984 - Woodcox letter to Chauvin.

"In response to your letter dated March 22, 1984, which was received by me on March 26, 1984, it is apparent that you have misunderstood both of my previous responses to your requests for data.

"If you will simply re-read my last response, especially the second and third paragraphs, you will clearly see that I did not refuse to provide the information you requested. On the contrary, I simply asked you for specific information (whether or not the issue at hand was an E.E.O. complaint) so that I could come to a decision on whether to release the information in a sanitized or unsanitized format.

"You still have not answered my question and without knowing the answer I can not make an informed judgement concerning the intrusion into the privacy of other employees. Absent that information, I will release extant copies of the first six items in your letter of February 16, 1984, in a sanitized format.

"As far as item 7 on your list is concerned, if you will contact my Operations Officer, Mrs. Sprizzo, at 264-9416, and advise her of the date and time you wish to review the weekly DOWR statistics for the Title II breakdowns, she will make those records and a photocopy machine available to you for that purpose.

"In the interest of labor relations, as well as cost effectiveness, I will provide you with an additional ten (10) days to provide the information I require. If at the end of that time I have either not heard from you or you have responded in the negative, I will then submit items one through six in a sanitized format. As that response will require my having to devote staff and considerable time to the task of retrieving and copying that data, I would not later entertain a request from you to resubmit the data in an unsanitized format, should you subsequently answer my question.

"Finally, I fail to understand your reluctance to make a simple statement as to whether or not it is an E.E.O. issue. By answering my question, you would neither reveal the employee'(s) identify nor the issue(s) surrounding the complaint, but would certainly expedite the deliverance of the data you require and allow both of us to get on with our responsibilities."

- April 7, 1984 - Chauvin letter to Woodcox.

"I am responding to your letter to me dated March 30, 1984. Your "offer" to provide me with sanitized information is unacceptable.

"In the fifth paragraph of your letter you mention "cost effectiveness" as one of the reasons for arbitrarily setting a deadline for me to respond to your letter dated March 30, 1984. If you are truly interested in being cost effective you would provide the information to me in unsanitized form instead of sanitized form or you could allow me to inspect and copy the material I requested so you would not have to commit your staff to retrieving and copying the data.

"My reluctance to identify individual(s) or provide you with enough information so that you can identify them stems from my knowledge of management's reprisal against individuals who exercise their rights. As you know, the Federal Labor Relations Authority has issued several complaints against you for violating the rights of employees.

"The employees responded to your record in labor relations by recently voting to have you removed from the Board of Directors of the HEW Federal Credit Union. Fortunately for them, the election was done by secret ballot.

"I will not call Ms. Sprizzo until you have provided me with the rest of the information I requested in unsanitized form.

"Unless I receive the information I originally requested on or before April 17, 1984, I will take other appropriate action with respect to my request."

- April 18, 1984 - Woodcox letter to Chauvin.

"I am responding to your letter dated April 7, 1984, which was received by me upon my return from Philadelphia, PA. on April 16, 1984.

"Based on your statements, "Your 'offer' to provide me with sanitized information is unacceptable" and "I will not call Mrs. Sprizzo . . .", I am not going to forward the data to you in a sanitized format.

"This should not be construed as a denial to provide information, because if you subsequently advise me whether or not the issue concerns an E.E.O. matter, I will then be able to make an informed decision consistent with the provisions of the Privacy Act and send you the data requested in the appropriate format.

Finally, I take exception to your distorted, malicious and erroneous statements concerning Federal Labor Relations authority actions that have never occurred and the Federal Credit Union elections. Those issues have been referred to my personal attorney for appropriate legal remedies."

The parties engaged in no other communication concerning the requested data and Respondent has never furnished the information to the Union.

Although its reasons were never communicated to Respondent, the Union requested the information to compare the performance of the potential grievant with that of other employees in Respondent's Downtown District Office and because the Union believed that such information would be relevant to a determination on whether to file a grievance or complaint or to take other appropriate action.[6] It was the Union's opinion that the information sought was required in unsanitized form in order to permit it to fully investigate and pursue a potential grievance and/or complaint.

The information requested was not available to the Union from any other source and was normally maintained by Respondent in the regular course of business, was reasonably available to Respondent and did not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining.

Discussion and Conclusions

The basic issue to be resolved herein is whether under section 7114(b)(4)(B) of the Statute Respondent was required to furnish the Union with the information it requested from the four locations herein. Counsel for the General Counsel essentially contends that since the data was sought either for use in processing an existing grievance or to determine whether to file a grievance, Respondent's refusal violated the Statute. Respondent essentially contends that the Union was obligated to state the relevance and necessity of obtaining the information in an unsanitized format and the Union's failure to do so privileged Respondent's refusal to furnish the data. Counsel for the General Counsel argues the information sought was of such a nature as to be presumptively relevant and necessary and therefore, the Union was not required to provide Respondent with any specific showing of relevance and necessity. Respondent argues that the presumptive relevance theory is inapplicable to the requests herein, especially since the requirements of the Privacy Act of 1974[7] must be

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[6] Under Article 24 of the parties' collective bargaining agreement a grievance may be filed concerning a performance progress review or an Equal Employment Opportunity matter.

[7] The Privacy Act, 5 U.S.C. § 552a, provides in relevant part:

"(b) Conditions of disclosure. --No agency shall disclose any record which is contained in a system of records by any means of

(continued)

considered. Counsel for the General Counsel counters by contending that the circumstances of the requests support a conclusion that the requirements of the Privacy Act have been met.

The Authority, in United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA No. 16 (1984) addressed the general status of the law under the Statute in this area by stating:

> "The Authority has previously held that section 7114(b)(4) of the Statute requires management to furnish an exclusive representative with information which would enable the union to effectively carry out its representational obligation in connection with the processing of an employee grievance or the determination whether to file a grievance, and that management violates the Statute if it refuses to do so. See, e.g., U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251 (1982); Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982); Department of the Navy, Portsmouth Naval Shipyard, 4 FLRA 619 (1980). However, the information sought must be necessary and relevant to assist the exclusive representative in discharging its responsibilities under the Statute, and therefore the Authority has dismissed complaints where this requirement has not been

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7/ (continued)

communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

. . . . .

> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)([illegible])(D) of this section . . ."

The parties acknowledge that the materials requested are contained in a "system of records" within the meaning of the Privacy Act and the "routine use" exception, above, would permit Respondent:

> "To disclose information to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions."

established. See, e.g., Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982); Director of Administration, Headquarters, U.S. Air Force, 6 FLRA 110 (1981)."

Thus, while management is clearly obligated to furnish a union with information in connection with the processing of a grievance or determining whether to file a grievance, it must be established that the information is necessary and relevant to the matter.

In the case herein, the record reveals that the Union requested information for use in a grievance in process or to determine whether to file grievances. However, these reasons were never disclosed to Respondent. Accordingly, with regard to the various requests, Respondent sought: (1) more information concerning the need for the material sought from the East New York Office[8]; (2) the identity of the issue involved, why information on all job categories was required and why unsanitized data was needed from the Murray Hill Office; (3) the "live" issue that generated the request and why unsanitized documents were required at the Jamaica Office; and (4) the case or issue related to the request for unsanitized information from the Downtown Office.[9] Essentially, Respondent was seeking to obtain sufficient facts whereby it could make an informed judgment as to whether the data sought was necessary and relevant for any legitimate collective bargaining purpose, especially since the Union was seeking unsanitized information. However, the Union replied merely by giving one or more cryptic and conclusionary references to the Statutory sections relating to the definitions of a grievance and the rights and duties of labor organizations and agencies under the Statute; the duty of an agency to provide information "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining"[10]; the necessity and relevance of information to "fairly and adequately represent the interests of employees," the negotiated grievance procedure; and monitoring the parties negotiated agreement.

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[8] This request was for information concerning all employees in the Office, not merely data confined to bargaining unit employees.

[9] Since Union Vice President Chauvin volunteered to photocopy the DOWR statistics and Respondent agreed to make them available on that basis but the Union ultimately declined to follow through with this arrangement until all data requested was provided in an unsanitized fashion, I conclude the Union waived its right to obtain this data.

[10] See section 7114(b)(4)(B) of the Statute.

In my view under *United States Environmental Protection Agency*, *supra*, and cases cited therein, the Union was obligated to sufficiently establish with Respondent how the information sought was necessary and relevant to it carrying out its representational obligations. Obviously what is required to fulfill this obligation will vary depending upon the circumstances of the case. Indeed, in certain situations the relevance and necessity might be apparent and no specific showing of relevance and necessity would be required, for example where the request is made when contract negotiations are imminent or actually in progress or where the request is made during a discussion of a specific grievance. But in the case herein the relevance and necessity of the requested data was never conveyed to Respondent nor apparent from the surrounding circumstances. Accordingly, I conclude the obligation to establish the relevance and necessity of the data was not met and Respondent was not obligated under the Statute to furnish the data sought.[11]

Counsel for the General Counsel argues that the requirement of establishing relevancy and necessity was met in this case, contending that the information sought was by its very nature "presumptively relevant." Counsel for the General Counsel suggests that the approach used in similar situations by the National Labor Relations Board (the Board) with court approval in cases arising under the National Labor Relations Act (the Act) should be applied to the case herein. The Board summarized its approach in a recent decision, *Bohemia, Inc.*, 272 NLRB No. 178 (1984), as follows:

> ". . . It is well established that an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Board uses a liberal, discovery-type standard to determine whether information is relevant, or potentially relevant, to require its production. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Information about terms and conditions of employment of employees actually represented by a union is presumptively relevant and necessary and is required to be produced. *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). Information necessary for processing grievances under a

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[11] In view of this resolution I find it unnecessary to decide whether the Union's request might have been deficient or other grounds as urged by Respondent in its brief.

> collective-bargaining agreement, including that necessary to decide whether to proceed with a grievance or arbitration, must be provided as it falls within the ambit of the parties' duty to bargain. *NLRB v. Acme Industrial, supra*; *Bickerstaff Clay Products*, 266 NLRB 983 (1983).
>
> "However, when a union's request for information concerns data about employees or operations other than those represented by the union, or data on financial, sales, and other information, there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather, the union is under the burden to establish the relevance of such information. *Ohio Power, supra* . . ."

Indeed, under the Act it has been long held that wage or related information, since it concerns the core of the employer-employee relationship, is presumptively relevant and a union is not required to show the precise relevance of it unless effective employer rebuttal comes forth. *See Curtiss-Wright Corp., Wright Aero Division v. NLRB*, 347 F.2d 61, at 69 (3d Cir. 1965).

The logic behind the Board's approach was expressed by Board Chairman Gray Farmer, with majority agreement, earlier in *Whitin Machine Works*, 108 NLRB 1537 at 1541 (1954), enf'd, *NLRB v. Whitin Machine Works*, 217 F. 2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955). In that case Chairman Farmer stated:

> "I would not require that the union show the precise relevancy of the requested information to particular current bargaining issues. It is enough for me that the information relate to the wages or fringe benefits of the employees. Such information is obviously related to the bargaining process, and the union is therefore entitled to ask and receive it.
>
> "My interpretation of the employer's obligation under Section 8(a)(5) in this respect, of course, also presupposes that the bargaining agent, in this area as in all others, will seek the wage-rate information as a good-faith act in the discharge of is duty as the representative of the employees. I would, therefore, hold that, short of evidence that union requests for wage data are used as an harassing tactic and not in good-faith effort to secure pertinent bargaining information, the employer has a continuing obligation to submit such data upon request to the bargaining agent of his employees. This does not,

> of course, preclude the employer from requiring the union to enter into reasonable arrangements for the compilation of the requested data including provisions for bearing the additional cost to the employer of furnishing the requested information. I am convinced, after careful consideration of the import of the problem on the collective-bargaining process, that this broad rule is necessary to avoid the disruptive effort of the endless bickering and jockeying which has theretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arises as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement."

Notwithstanding the Board and court cases and principles stated above, the Supreme Court in Detroit Edison Company v. NLRB, 440 U.S. 301 (1979), 99 S.Ct. 1123 at 1131 stated:

> "A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8(a)(5) turns upon "the circumstances of the particular case," NLRB v. Truitt Mfg. Co., 351 U.S., at 153, 76 S.Ct., at 756, and much the same may be said for the type of disclosure that will satisfy that duty. See e.g., American Cyanamid Co., 129 N.L.R.B. 683, 684 (1960)."

In Detroit Edison a union sought certain information about employee aptitude tests to prepare for arbitration of a grievance. The Court, after noting that no absolute rule has ever been established wherein a union's interests in arguably relevant information must always predominate over all other interests, however legitimate, id at 1132, 1133, went on to balance the conflicting interests of the parties to resolve the matter. Thus, it is apparent that where a request for "arguably relevant" information is at issue, all the circumstances of the request must be considered in balancing conflicting interests. It follows that similar consideration should be accorded a request for "presumptively relevant" data.

The Authority used this approach in *Veterans Administration Regional Office, Denver, Colorado*, 7 FLRA 29 (1982). In that case the union, while investigating an employee's grievance alleging preselection in a promotion, sought the names of other candidates so it could match known ratings of a rating panel with particular employees. *Veterans Administration, Denver*, relying on prior similar cases which arose under Executive Order 11491[12/], balanced privacy rights against the union's Statutory right for information and found the union's right and need for data to substantially outweigh the employee's right to privacy in the circumstances therein.[13/]

In the case herein, the Union made broad requests for unsanitized information in situations wherein the necessity to the Union was not immediately apparent nor in such circumstances that Respondent could be expected to have known the relevance and necessity of the information to a particular concern of the Union. Thus, unsanitized time and attendance records for all employees, which would obviously include non-unit employees at the East New York Office, were sought. At the other offices the Union sought unsanitized appraisal information and other data of a particular personal nature at a time when no negotiations were planned or in progress, no particular dispute was occurring and no indication was given to management the data sought was necessary for a grievance in progress or being considered.[14/]

12/ *Department of Defense, State of New Jersey*, 3 FLRC 285 (1975), 5 A/SLMR 499 (1975), 3 A/SLMR 591 (1973); *Department of the Treasury, Internal Revenue Service, Milwaukee, Wisconsin*, 8 A/SLMR 113, A/SLMR No. 974, aff'd 6 FLRC 797 (1978); *Internal Revenue Service, Chicago, District Office*, 8 A/SLMR 309, A/SLMR No. 1004 (1978); *Department of Health, Education and Welfare, Region VIII*, 8 A/SLMR 949, A/SLMR No. 1109 (1978); *Department of the Treasury, Internal Revenue Service and IRS Milwaukee District*, 8 A/SLMR 1125, A/SLMR No. 1133 (1978).

13/ The cases under the Executive Order were decided based upon section 10(e) of the Order under which an exclusive representative was entitled and responsible to represent the interests of all employees in the unit. Although in *Veterans Administration, Denver*, *supra*, the Authority specifically rejected the theory that an exclusive representative's right to information derived from section 7114(a)(1) of the Statute, which is virtually identical to the language of section 10(e) of the Executive Order, the Authority nevertheless did not reject the procedure of balancing conflicting rights an interests in these situations.

14/ Indeed, when management sought to ascertain, even in a general way, how the data sought was relevant and necessary to a legitimate Union concern, the Union refusal to give management even a reasonable hint to support its request.

In evaluating the request herein, even assuming *arguendo* that the requested information was generally presumptively relevant to collective bargaining, since the Union was seeking unsanitized data of a personal nature, I conclude Respondent's obligation to adhere to the proscriptions of the Privacy Act must be balanced against the Union's need for such information. Respondent is placed in a situation of being required to follow the dictates of two statutes, one requiring the production of information and one limiting production. It is obvious that in such situations an employer must have some information relative to why the Union needs the data in order to balance the necessity and relevance of the data against the obligations imposed by the Privacy Act. Indeed, section 7114(b)(4) of the Statute only requires the production of data ". . . to the extent not prohibited by law" and the Privacy Act permits the disclosure to a union of otherwise personal employee information where that data is "relevant and necessary" for the union to perform its proper representational functions. But how can an employer decide if particular information is relevant and necessary unless it has some idea of why the union needs the information?

In my view there is no merit to the claim that a "presumptive relevance" theory would satisfy the requirement of the Privacy Act and the section 7114(b)(4)(B) of the Statute in a situation as herein. *Veterans Administration Regional Office, Denver*, *supra*, and *Detroit Edison Company*, *supra*. Rather, I conclude that under the Statute when unsanitized personal information is sought wherein Privacy Act considerations are legitimately raised, sufficient facts demonstrating a union's need must be available to an agency so the employer can balance the union's need for the information against the employer's duties and obligations under the Privacy Act and the Statute.15/

15/ As indicated previously, all the circumstances surrounding the request for information must be considered when assessing how much detail must be provided management relative to a union's need for data. I find noteworthy, especially when considering the particular facts of the case herein and the Authority's decision in *United States Environmental Protection Agency*, *supra*, the following language used by Court of Appeals for the Ninth Circuit in *NLRB v. F.W. Woolworth Co.*, 235 F.2d 319 at 322 (9th Cir. 1956); rev'd 352 U.S. 930 (1956):

> "We do not hold that a request must painfully, laboriously or absolutely demonstrate in detail a relevancy, but we do believe that at sometime or someplace some specific relevancy should be asserted or facts should be shown whereby one could say that the employer ought to know anyway without demonstration the relevancy of the information to the relationship of the parties. It must be something more than Micawber's "something may turn up."

Accordingly, in view of the entire foregoing and under the particular circumstances herein I conclude that no violation of the Statute occurred by Respondent's refusal to furnish the Union with the requested data and I recommended the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Consolidated Complaint in Case Nos. 2-CA-40303, 2-CA-40304, 2-CA-40343 and 2-CA-40350 be, and hereby is, dismissed.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: March 8, 1985
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 207

Union

and

Case No. O-NG-446
14 FLRA 598

FEDERAL DEPOSIT INSURANCE
CORPORATION, WASHINGTON, D.C.

Agency

DECISION ON REMAND

I. Statement of the Case

By its Order of April 26, 1985, the United States Court of Appeals for the District of Columbia Circuit granted the Authority's motion to remand the record in the instant case so that the Authority could consider the relevance, if any, of the Agency's August 20, 1984 issuance to the Authority's initial decision herein, National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598 (1984) (Member Haughton dissenting). The proposal remanded to the Authority was the following:

Union Proposal 5[1]

Article 59 - Salary

Section 1

> The salary structure, that is the grades and steps of the schedule, being used by FDIC will be maintained. Hereafter, all employees will have their current salaries adjusted for the cost-of-living/comparability factor. The

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[1] The proposal will be referred to herein by the number given to it in the Authority's initial decision.

> adjustment will be equal to the statistical adjustment recommended to the President by the Pay Advisory Council. (After October 1980 the adjustment factor developed by the Council will be modified to account for the different comparability positions between FDIC and those employees under the General Schedule. Beginning in January 1981 the parties will meet to seek agreement on the modification formula.) This adjustment will become effective the beginning of the first pay period following the announcement of it by the council or other appropriate sources. It will be unaffected by Presidential or Congressional actions.

Section 2

> NTEU agrees to establish with the EMPLOYER a productivity committee that will monitor the impact of the new salary adjustment system and seek reasonable ways to increase the productivity of the EMPLOYER, e.g., decrease employee turnover, remove work obstacles, improve upon available machinery and procedures, raise employee morale, etc.

In its initial decision the Authority held that Union Proposal 5 was outside the duty to bargain under section 7117(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute), as amended, 5 U.S.C. §§ 7101-7135 (1982 and Supp. II 1984)[2] and section 2424.11(a) of the

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[2] Section 7117(a)(2) provides as follows:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> . . . .
>
> (a)(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined

(Continued)

Authority's Rules and Regulations[3] because it was barred from negotiation by an Agency resolution for which a compelling need exists. Specifically, the Authority determined that Agency resolutions establishing a uniform salary structure for Agency employees were essential to the accomplishment of the mission or the execution of the functions of the Agency in a manner which is consistent with the requirements of an effective and efficient government.[4] The Authority found that the Agency's

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under regulations prescribed by the Authority) exists for the rule or regulation.

[3] Section 2424.11(a) of the Authority's Rules and Regulations provides as follows:

> § 2424.11 Illustrative criteria.
>
> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

[4] The parties stipulated that the Agency is a Government Corporation and is not subject to the pay and allowance provisions of Chapter 51 of title 5 of the United States Code, *see* 5 U.S.C. § 5102, 5 CFR 511.201; the compensation paid to its employees is not limited by the restrictions applicable to the "General Schedule"; and the Agency's Board of Directors, in its discretion, regularly has adopted resolutions pursuant to which the Agency pays its general graded and wage graded employees at the same rates of pay as are paid to Federal employees who are subject to Chapter 51 of title 5 of the U.S. Code. There is no dispute in this case as to whether the Agency's salary resolutions constitute agency rules or regulations which could bar negotiation of conflicting proposals if supported by a compelling need.

(Continued)

uniform salary system, whereby employees at the same grade and step receive the same salary, was essential to achieving the Agency's objective of pay equity. Further, the Authority determined that pay equity was a critical factor in maintaining employee morale and productivity, which in turn facilitated the effective and efficient operation of the Agency. The Union's proposal, the Authority concluded, by providing a different salary system for unit employees in the Washington headquarters office, would frustrate the goal of pay equity and thus would disrupt the effective and efficient accomplishment of the mission of the Agency. The Agency is comprised of employees in 14 regional offices across the country as well as bargaining unit and nonbargaining unit employees in the Washington headquarters.

The Union appealed the Authority's decision to the U.S. Court of Appeals for the District of Columbia Circuit, *appeal docketed sub nom. National Treasury Employees Union v. Federal Labor Relations Authority*, No. 84-1286 (D.C. Cir. July 6, 1984). Subsequent to the filing of the appeal, the Agency's Board of Directors, on August 20, 1984, adopted a resolution establishing a cost-of-living adjustment to the salaries of all Agency employees effective January 1, 1985.[5] On the same date, the Agency notified employees

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(Continued)

National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598, 610 (1984). *See also* Agency Statement of Position on Remand at 5; Union Statement of Position on Remand at 2.

[5] The resolution of the Board of Directors of the Federal Deposit Insurance Corporation, August 20, 1984, (Attachment C to Agency's Statement of Position on Remand), provided, in relevant part, as follows:

> BE IT FURTHER RESOLVED, that the Board of Directors hereby approves, and authorizes appropriate officers of the Corporation to take such actions as are necessary to implement, the following changes in employee benefits:
>
> 1. the establishment of a full cost-of-living adjustment to the salaries of all Corporation employees except members of the Board of Directors, to become effective on January 1, 1985, as proposed

(Continued)

of a reorganization of its regional offices and explained that the system of cost-of-living benefits established by the Board of Directors' resolution was designed, in part, to make it possible for employees moving to higher cost areas pursuant to the reorganization to suffer no financial loss when compared to Agency employees in lower cost areas.6/

(Continued)

> at Tab D of the attached document entitled "Regional Restructuring and Other Proposals" and as amended by the attached document entitled "Salary Differential Locations," with adjustments for Budget Year 1986 and ensuing years to be determined in accordance with an index to be developed annually at the direction of the Division of Accounting and Corporate Services and reported to the Board of Directors[.]

"Tab D" referenced above is set forth in an Appendix to the decision herein.

6/ The Agency's Notice to All Employees, August 20, 1984, entitled "Restructuring of Regional Operations" (Attachment A to Agency's Statement of Position on Remand at 5-6) states, in relevant part, as follows:

> What about the Changes in the Compensation and Benefit Packages We've Been Hearing About?
>
> . . . .
>
> Cost-of-Living Salary Adjustments (COLA) - A comprehensive analysis has been made of variations in the costs of housing, taxation, transportation, goods and services and other pertinent expenses in 135 field locations representing DBS field offices and major Liquidation sites across the country. The analysis was based on a family of four with a $35,000 income level, ownership of the home and two automobiles, etc. From that information, an index of cost-of-living adjustments was prepared which will allow us to more nearly match the salaries of personnel working in high-cost locations with those working in standard-cost areas. For example, individuals

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The Union then filed with the Court a Motion to Supplement the Record to include the Agency's August 20, 1984 Notice to All Employees, arguing that the Notice revealed that the Agency had abandoned a uniform salary scheme. The Authority also filed a motion with the Court requesting that the case be remanded to enable it to consider the relevance, if any, of the Agency's action to the Authority's earlier decision. By Order of April 26, 1985, the Court granted the Authority's motion and denied the Union's motion. The issue before the Authority on remand concerns the relevance of the Agency's August 20, 1984 resolution to the Authority's previous decision. After careful consideration of the record in the

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(Continued)

> assigned to New York City would have their salaries adjusted upward 12.6% while persons working in Syracuse, New York would receive a 1.6% adjustment. If you work in a standard cost area, there would be no COLA adjustment to your salary. This is a significant and long-studied step by the Corporation and will markedly improve the equity of our salary structure and enable us to attract more people to the urban areas where our attention is increasingly being focused. Implementation is set for January 1, 1985.
>
> . . . .
>
> The structural changes we are implementing are extensive and may involve relocation and new responsibilities for some of you. While change can be disruptive, consolidation of the Regional Offices will also bring about many new opportunities. The Board believes these steps are necessary to enable the Corporation to properly meet its future responsibilities and has attempted to compensate for their adverse impact through a number of very positive steps affecting compensation and benefits. I have every confidence that the skill, dedication and professionalism which have consistently been the hallmark of Corporation employees will again be demonstrated as we put this plan into effect.

See also Agency Statement of Position on Remand at 9.

case, including the parties' submissions pursuant to the Authority's Notice of Reopened Proceedings, the Authority makes the following determinations.

II. Positions of the Parties

On remand, the Union contends that the Agency's August 20, 1984 resolution undermines the Authority's earlier determination that a compelling need exists for Agency resolutions prescribing a uniform salary structure based upon an employee's grade and step. The Agency contends that its August 20, 1984 resolution establishes a benefit for employees wholly apart from and unrelated to its salary schedule and, thus, the August 20, 1984 resolution does not fall within the scope of the Authority's decision as to the essentiality of the Agency's salary schedule. In the alternative, the Agency argues that even if the Agency's August 20, 1984 resolution is found to pertain to employee salaries, that determination does not require the reversal of the Authority's decision. The Agency concludes that, for the same reasons as are set forth in the Authority's original decision, a compelling need exists for the cost-of-living adjustments established in the Agency's August 20, 1984 resolution. The Agency also contends that the proposal directly interferes with its right to determine its budget under section 7106(a)(1) of the Statute.

III. Analysis

A. Relationship of Resolution to Salary

As to the Agency's first contention, that its cost-of-living adjustments constitute separate and unrelated employee benefits, the Authority finds, in agreement with the Union,[7] that the subject matter of the Agency's August 20, 1984 resolution directly relates to the issues pertaining to the Agency's salary structure resolved by the Authority in its initial decision. The resolution provides for "a full cost-of-living adjustment to the salaries of all . . . employees." [Emphasis added.][8] Moreover, the record indicates that a major reason for adopting a system of cost-of-living adjustments is to make the salaries of Agency employees more competitive with salaries for comparable jobs in higher cost areas.9/ The Agency argues that because the cost-of-living adjustment is based upon job location rather than position classification it is a "relocation differential" and as such is an employee benefit. However, rather than substantiating its claim, the Agency's argument only emphasizes the similarity to other forms of wage differentials, like an environmental differential or hazardous duty pay. Furthermore, the Agency acknowledges that its cost-of-living adjustment constitutes taxable income to the employee, again implicitly underscoring the distinction between the cost-of-living adjustment involved herein and typical non-taxable employee benefits, like life and health insurance.10/ In short, the cost-of-living adjustment established by the Agency is an increment to employee salary. It is necessary, therefore, to consider the effect of its establishment upon the Authority's prior decision.

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[7] Union Supplemental Statement of Position on Remand at I-3.

[8] See note 5, *supra*.

B. Compelling Need

The Union contends that the Agency can no longer claim, and the Authority could not now find, that the uniform salary system established by Board of Director resolutions is essential to the accomplishment of the Agency's mission or the execution of its functions in a manner consistent with the requirements of an effective and efficient government. With the adoption of the August 20, 1984 resolution, the Agency no longer has a uniform salary system. In particular, the Union argues that since, under the Agency's cost-of-living adjustment, employees at the same grade and step will not receive the same salary, the Agency cannot claim, nor can the Authority find, that the August 20, 1984 resolution is essential to the achievement of pay equity and the preservation of employee morale. The Union concludes that there is no compelling need for the Agency's resolution so as to bar negotiation on the Union's proposal. The Agency cannot show that the disparate rates of pay established thereby are any more "essential" than the difference in rates of pay for unit employees which would result from the Union's proposal.

In its initial decision the Authority held that a compelling need existed for uniformity in the Agency's pay-setting system, compensating employees on the basis of the same salary rate for positions at the same grade and

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9/ See Appendix ("Tab D") at 1.

10/ Agency Statement of Position on Remand at 7-10.

step. The Authority stated as follows (at 611-12 of the decision):

> The Agency has demonstrated that the need for uniformity in its pay system is an integral aspect of the Agency's stated objective of pay equity. The Agency's need for uniformity is thus not one of mere administrative convenience, as our colleague suggests in dissent. In this regard, the Agency has shown that in the pay setting area, under the circumstances presented, lack of uniformity would result in pay inequity which in turn would result in disruption inimical to the accomplishment of the Agency's mission and execution of its functions in a manner consistent with an effective and efficient government. Thus, in the circumstances in this case, we are persuaded that there is an overriding need for a uniform pay setting system throughout the Agency in order to operate effectively and efficiently to accomplish its mission. [Footnotes omitted and emphasis added.]

In reaching its finding of compelling need the Authority addressed both uniformity as to amount, i.e., that employees at the same grade and step receive the same salary, and uniformity of pay-setting method, i.e., that all employees would be paid on the basis of the same system of computing salary rates. The Authority did not distinguish between these two different aspects of uniformity because, under the facts presented at that time, the method of computing employee salaries resulted in uniform salary rates. However, as the Union argues, the Agency's pay-setting system as modified in the August 20, 1984 resolution no longer provides uniform salary rates for employees at the same grade and step. Thus, the issue now before the Authority is whether the Agency has shown that it nevertheless has preserved in its pay-setting system a uniformity of method which is essential to the accomplishment of its mission.[11]

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[11] The Authority notes that employees' basic salary is still determined by grade and step. Pursuant to the August 20, 1984 resolution, employees' total salary is determined by a combination of that method with the method used to determine the applicable cost-of-living adjustment.

While the August 20, 1984 resolution modifies the Agency's salary structure by adding a cost-of-living adjustment, the system of determining employee salaries remains uniform. The same method or formula for computing relative cost-of-living in areas where Agency offices are located is applied to all employees of the Agency.[12] As the Agency notes, the cost-of-living adjustment modification of its salary structure enhances its ability to maintain pay equity among its employees by eliminating regional cost differentials and thereby equalizing employee "buying power."[13] In so doing, the Agency increases the efficiency and effectiveness of its accomplishment of its mission by facilitating the movement of employees within its regional offices and by making its salaries more competitive with other employers in higher cost areas.[14] The Union's proposal, on the other hand, would establish a method of computing the cost-of-living adjustment for unit employees in the Washington headquarters office which is different from that established for non-unit employees in the headquarters and 14 other regional locations by the Agency's August 20, 1984 resolution,[15] namely, it would adopt the recommendations of the President's Pay Council.[16] Such different treatment of those employees who happen to be in the unit nullifies the Agency's objective of equalizing employee "buying power" throughout the Agency and, consequently, undermines the incentives for employees to move. The only way by which the Agency can insure its

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12/ The Agency refers to the formula set forth in the August 20, 1984 resolution as a "standard cost area index." *See* Agency Statement of Position on Remand at 8. *See also* Attachment B to the Agency's Statement of Position on Remand and "Tab D" set forth in the Appendix hereto; Agency Supplemental Statement of Position on Remand at 5-6.

13/ Agency Statement of Position on Remand at 10-12. Agency Supplemental Statement of Position on Remand at 4-5. See note 6, *supra*. *See also* "Tab D" set forth in the Appendix hereto.

14/ Agency Statement of Position on Remand at 10-12. *See also* "Tab D" set forth in the Appendix hereto.

15/ Union Statement of Position on Remand at 5. Agency Supplemental Statement of Position on Remand at 6. It is not disputed on remand herein that Union Proposal 5 conflicts with the Agency's August 20, 1984 resolution.

16/ *See* 5 U.S.C. § 5305(b).

ability to accomplish its objective of equitable treatment of its employees is to maintain a uniform pay-setting system. The Authority disagrees with the Union's argument that the Agency has not shown that the pay-setting system set forth in the August 20, 1984 resolution is the only way to achieve those objectives.17/ Any pay-setting system which involves different methods of calculating the salaries of similar groups of employees, as would be the case if the Union's proposal were ultimately to be adopted, could produce inherently inequitable results by treating similarly situated groups of employees differently.

C. Management's Right to Determine Its Budget

The Agency also argued in this case that Union Proposal 5 is outside the duty to bargain under the Statute because it directly interferes with management's right to determine its budget under section 7106(a)(1).18/ However, the Agency has not demonstrated that implementation of the Union's proposal would directly interfere with management's right to determine its budget under the test set forth in *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 995 (1982). It is clear from the record in this case that Union Proposal 5 does not prescribe a particular program or operation which must be included in the Agency's budget. Rather, it concerns an already existing item, employee salaries. Moreover, the proposal does not prescribe the amount to be allocated to that item. It simply establishes a formula for adjusting employee salaries. There is no showing that the proposal directly interferes with the Agency's right to determine its

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17/ Union Statement of Position on Remand at 11.

18/ Section 7106(a)(1) of the Statute provides, in relevant part, as follows:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> (1) to determine the . . . budget . . . of the agency . . . [.]

budget. Further, the Agency has not demonstrated that implementation of the Union's proposal would result in a significant and unavoidable increase in costs. The Agency has presented no evidence as to the cost impact of the Union's proposal compared with the costs of the system, including the regional differential, adopted by the Agency. It has not been shown that the alleged increase in costs is not outweighed by compensating benefits. Union Proposal 5 does not directly interfere with management's right to determine its budget under section 7106(a)(1) of the Statute.

IV. Conclusion

The Authority finds that the Agency's August 20, 1984 resolution, modifying the Agency's pay-setting system by providing for regional cost-of-living adjustments, maintains a uniform formula for calculating the salary of employees of the Agency. Such action is essential to the accomplishment of the Agency's mission and execution of its functions in a manner consistent with an effective and efficient government. The Authority finds that Union Proposal 5 conflicts with an Agency resolution for which a compelling need exists. The Authority reaffirms its decision that the proposal is outside the duty to bargain under section 7117(a)(2) of the Statute and section 2424.11(a) of the Authority's Rules and Regulations.

Issued, Washington, D.C., April 14, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

I. PROPOSAL

A combination of factors is likely to result in a significant number of Corporation employees moving over time from generally lower-cost areas to higher-cost urban centers. These factors are mainly the regional realignment itself and our changing regulatory focus on large and problem banks regardless of their charter source. To minimize the financial hardships associated with relocating into higher-cost areas, to mitigate employee concern with the phase-out of six Regional Offices, and to make our salary structure more equitable for all personnel and the Corporation more competitive with other employers in high cost locations, we recommend adoption of a salary cost-of-living differential.

A summary schedule is attached which presents an index of adjustments that would be necessary to make more equitable the incomes of employees in high-cost locations throughout the country and those who work in standard or low-cost areas. Five alternatives are shown, ranging from paying full COLA to maximum adjustments of 10%, 7.5%, 5% and 2.5% of current salaries. Either the full living cost adjustment or the cap at 10% would go a long way toward alleviating the present inequities. However, we favor the full COLA option and feel its higher cost will be well justified.

II. JUSTIFICATION

As noted, we believe a mechanism is needed to adjust employee salaries for the significant differences that exist in various locations across the country in terms of housing, taxation, transportation, goods and services and other expense elements. This will therefore be an important benefit for the significant number of Corporation employees now living in high cost areas, and will also be helpful as we implement the regional restructuring plan and relocate significant numbers of personnel.

We contracted with Runzheimer and Company, Inc., to undertake a comprehensive analysis of living cost differences in 135 field locations. These locations represent DBS field offices and major Liquidation sites. Based on the firm's report, we believe we now have a supportable index and comprehensive cost profiles for each of the selected sites and therefore have a sound basis for instituting regional pay differentials.

The adjustment percentages shown in the attached summary schedule represent cost-of-living differences with "Standard City", an arithmetic mean of living cost standards in 100 representative cities. These percentages can be adjusted each year.

COST OF LIVING ADJUSTMENT

Location		Index	COLA Alternatives				
			Full	10%	7.5%	5.0%	2.5%
San Francisco	CA	111.0	8.8%	4.7%	3.5%	2.3%	1.2%
NYC Thornwood	NY	120.8	18.4%	9.7%	7.3%	4.9%	2.4%
San Juan	PR	121.3	18.9%	10.0%	7.5%	5.0%	2.5%
New York City	NY	114.9	12.6%	6.7%	5.0%	3.3%	1.7%
Los Angeles	CA	108.7	6.6%	3.5%	2.6%	1.7%	0.9%
Boston	MA	112.1	9.9%	5.2%	3.9%	2.6%	1.4%
NYC (LI) Bellrose	NY	115.7	13.4%	7.1%	5.3%	3.5%	1.8%
Los Angeles-Orange	CA	108.5	6.4%	3.4%	2.6%	1.7%	0.9%
Los Angeles-Glendale	CA	108.5	6.4%	3.4%	2.6%	1.7%	0.9%
Rochester	MN	109.1	7.0%	3.7%	2.8%	1.8%	0.9%
NYC Totowa	NJ	108.1	6.0%	3.2%	2.4%	1.6%	0.8%
Minneapolis	MN	109.0	6.9%	3.7%	2.8%	1.8%	0.9%
Chicago	IL	106.6	4.5%	2.4%	1.8%	1.2%	0.6%
Baltimore	MD	105.0	2.9%	1.5%	1.1%	0.7%	0.4%
East Lansing	MI	106.3	4.2%	2.2%	1.7%	1.1%	0.5%
Portland	OR	104.6	2.6%	1.3%	1.0%	0.7%	0.3%
Salt Lake City	UT	103.1	1.1%	0.5%	0.4%	0.3%	0.1%
Plainfield Township	MI	105.1	3.0%	1.6%	1.2%	0.8%	0.4%
Detroit	MI	106.9	4.8%	2.5%	1.9%	1.3%	0.7%
Milwaukee	WI	103.4	1.4%	0.7%	0.5%	0.3%	0.2%
Syracuse	NY	103.6	1.6%	0.8%	0.6%	0.4%	0.2%
Sioux City	IA	103.4	1.4%	0.7%	0.5%	0.3%	0.2%
Washington	DC	106.3	4.2%	2.2%	1.7%	1.1%	0.5%

NOTE: Some of the above indexes are composites of several communities within a metropolitan area (e.g., the index for Minneapolis, Minnesota) and certain others represent selected communities within a metropolitan area (e.g., the index for San Francisco, California).

III. IMPLEMENTATION

DACS has indicated the program can be implemented on January 1, 1985 and we recommend that be the initiation date. This will provide sufficient time for needed administrative and payroll changes and will also mean that the plan is operational when the first Regional Office closing takes place (June 15, 1985).

IV. COST ANALYSIS

Estimated annual costs for the various percentage adjustment scenarios, as developed by DACS, are shown below. It should be noted this proposal results in no change to the salaries of most Corporation employees who work in standard or low-cost areas.

	Adjustment			
Full COLA	10%	7.5%	5%	2.5%
$2,700,000	$1,400,000	$1,080,000	$700,000	$350,000

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and Case No. 0-NG-547

U.S. ARMY ENGINEER
DISTRICT, KANSAS CITY, MO.

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the underscored portion of the following Union proposal.

> Annual ratings are effective as of the date approved and remain the employee's current official rating for one year or until replaced by another rating or an entrance rating. An entrance rating is an automatic official rating of Fully Successful, as a minimum, unless an Exceptional or Highly Successful rating has been given within the last 12 months, in which case, that rating will be the entrance rating for one year from its effective date; provided the employee has not changed career fields.

II. Positions of the Parties

The Agency contends that the proposal conflicts with an internal agency regulation which provides that an employee's entrance rating when changing positions will be "Fully Successful." It claims that a compelling need exists for this regulation because it (1) implements in an essentially nondiscretionary manner the mandate of a Government-wide regulation and (2) is essential to the maintenance of basic merit principles. It argues that the proposal is, therefore, outside the duty to bargain under section 7117(a)(2) of the Statute.

The Union contends that the Agency has not demonstrated a compelling need for its regulation.

III. Analysis and Conclusion

The Union's proposal provides that an employee whose past performance warranted an "Exceptional" or "Highly Successful" rating would retain that rating for one year and would receive the same rating as an entrance rating when changing positions during that year. The proposal conflicts with Army Regulation 690-400, Chapter 430 which provides that an employee's entrance rating is an automatic official rating of "Fully Successful." However, an agency regulation does not bar negotiation on a conflicting union proposal unless the agency demonstrates that its regulation is supported by a compelling need. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 450, 454 (1980).

The Agency first contends that there is a compelling need for its regulation under the illustrative standard for determining whether a compelling need exists as set forth in section 2424.11(c) of the Authority's Rules. It claims that a Department-wide performance appraisal system which results in consistent ratings throughout the Agency is required to implement the requirement of 5 CFR 351.201(c).[1] That provision states that 5 CFR Part 351 must be "uniformly and consistently applied in any one reduction in force [RIF]." The Agency argues that the Union's proposal would result in employees in different bargaining units who had performed equally well receiving different entrance ratings and, consequently, different service credit in the event of a RIF.[2]

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[1] All references in this decision to the Office of Personnel Management's regulations concerning reductions-in-force (RIF) in 5 CFR Part 351 are to the revised regulations published at 51 Fed. Reg. 318-326 (1986) which became effective February 3, 1986 (hereinafter referred to as the RIF regulations).

Both the Union proposal and the agency regulation do not specifically concern the amount of service credit which an employee will receive under OPM regulation. Rather, the proposal and the agency's regulation each establish an entrance rating which would serve as the basis for determining the service credit to which an employee would be entitled. The Agency has not shown that the only way it could apply section 351.504(d) in a uniform and consistent manner is by giving all employees an entrance rating of "Fully Successful." It has not demonstrated that the Union's proposal would prevent it from crediting all employees with similar ratings with the same amount of service credit as required under section 351.504(d).

Moreover, the Agency would be required to replace its current regulation with one similar to the Union's proposal under the new OPM Performance Management System regulations effective April 10, 1986. 51 Fed. Reg. 8396-8421 (1986). The new regulations require all agencies to transfer an employee's current performance rating of record to the employee's new job when an employee moves to a new position between performance appraisals. See 5 CFR 430.206(f) and 293.405(a). To the same effect, the Federal Personnel Manual chapter implementing the RIF regulations provides that "[r]egardless of whether the employee's service occurred in one or more agencies," the additional service credit an employee receives in a RIF should be based on "the employee's actual ratings." Interim FPM chapter 351 section 3-9(d)(3) (transmitted March 4, 1986 by FPM Letter 351-20).

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[2] The relevant regulation, 5 CFR 351.504(d), provides:

> §351.504 Credit for performance.
>
> . . . .
>
> (d) The additional service credit an employee receives for performance under this subpart shall be expressed in additional years of service and shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the employee's last three (actual and/or assumed) annual performance ratings of record computed on the following basis:
>
> (1) Twenty additional years of service for each performance rating of outstanding (Level 5) or equivalent;
>
> (2) Sixteen additional years of service for each performance rating of exceeds fully successful (Level 4) or equivalent; or
>
> (3) Twelve additional years of service for each performance rating of fully successful (Level 3) or equivalent.

Additionally, the Agency has not provided support in the record for its contention that the proposal, which applies only to employees in the Kansas City District bargaining unit, would require it to treat employees in a single competitive area inconsistently in the event of a RIF. In this connection, the Agency does not claim that the competitive area encompassing the Kansas City District bargaining unit also includes positions and employees who are not within the bargaining unit. See National Treasury Employees Union and Department of Health and Human Services, Region IV, 11 FLRA 254 (1983), in which the Authority made no determination as to whether Union Proposal 1 concerning competitive areas applied to non-bargaining unit employees because the agency's sole contention was that the proposal conflicted with a regulation for which a compelling need existed.

The Agency also contends that its regulation satisfies the standard for compelling need set forth in section 2424.11(b) of the Authority's Rules because it is essential to the maintenance of basic merit principles mandating fair and equitable treatment for employees set forth at 5 U.S.C. §2301(b)(2) and (6). However, the Agency's contentions amount to nothing more than a reassertion of its argument concerning additional service credit based on performance disposed of above.

The Authority finds that the Agency has failed to demonstrate that its regulation is supported by a compelling need. Therefore, the regulation does not bar negotiation on the Union proposal and the proposal is within the duty to bargain.3/

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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3/ In finding the proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union's proposal.

Issued, Washington, D.C. April 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 38

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE PANAMA CANAL COMMISSION

Activity

and

Case No. 0-AR-1059

MARITIME METAL TRADES COUNCIL,
AFL-CIO

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

The case is before the Authority on a request for reconsideration filed by the Union on February 25, 1986, seeking reconsideration of the Authority's Order of December 9, 1985, dismissing the Union's exceptions (20 FLRA No. 100 (1985)). For the reasons set forth below, the Union's request must be denied.

The Authority dismissed the Union's exceptions to the arbitrator's award on the basis that such exceptions were untimely. The Authority found that the arbitrator's award was dated October 3, 1985, and pursuant to section 7122(b) of the Statute, as amended, 1/ and section 2425.1 of the Authority's Rules and Regulations, as amended, 2/ which amendments are applicable to exceptions filed on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Authority's Rules and Regulations, which are also applicable to computation of time limit here involved, the exceptions had to be filed in the national office of the Authority not later than the close of business on November 6, 1985.

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

However, the exceptions were not filed with the Authority at its national office until November 20, 1985, after having been mistakenly mailed to the Authority's Dallas Regional Office where it was received on November 19, 1985, and immediately forwarded.

In its request for reconsideration, which the Union recognizes is untimely filed under section 2429.17 of the Authority's Rules and Regulations,[3] it requests a waiver of both the time limit for filing a request for reconsideration and the time limit for filing the original exceptions to the arbitration award on the basis of the unique mailing problems that exist between Panama and the United States. The Union asserts in this regard that (1) it did not receive the Authority's December 9, 1985, Order Dismissing Exceptions until December 31, 1985, and (2) it had filed all previous exceptions with the Dallas Regional Office and those in this case were mailed with sufficient time for the Dallas Regional Office to forward its exceptions to the national office of the Authority.

With respect to the untimely request for reconsideration, section 2429.23(b) of the Authority's Rules and Regulations provides, in pertinent part, that "Except as provided in paragraph (d) of this section, the Authority ... may waive any expired time limit ... in extraordinary circumstances." While recognizing that mail delivery between Panama and the United States presents unique problems for a party meeting the filing requirements and such problems may, in appropriate circumstances, provide "extraordinary circumstances" for waiving an expired time limit, such circumstances are not present here. 4/ In this regard, it is noted particularly that the Union acknowledges receipt of the Authority's Order of December 9, 1985 on December 31, 1985, but did not file its request for reconsideration until February 25, 1986.5/

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[3] Section 2429.17 of the Authority's Rules and Regulations provides that a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may file a motion for reconsideration of a final decision or order of the Authority within ten (10) days after service of such decision or order. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Union's request for reconsideration was due in the national office of the Authority before the close of business on December 24, 1985. However, the Union's request was not filed until February 25, 1986.

4/ The Authority is not unmindful of the unique problems experienced by parties making filings from outside of the continental United States and it is the Authority's practice consistent with the provisions of the Statute and section 2429.23 of the regulations to grant extensions of time where good cause is shown and to waive expired time limits in extraordinary circumstances.

5/ While it is concluded that the request for reconsideration must be dismissed as untimely, it is noted that even if timely, no basis exists for granting the Union's request that the time limit for filing the original exceptions to the arbitrator's award be waived. Section 2429.23(d) of the Authority's Rules and Regulations provides, in pertinent part, that the time limits established in 5 U.S.C. 7122(b) "may not be extended or waived ...." Section 7122(b) of the Statute establishes the 30 day time period for filing exceptions to an arbitrator's award. As described above, the exceptions had to be filed in the National Office not later than close of business on November 6, 1985. Although the exceptions were mailed by the Union through the Air Force APO mail system on November 2, 1985, they were not received by the Dallas Regional Office until November 19, 1985, (possibly being delayed by the fact that they were addressed to the former address of the Regional Office). Consequently, they were not filed with the National Office until November 20, 1985. While the Union did mail the exceptions on November 2, 1985, presumably in sufficient time to be timely received if properly addressed, exceptions to an arbitrator's award cannot be filed at a Regional Office. Since the inception of the Authority in 1979, applicable regulations have required that exceptions to arbitration awards filed with the Authority be filed at the National Office.

Accordingly, as the Union's request for reconsideration does not present extraordinary circumstances warranting waiver of the time limit for filing such request, it must be denied.

For the Authority.

Issued, Washington, D.C., April 16, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

21 FLRA No. 39

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Activity

and

Case No. 0-AR-1056

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Robert J. Ables filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance alleged that the Activity denied the grievant the opportunity to work overtime on an asbestos rip-out project because she was absent on sick leave on the day the overtime assignments were made. The grievance also alleged that during later changes in the overtime assignments made after the grievant had returned to work a less qualified employee was chosen instead of the grievant. The Arbitrator found that the Activity violated pertinent provisions of the parties' collective bargaining agreement when it failed to select the grievant for the overtime assignment and ruled that "the grievant should have been assigned or, at least, been requested to perform overtime work on the second shift." He sustained the grievance and as a remedy ordered the Activity to pay the grievant as though she had worked 12 hours of overtime.

III. EXCEPTION

As its exception, the Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator failed to find that the grievant would have worked 12 hours of overtime but for the violation of the agreement.

IV. ANALYSIS AND CONCLUSION

In order for an award of backpay to be authorized by the Back Pay Act, the arbitrator must determine that the aggrieved employee was affected by an unjustified or unwarranted personnel action, that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials, and that but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. U.S. Army Aberdeen Proving Ground and Local 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, 19 FLRA No. 35 (1985). In this case, the Arbitrator determined that the Activity violated the parties' agreement by denying the grievant overtime. However, he did not find specifically that but for the Activity's violation of the parties' agreement, the grievant would have performed the overtime work and received overtime pay. That is, the Arbitrator's finding that the grievant should have been assigned or should have been requested to perform the overtime does not constitute the requisite finding that she would have performed the work. Consequently, the award of retroactive overtime pay to the grievant is contrary to the Back Pay Act. See Jefferson Barracks National Cemetery, St. Louis, Missouri and National Association of Government Employees, Local R14-116, 13 FLRA 703 (1984).

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is set aside.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 40

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1078

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2006

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Barbara Fausner Tener filed on behalf of the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

In her award the Arbitrator found that the Agency had removed the grievant from the Federal service for just cause and denied the grievance.

III. ANALYSIS AND CONCLUSION

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as removal actions. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. E.g., Veterans Administration Medical Center, New York, N.Y. and Local No. 2094, American Federation of Government Employees, 7 FLRA 788 (1982).

Since the Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

IV. DECISION

Accordingly, for that reason and apart from other considerations, the Union's exceptions are dismissed.

Issued, Washington, D.C., April 16, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 41

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1857

Union

and

Case No. 0-AR-1100

SACRAMENTO AIR LOGISTICS CENTER,
McCLELLAN AIR FORCE BASE

Activity

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Jean Wilcox filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

The grievance in this case concerned the conduct of the grievant which resulted in her being reprimanded and then removed. In her award the Arbitrator found that the reprimand and the removal of the grievant were in accordance with applicable law and regulation and the collective bargaining agreement.

III. ANALYSIS AND CONCLUSIONS

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute pertinently provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than

> an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as removal actions. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Because the Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512, i.e., the removal of the grievant, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

IV. DECISION

Accordingly, for these reasons and apart from other considerations, the Union's exceptions are dismissed.

Issued, Washington, D.C., April 16, 1986.

J. R. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 42

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-87

Union

and

Case No. 0-NG-910

THE ADJUTANT GENERAL
OF KANSAS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals.

II. Union Proposal 1

Article 12, Section 7: Change to read:

> a. When the specific position, in an activity, from which an individual has been removed or demoted through reduction in force (RIF) is vacant and is being filled, the individual who was removed or demoted will be returned to the position and/or grade noncompetitively subject to paragraph b, below.
>
> b. A basis for an individual not to be returned to his former position and/or grade, noncompetitively is an unsatisfactory performance rating which is documented in the individual's OPF, at the time the position concerned becomes vacant, or documentation that the individual's work either before or

after the action by reduction in force, was not at an acceptable level of competence.

c. If more than one individual meets the criteria contained in a and b above, the employee who possessed the highest retention standing at the time of the RIF action will be returned to the concerned position and/or grade prior to others listed on the retention register.

d. All individuals previously affected in a RIF without personal cause, misconduct, or inefficiency, will receive special consideration for being returned to their former position and/or grade.

NOTE: FOR THIS SECTION THE TERM [sic] "FORMER POSITION" and "CONCERNED POSITION" INCLUDES BUT IS NOT LIMITED TO THE ACTIVITY THE INDIVIDUAL WAS EMPLOYED AT, AT THE TIME OF THE RIF.

A. Positions of the Parties

The Agency alleges that the proposal is nonnegotiable because it interferes with management's right under section 7106(a)(2)(C) to fill positions by making selections from any appropriate source. The Agency also alleges that the proposal violates management's right to assign employees under section 7106(a)(2)(A) by requiring the reassignment of demoted employees. The Union argues, citing the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981), that the provision constitutes an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute for employees adversely affected by the exercise of management's rights.

B. Analysis

Union Proposal 1 in this case, which provides reemployment or repromotion rights for persons removed or demoted in a reduction-in-force (RIF), is comparable to Provision 2 at issue in National Association of Government

Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

The proposal in this case, like Provision 2 in that case, would apply only when management decides to fill positions from which employees have been removed or demoted in a RIF. Similarly, it would only require management to reemploy or promote employees who were qualified for and had previously performed acceptably in the position being filled. Union Proposal 1, therefore, does not impose any greater burden on management or provide any greater benefit for employees than the provision in Kansas Army National Guard. As with the provision at issue in Kansas Army National Guard, the burden on management in these circumstances is insubstantial in comparison to the detriment originally suffered, and the benefit later obtained, by the affected employees.

C. Conclusion

Consistent with our reasoning in Kansas Army National Guard, we hold that Union Proposal 1 does not excessively interfere with management's right, under section 7106(a)(2)(C), to fill vacant positions by making selections from any appropriate source and that it is an appropriate arrangement under section 7106(b)(3). We note that while the Kansas Army National Guard case involved only repromotion rights, and this case involves repromotion and reemployment rights, it does not appear, nor do the parties argue, that there is any material difference in those rights so as to affect the outcome in this case.

We further conclude that Union Proposal 1 does not excessively interfere with management's right to assign employees under section 7106(a)(2)(A). Even if the Agency's argument that reemployment and repromotion are "assignments" within the meaning of section 7106(a)(2)(A) were credited, there would not be any different or additional substantive effect on management's rights or on management's practical needs. Therefore, we find that by designating the particular employee to be reemployed or repromoted, that is, "reassigned," the proposal would not excessively interfere with management's right to assign employees.

III. Union Proposal 2

Article 13: Add the following note:

> NOTE: Provisions of Article 12, Section 7, [Union Proposal 1, supra] of this agreement will take precedent [sic] over this article.

A. Positions of the Parties

As explained by the parties, Union Proposal 2 requires the Agency to abide by Article 12, Section 7, in any situation where that provision conflicts with the Agency's RIF regulations which are cited in Article 13. The Agency contends that, by making Union Proposal 1 applicable in RIF situations, Union Proposal 2 is nonnegotiable for the same reasons it alleges Union Proposal 1 is nonnegotiable. In addition, the Agency argues that Union Proposal 1 could not, as required by Union Proposal 2, take precedence over Article 13 because the latter incorporates Technician Personnel Regulation (TPR) 300 (351), an Agency regulation for which the Authority has found a compelling need to exist. The Union contends that if Union Proposal 1 is negotiable, Union Proposal 2, which depends upon it, is also negotiable.

B. Analysis

Because it would also give force to Article 12, Section 7 (Union Proposal 1 in this case), the proposal presents issues as to management rights which are identical to those addressed in the discussion of Union Proposal 1. For the reasons set forth above we find that this proposal does not excessively interfere with management's rights under the Statute.

The Agency further argues that by giving Article 12, Section 7, priority over Article 13, Union Proposal 2 conflicts with an Agency regulation, Technician Personnel Regulation (TPR) 300 (351), for which a compelling need exists. The Agency cites certain Authority decisions in support of its argument.[1] Those decisions, however,

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[1] The Agency cites American Federation of Government Employees, AFL-CIO, Local 2953 and National Guard Bureau, Office of the Adjutant General, Nebraska, 7 FLRA 87 (1981), affirmed American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority, 730 F.2d 1534 (D.C. Cir. 1984); Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters 120th Fighter Interceptor Group (ADTAC), 11 FLRA 585 (1983), affirmed as to these matters and reversed and remanded as to other matters sub nom. Association of Civilian Technicians, Montana Air Chapter v. Federal Labor Relations Authority,

(Continued)

held that there was a compelling need only for that part of the cited regulation which requires civilian technician RIF retention standing to be based on each employee's civilian and military appraisals. These decisions stand for the limited proposition that that part of the regulation constituted a bar to proposals insofar as they would have eliminated the military appraisal as a factor in determining technician retention standing. The Agency does not claim, or refer to any other decision in which the Authority has found, that a compelling need exists for any other portion of that regulation. Thus it appears that the Agency is only arguing that Union Proposal 2 conflicts with the part of its RIF regulations which prescribe the criteria for determining an employee's retention standing.

The Agency's argument, however, overlooks the fact that the proposal requires the selection of the employee with the highest retention standing and that the standing would be determined in accordance with the Agency's regulations. That is, the proposal by its express terms must be applied consistent with precisely that part of its regulations on which the Agency relies to bar negotiation.

C. Conclusion

Since the Agency has not demonstrated any conflict between the proposal and the cited Agency regulation, that regulation does not constitute a bar to negotiation of Union Proposal 2. Union Proposal 2, therefore, constitutes a negotiable appropriate arrangement under section 7106(b)(3) and is within the Agency's duty to bargain under the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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(Continued)

756 F.2d 172 (D.C. Cir. 1985), Decision and Order on Remand, 20 FLRA No. 85 (1985). See also Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (Proposal 2).

Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1 and 2.[2]

Issued, Washington, D.C. April 16, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In deciding that the proposals are within the duty to bargain, the Authority makes no judgment as to their merits.

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Federal
Labor Relations
Authority

Washington, D.C. 20424

NUMBER 357 REPORT OF CASE DECISIONS April 22, 1986

NEGOTIABILITY CASE

21 FLRA No. 46 (April 21, 1986)

American Federation of Government, AFL-CIO and Department of Housing and Urban Development, Case Nos. 0-NG-930 and 0-NG-931

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UNFAIR LABOR PRACTICE CASES

21 FLRA No. 43 (April 16, 1986)

National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO, and Rose M. Lepore, Regional Commissioner, Region III, Social Security Administration, Case No. 2-CO-50010

21 FLRA No. 44 (April 17, 1986)

U.S. Soldiers' and Airmens' Home, Washington, D.C. and American Federation of Government Employees, Local 3090, AFL-CIO, Case No. 3-CA-20561

21 FLRA No. 45 (April 18, 1986)

American Federation of Government Employees, Local 2782 AFL-CIO and Department of Commerce, Bureau of the Census, Case No. 3-CO-50002

21 FLRA No. 47 (April 21, 1986)

Immigration and Naturalization Service and American Federation of Government Employees, Local 1917, AFL-CIO, Case No. 2-CA-40021

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21 FLRA No. 43

The Nat'l Council of SSA
Administrative Field Operations
Locals - Council 220, AFGE and Rose
M. LePore, Regional Commissioner,
Region III, SSA, Case No.
2-CO-50010 (Decided April 16, 1986)

**Federal
Labor Relations
Authority**

DIGEST HEADINGS	STATUTE
5000 UNFAIR LABOR PRACTICES	7114(b)(5)
5500 Refusal to Consult, Confer, Negotiate	7116(b)(5)
	7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Collective Bargaining
    Bargaining Agent
    Local Agreement that conflicts with National Agreement
      Where Bargaining Agent Agreed to Terms
  Remedy
    Sign Memorandum of Understanding
  Union Violations
    Refusal to Confer, Consult, Negotiate
      Refusal to Sign an Agreed Upon Memorandum of Understanding

DIGEST NOTES

Where an authorized representative of the Union possessed at least apparent authority to bind the Union, and he negotiated and reached an agreement with the agency concerning overtime distribution and compensatory leave, the union must sign the written memorandum of understanding embodying the agreed upon terms. The Union failed to prove that the agency had any prior knowledge that there were restrictions on the union representative's authority. The Authority concluded, in agreement with the Judge, that by ordering its agent to refuse to execute the negotiated agreement concerning overtime distribution and compensatory leave and by continuing to refuse to execute that agreement, the union violated § 7116(b)(5).

21 FLRA No. 44

Federal
Labor Relations
Authority

Soldiers' and Airmen's Home, Washington, D.C. and AFGE, Local 3090, Case No. 3-CA-20561 (Decided April 17, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7116(a)(1) and (8)
1550 Procedure	7122(b)
1552 Time Limits	
4000 UNFAIR LABOR PRACTICE: AGENCY	
4800 Otherwise Refuse to Comply with the Statute	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Procedure
    - Stay of Arbitration Awards
      - Separate Request Required in Addition to Filing Exceptions
- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply with the Statute
      - § 7122(b)
  - Remedy
    - Comply with Arbitration Award

DIGEST NOTES

An activity must comply with the terms of an arbitration award if it fails to request a stay of an award as required by § 2429.8 of the Authority's rules and regulations, despite filing timely exceptions. The U.S. Court of Appeals for the District of Columbia Circuit set aside the Authority's previous decision in which the Authority found that the respondent had not failed and refused to comply with the provisions of § 7122(b) and therefore had not violated § 7116(a)(1) and (8) where it had filed timely exceptions but neglected to requested a stay of the award. The Authority, accepting the court's opinion as the law of the case, issued a remedial order.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 45

Federal Labor Relations Authority

AFGE, Local 2782 and Dep't of Commerce, Bureau of the Census, Case No. 3-CO-50002 (Decided April 18, 1986)

DIGEST HEADINGS	STATUTE
5000 UNFAIR LABOR PRACTICES	7116(b)(1) and (8)
5800 Otherwise Refuse to Comply with the Statute	7118
Negotiate	7121

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Failure of Union to Participate in Arbitration
Unfair Labor Practice
  Remedy
    Proceed to Arbitration Union Violations
  Otherwise Refuse to Comply with the Statute
    § 7121

DIGEST NOTES

The Authority adopted the Judge's decision that the Union violated § 7116(b)(1) and (8) when it refused to proceed to arbitration concerning three grievances filed by the agency. Once arbitration is invoked by one party to a collective bargaining agreement, the other party is obligated to proceed to, and participate in, the requested arbitration proceedings. A failure of a party to so participate, is violative of § 7121 and constitutes an unfair labor practice. The Judge concluded that although the union asserted that the 1983 agreement was "null and void " and, therefore, it would only honor grievances under the prior 1979 agreement, the union was required to proceed to arbitration under the parties' prior 1979 agreement which contained a similar grievance and arbitration procedures as the 1983 agreement. Thus, by failing or refusing to proceed to arbitration pursuant to the grievance and arbitration provisions of either collective bargaining agreement, the union failed to comply with § 7121.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. [illegible]

AFGE, Local 2782 and Dep't of Commerce, Bureau of the Census, Case No. 3-CO-50001 (Decided April 18, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
5500 UNFAIR LABOR PRACTICES	7116(b)(1) and (8)
5530 Otherwise Refuse to Comply with the Statute	7118
Negotiate	7121

SUBJECT MATTER INDEX ENTRIES

Arbitration
Failure of Union to Participate in Arbitration
Unfair Labor Practice
Remedy
Proceed to Arbitration Union Violations
Otherwise Refuse to Comply with the Statute
§ 7121

DIGEST NOTES

The Authority adopted the Judge's decision that the Union violated § 7116(b)(1) and (8) when it refused to proceed to arbitration concerning three grievances filed by the agency. Once arbitration is invoked by one party to a collective bargaining agreement, the other party is obligated to proceed to, and participate in, the requested arbitration proceedings. A failure of a party to so participate, is violative of § 7121 and constitutes an unfair labor practice. The Judge concluded that although the union asserted that the 1983 agreement was "null and void" and, therefore, it would only honor grievances under the prior 1979 agreement, the union was required to proceed to arbitration under the parties' prior 1979 agreement which contained a similar grievance and arbitration procedure as the 1983 agreement. Thus, by failing or refusing to proceed to arbitration pursuant to the grievance and arbitration provisions of either collective bargaining agreement, the union failed to comply with § 7121.

Federal
Labor Relations
Authority

21 FLRA No. 46

AFGE and HUD, Case Nos. 0-NG-930 and 0-NG-931 (Decided April 21, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7103(a)(14)(B)
2150 Management Rights	7105(a)(2)(E)
2200 Mandatory Subjects of Bargaining	7106(a), (b) and (b)(3)
2210.05 Appropriate Arrangements	
2600 Conditions for Review	
2601 Proposal Alleged to be Inconsistent with Federal Law	
2700 Petition For Review	
2702 Timeliness	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions of Employment
    - Classification of Any Position [7103(a)(14)(B)]
      - Cost Calculations
  - Management Rights
    - Generally
      - Consideration of Alternate Courses of Action
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangements
      - Considering Furloughs and Retraining instead of RIF Action
  - Reduction-in-Force
    - Cost Studies
      - Comparing Furloughs and Retraining to RIF Action
  - Procedure
    - Timeliness
      - Oral vs. Written Notification of Nonnegotiability Allegation

DIGEST NOTES

A proposal is negotiable that requires the agency to conduct a cost study to determine whether instituting a furlough or retraining program for affected employees would be less costly than conducting a RIF. Also the proposal provides a suggested furlough schedule as part of the cost study by which management would calculate the cost savings of temporarily laying off employees according to their GS grade. The proposal requires management to consider certain alternative courses of action, without placing any obligation on the agency to adopt any of the specified actions in lieu of a RIF. Accordingly, the proposal is not inconsistent with management rights under § 7106(a) and (b) and is an appropriate arrangement under § 7106(b)(3). (proposal 1)

A proposal is negotiable which requires the agency, when conducting cost studies concerning a possible RIF, to calculate the cost savings of furloughing wage grade and printing employees in the same manner as specified GS employees. The proposal does not concern the classification of a position within the meaning of § 7103(a)(14)(B) and therefore is not excluded from the definition of a condition of employment. (proposal 2)

The time limits for filing a negotiability appeal under § 2424.3 of the Authority's rules and regulations runs from the date an agency's allegation is served in writing upon a union rather than, as the agency alleged, when it orally stated to the union that the proposal was nonnegotiable.

21 FLRA No. 47

INS and AFGE, Local 1917, Case No. 2-CA-40021 (Decided April 21, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4500 Refusal to Negotiate 6810 Remedies for Agency Violations	7116(a)(1), (5) 7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Change in Practice of Issuing Blackjacks to Guards
        - More than *de minimis*
  - Remedy
    - *Status Quo Ante*
      - Practice of Issuing Blackjacks to Guards
        - Efficiency of Activity Not Disrupted or Impaired
        - Legality - N.Y. State Laws Not Applicable
        - Propriety - No Judgment by Authority

DIGEST NOTES

The Authority adopted the Judge's decision that the Agency violated § 7116(a)(1) and (5) when it unilaterally changed a practice of issuing blackjacks to detention officers without bargaining over the impact and implementation of its decision to discontinue the past practice. The Authority found, as did the Judge, that the change had more than *de minimis* impact on unit employees' conditions of employment. The Agency, therefore, was obligated to notify the Union and afford it an opportunity to bargain over the procedures to be observed in implementing such change and appropriate arrangements for unit employees adversely affected by its decision to change the practice of issuing blackjacks.

The Authority, contrary to the Judge, concluded that since the laws of the State of New York were not applicable to the

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employees in this case, there was not a basis to conclude that a *status quo ante* remedy was unlawful. The Authority found that a *status quo ante* remedy was warranted in the circumstances of this case where no notice or bargaining opportunity was afforded the Union concerning the change; the agency refused the union's request for negotiations after implementation of the change; other detention officers retained possession of their previously issued blackjacks; and there was no indication in the record that the Respondent's operations would have been disrupted by reinstating the past practice of issuing blackjacks.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL COUNCIL OF SOCIAL
SECURITY ADMINISTRATION FIELD
OPERATIONS LOCALS - COUNCIL 220
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and Case No. 2-CO-50010

ROSE M. LEPORE, REGIONAL
COMMISSIONER, REGION III
SOCIAL SECURITY ADMINISTRATION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed to the attached Decision of the Administrative Law Judge. The complaint before the Judge alleged that the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO (the Union) violated section 7116(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to execute a negotiated agreement concerning overtime distribution and compensatory leave. The Judge found that the Union had engaged in the unfair labor practices alleged in the complaint, in violation of the Statute, and recommended that the Authority issue an appropriate order directing the Union to cease and desist from these unfair labor practices.

II. Background Facts

As the result of negotiations between the Union and the Agency (the Charging Party), concerning overtime distribution and compensatory leave, the parties reached an agreement. However, when the agency presented the agreement for signature to Thomas Biggar, the Union's Acting Regional Vice President, with whom it had been negotiating, Biggar refused to sign the agreement, stating that he was under a direct order not to sign. The agency then filed the unfair labor practice charge that led to this complaint.

III. Positions of the Parties

At the hearing the General Counsel argued that the Union negotiator, Biggar, had the apparent authority to bind the Union and that, if he was restricted in any way in this regard, the Union had failed to meet the burden of proving that the agency was aware of any such restrictions.

In its exceptions, the Union argues, as it did before the Judge, that the agency had the burden of explicitly confirming with higher Union officials the exact nature of Union negotiator Biggar's authority to bind the Union to an agreement. If the agency had sought such confirmation, it argues, the agency would then have known that Biggar's authority was in fact limited. From this, it contends that the Judge was incorrect in finding that the Union should be bound by Biggar's actions.

IV. Analysis

In his decision, the Judge held that Union negotiator Biggar possessed at least apparent authority to bind the Union and that the Union failed to meet the burden of proving otherwise. We agree with the Judge's conclusion that, as an authorized representative of the Respondent Union negotiated and reached agreement, the Union must be required to sign the written memorandum of understanding embodying the agreed upon terms. However, we find it unnecessary to pass upon, and specifically do not adopt, the Judge's statement with regard to whether, or in what forum, the memorandum's enforceability may be challenged as potentially conflicting with the terms of the parties' national collective bargaining agreement.

V. Conclusion

The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings,[1] conclusions, and recommended Order as modified.[2] Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. We therefore conclude that the Respondent has violated section 7116(b)(5) of the Statute by ordering its agent to refuse to execute a negotiated agreement concerning overtime distribution and compensatory leave and by continuing to refuse to execute that agreement.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO, shall:

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[1] The Respondent in essence excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

[2] The Judge's recommended Order has been modified for consistency with remedial orders previously issued where substantially identical violations of the Statute have been found. *See, e.g.*, *American Federation of Government Employees, AFL-CIO, Local 3732*, 16 FLRA 318 (1984).

1. Cease and desist from:

(a) Refusing to bargain in good faith with Region III, Social Security Administration, by withdrawing its delegation of authority to its agent, Biggar, by ordering him not to sign, and by refusing to sign the January 21, 1985 written memorandum of understanding embodying terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

(b) In any like or related manner failing to bargain in good faith with Region III, Social Security Administration.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, sign the January 21, 1985 memorandum of understanding reached with Region III, Social Security Administration, which embodies terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

(b) Post at its business offices and normal meeting places, including all places where notices to members and to employees of Region III, Social Security Administration, are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Regional Vice President of the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notice to the Regional Commissioner, Region III, Social Security Administration, for posting in conspicuous places where unit employees are located, where they should be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with Region III, Social Security Administration, by withdrawing the delegation of authority to our agent, Biggar, by ordering him not to sign, and by refusing to sign the January 21, 1985 written memorandum of understanding embodying terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

WE WILL NOT in any like or related manner fail to bargain in good faith with Region III, Social Security Administration.

WE WILL, upon request, sign the January 21, 1985 memorandum of understanding reached with Region III, Social Security Administration, which embodies terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

____
(Labor Organization)

Dated:____________ By:____________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278, and whose telephone number is: (212) 264-4934.

[21 FLRA No. 43]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

NATIONAL COUNCIL OF SOCIAL SECURITY
ADMINISTRATION FIELD OPERATIONS
LOCALS - COUNCIL 220, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO

Respondent

and   Case No.: 2-CO-50010

ROSE M. LEPORE, REGIONAL
COMMISSIONER, REGION III, SOCIAL
SECURITY ADMINISTRATION

Charging Party

. . . .

John R. Steen, Esquire
Edgar Allan Jones, III, Esquire
For the General Counsel

Martin R. Cohen, Esquire
For the Respondent

Irving L. Becker, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on February 26, 1985, by Rose M. LePore, Regional Commissioner, Region III, Social Security Administration, (hereinafter called the Charging Party or SSA), a Complaint and Notice of Hearing was issued on April 29, 1985, by the Regional Director for Region II, Federal Labor Relations Authority, New York, New York. The Complaint alleges that the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, (hereinafter called the Union or Respondent), violated Section 7116(b)(5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in refusing to execute a negotiated agreement concerning overtime distribution and compensatory leave.

A hearing was held in the captioned matter on June 10, 1985, in Philadelphia, Pennsylvania. All parties were afforded the full opportunity to be heard, to examine and cross-examine witness, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on July 25, 1985, which have been duly considered.

Upon the basis of the entire record, including my observation of the witness and his demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE), is the exclusive representative of a consolidated nationwide unit of certain employees of the Social Security Administration, including among others, all employees employed in the District and Branch offices of the Social Security Administration in the States of Pennsylvania, Delaware, Virginia, West Virginian and Washington, D.C.[1] The aforementioned District and Branch offices of the Social Security Administration fall within the jurisdiction of Region III and are under the supervision of Regional Commissioner Ms. Rose LePore. Council 220, the Respondent herein, is the AFGE representative for Region III. Thomas Wachter is the Regional Vice President for Council 220 and empowered to negotiate and execute agreements on behalf of Council 220. He also has the power to delegate his responsibilities in the area of negotiations such as grievances to other Union representatives.

Mr. Michael Gutkind, Regional Labor Relations Specialist, represents SSA Region III in labor relations matters at the local, area and regional levels. In his capacity as the Regional Labor Relations Specialist he has successfully negotiated agreements at all levels, i.e. local, area and regional wide, with Mr. Wachter's designees that have been signed by the Respondent Union. Although the Respondent Union had a policy of having any agreement negotiated by Mr. Wachter's designees reviewed by Mr. Wachter or Ms. Jill Hastings, a Regional Vice President designee, prior to execution,[2] Mr. Gutkind was never advised of this policy.

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[1] The AFGE and SSA are parties to a nationwide collective bargaining agreement.

[2] In her position as a Regional Vice President designee, Ms. Hastings handles various matters and/or assignments from Mr. Wachter.

On August 6, 1984, Mr. Wachter designated Mr. Thomas Biggar, a Regional Vice President and also a Local president, to represent the Respondent Union on a grievance concerning the assignment of overtime. At this time Mr. Biggar had already been designated the Union's representative on another grievance concerning the awarding of compensatory time for overtime worked. There was also a third grievance pending concerning overtime which had been assigned to another representative or designee. The grievances concerned the way volunteers were selected for overtime and the awarding of compensatory time in lieu of wages.

SSA Region III was of the opinion that the grievances had some merit as there appeared to be a difference in the various offices of SSA concerning the criteria to be utilized in selecting individuals for overtime and the awarding of compensatory time for overtime worked. Thus it appears that some offices would not allow employees to work overtime if they had used annual leave during the pay period when overtime work was available. In order to correct the situation the Regional Commissioner decided that a region-wide agreement should be negotiated so that there would be uniformity among all the offices within the Region with respect to the awarding of overtime.

In September 1984, Mr. Gutkind telephone Mr. Biggar, and discussed the grievances that Mr. Biggar had been designated on as the Union representative, informed Mr. Biggar that he was personally speaking for the Regional Commissioner and that she desired to negotiate a settlement which would be Region wide, and that although he, Mr. Biggar, did not represent the Union on the third grievance pending against SSA Region III it would be appreciated if he could coordinate its resolution with the other two grievances on which he had been designated union representative. Mr. Biggar agreed to coordinate the third grievance and agreed to exchange proposals with Mr. Gutkind.[3]

In accordance with their agreement, Mr. Gutkind mailed his proposals to Mr. Biggar on October 19, 1984. Mr. Biggar received the proposals and on November 8, 1984 mailed counterproposals to Mr. Gutkind. Mr. Gutkind considered the counterproposals to be applicable to all three grievances since Mr. Biggar stated in proposal No. (3) as follows:

> 3. The Union agrees to withdraw all requests for individual remedies in the 2 grievances which raised

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[3] Mr. Biggar acknowledges a discussion with Mr. Gutkind, but claims that the discussion only involved the two grievances that he had been designated as union representative.

these issues. The Union also agrees to withdraw its arbitration request in 84k14304.[4]

In making his counterproposals Mr. Biggar requested that further negotiations be postponed until he returned from an assigned work detail which ran or was scheduled to run from September 1, 1984 through December 14, 1984. Mr. Gutkind did not pursue the matter until he returned from a two week vacation in early January, 1985.

In early January 1985, Mr. Wachter notified the SSA Region III by telephone that Mr. Biggar would be Acting Regional Vice President of Council 220 because he, Mr. Wachter, was going to be involved for approximately 30 days in negotiations in Baltimore. Mr. Wachter confirmed the delegation in writing by letter dated January 17, 1985. Although Mr. Wachter testified that he had informed Mr. Biggar not to sign any agreement without first contacting Ms. Jill Hastings, he admitted that he had never informed Mr. Gutkind of any a kind of restrictions on Mr. Biggar's authority. The record indicates that Mr. Biggar had on two occasions in the past been designated Acting Regional Vice President.

According to Mr. Gutkind, he telephoned Mr. Biggar in early January and discussed the proposals and the fact that it included all three grievances. Although, Mr. Bigger testified that all his discussions were confined to only two grievances, he did acknowledge that the Agency's proposals would have region-wide impact. Subsequently, Mr. Gutkind and Mr. Biggar, commencing on January 9, 1985, held approximately five or six telephone conversations and discussed the problems each had with the other's proposals.[5] The parties finally reached an agreement on or about January 14, 1985. Mr. Gutkind then prepared a written agreement, had it signed by Commissioner LePore, and mailed it to Mr. Biggar for signature. According to Mr. Biggar, during the negotiations, he on one occasion notified Mr. Gutkind that the agreement was subject to review by Mr. Wachter. Mr. Gutkind denies ever being informed of any limitation on Biggar's authority, and I credit his denial.

Shortly after January 14, 1985, Mr. Wachter spoke with Ms. Hastings and learned that Mr. Biggar was negotiating an agreement which involved more than the grievances on which he had been designated the union representative. Mr. Wachter then telephoned Mr. Biggar and requested all correspondence on the matter.

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[4] Mr. Gutkind testified that he understood the reference to the two grievances and one arbitration request to be the three grievances he had discussed earlier in the negotiations with Mr. Biggar. Mr. Biggar testified that his response was only applicable to the two grievances on which he had been designated as the Union representative. The reference to the arbitration request was part of one of the grievances. Mr. Biggar's testimony to this effect is supported by one of the grievances which indeed makes mention of Arbitration No. 84k14304.

[5] At this time Mr. Biggar was Acting Regional Vice President for Council 220.

Ms. Hastings then contacted Mr. Gutkind by telephone on January 16, 1985, and informed him that there would be no regional agreement on the subject of overtime. Mr. Gutkind informed Ms. Hastings that he was dealing with Mr. Bigger on the matter. Mr. Gutkind then telephoned Mr. Biggar and informed him of Ms. Hastings' telephone call. Mr. Biggar apologized and stated that Ms. Hastings was out of line, that he intended to sign the agreement and that he would straighten out the matter.6/

On January 21, 1985, not having received the signed agreement from Mr. Biggar, Mr. Gutkind telephoned Mr. Biggar and inquired about its status. Mr. Biggar informed Mr. Gutkind that he would not sign the agreement without four specified changes. Although Mr. Gutkind insisted that an agreement had already been reached, Mr. Biggar stood fast in his position that further changes would have to be made before he signed the agreement. The telephone conversation ended with Mr. Gutkind agreeing to reconsider the matter. Later that same day, after determining that the changes did not materially change the agreement, Mr. Gutkind telephoned Mr. Biggar and informed him that his suggested changes would be made and that another signed agreement would be mailed to him. Mr. Gutkind then redrafted the agreement, had it signed by Ms. LePore and mailed it out on January 24, 1985.

By letter dated February 4, 1985, Ms. Hastings informed Ms. LePore that the Union would be glad to negotiate an agreement on the assignment of overtime.

On February 12, 1985, Mr. Gutkind telephoned Mr. Biggar and asked where the signed agreement was. Mr. Biggar informed him that he could not sign the agreement because he had received orders from Mr. Wachter forbidding its execution. According, to Mr. Gutkind, Mr. Biggar told him that he had been threatened with a personal law suit and could not discuss the matter further. According, to Mr. Wachter, he did not want the agreement signed because he was of the opinion that it conflicted with the parties national agreement.7/

6/ Mr. Biggar acknowledges the telephone call but claims that he informed Mr. Gutkind that the only person within the Region that had authority to review the agreement was Mr. Wachter.

7/ In this connection Article 10, Section 2 of thee contract provides in pertinent part as follows:

> A. Overtime shall be distributed to bargaining unit employees whose performance is fully satisfactory.

(continued)

On February 18, 1985, Mr. Biggar wrote a letter to Mr. Gutkind which reads as follows:

> Dear Michael,
>
> The recent action of the union concerning the agreement we negotiated troubles me. Because of that action I have resigned my regional position. Although I am no longer in a position to make agreements on a regional level and cannot sign the MOU as written, I can make agreements covering Area 6 and am willing to sign the MOU if it is revised to cover Area 6 offices only. I only wish that there was some way I could have signed it for the region because I think it was a good settlement. However faced with a direct order not to sign and the threat of a suit if I did I had no choice.
>
> Please let me know if the above offer is acceptable. I hope it is but can certainly understand why you might not want to make an agreement for only one area.

Mr. Biggar subsequently resigned his Union position due in part to the Union's action in preventing him from signing the agreement negotiated with Mr. Gutkind.

Mr. Wachter testified that other than submitting a written confirmation of Mr. Biggar's appointment to Acting Regional Vice President, he never discussed with Mr. Gutkind any restriction he had placed on Mr. Biggar's authority to represent the Union.[8]

(footnote continued)

B. Overtime shall not be distributed or withheld as reward or penalty.

Mr. Witold Skwierczynski, President of the National Council of SSA Field Operation Locals and one of the negotiators of the national collective bargaining agreement, corroborated Mr. Wachter's testimony that the memorandum of understanding conflicts with the terms of the national collective bargaining agreement. He further testified that during negotiations for the national agreement the SSA had attempted to insert restrictions on the distribution of overtime by penalizing employees who had taken sick leave, annual leave or leave without pay during the pay period when overtime leave was available.

[8] In his written notice to the Agency concerning the designation of Mr. Biggar as Acting Regional Vice President, Mr. Wachter merely informed the SSA that he would "continue to handle all pending grievances and arbitration cases for which I am the representative of record." No other restrictions were in the letter.

Discussion and Conclusions

The General Counsel takes the position that the Union violated Section 7116(b)(5) of the Statute by refusing to execute the memorandum of understanding concerning overtime distribution and compensatory leave negotiated by Mr. Gutkind and Mr. Biggar while Mr. Biggar was acting in the capacity as Acting Regional Vice President. In support of his position the General Counsel points out that the Regional Vice President possessed the power to bind the Union. In such circumstances, while there may have been some internal restrictions on Mr. Biggar's designation as Acting Regional Vice President, such restrictions were never conveyed to SSA, Region III. In such circumstances the Union is bound by the memorandum of understanding negotiated by its agent, Mr. Biggar, who it had clothed with the apparent authority possessed by the Regional Vice President in the area of negotiability.

The Respondent Union, on the other hand, takes the position that it was under no obligation to sign the memorandum of understanding since Mr. Gutkind was aware of the fact that any agreement negotiated by Mr. Biggar was subject to approval of Mr. Wachter. In support of its position it relies on the testimony of Mr. Biggar and points out, that in any event, Mr. Gutkind should have sought clarification of Mr. Biggar's bargaining authority following the telephone call from Ms. Hastings. Additionally, the Union argues that it should be excused from executing the memorandum of understanding because it conflicts with the terms of the national agreement between the parties.

Section 7114(b)(5) of the Statute provides that "the duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation if an agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms. . . ." Failure of a union to so execute an agreement embodying agreed terms of employment is violative of Section 7116(b)(5) of the Statute. American Federation of Government Employees, AFL-CIO, Local 3732 and Department of Transportation, Maritime Administration, U.S. Merchant Marine Academy, Kings Point, N.Y., 16 FLRA No. 50.

Respondent Union does not appear to be arguing with the above conclusions concerning the state of the law, but rather takes the position that although agreement had been reached between Mr. Gutkind and Mr. Biggar on the memorandum of understanding dealing with the distribution of overtime, etc., the agreement was subject to the approval of Mr. Wachter.

However, in order to sustain such position, it is incumbent upon the Respondent Union to prove that SSA, Region III had prior knowledge of the restrictions placed on Mr. Biggar, who by virtue of his position as Acting Regional Vice President had apparent authority to conclude an agreement. In this context, Mr. Wachter admits that any internal restrictions on Mr. Biggar's authority to enter into a binding agreement were never conveyed by him to management during his conversations with Mr. Gutkind. In fact the only evidence indicating that such restrictions were conveyed to management is Mr. Biggar's testimony that on one occasion during the negotiations he told Mr. Gutkind that any agreement was subject to Mr. Wachter's approval. Mr. Gutkind denies being so informed.[9]

The fact that Ms. Hastings may have informed Mr. Gutkind that the agreement would never by signed does not alter the above conclusion since Ms. Hasting was subordinate to the Regional Vice President in authority.

Finally, with respect to Respondent Union's defense predicated upon the allegation that the memorandum of understanding conflicts with the terms of the national collective bargaining agreement, I find such defense to be without merit. Whether or not there is a conflict between the memorandum of understanding and the terms of the national collective bargaining agreement which might render the memorandum of understanding unenforceable is a matter to be determined in another forum, i.e. arbitration or a suit to rescind the memorandum of understanding.

Accordingly, having designated Mr. Biggar Acting Regional Vice President without any restrictions, save the pending grievances on which Mr. Wachter was the designated Union representative, and having clothed Mr. Biggar with all the apparent authority of the Regional Vice President, it is obligated to honor and execute any and all agreements negotiated by him. Long Beach Naval Shipyard, Long Beach, California and FEMTC, AFL-CIO, 7 FLRA 102.

Based upon the above findings and conclusions, I further find that by refusing to execute the memorandum of understanding concerning the distribution of overtime and compensatory leave, the Respondent Union violated Section 7116(b)(5) of the Statute.

Having found that the Respondent Union has violated the Statute, I hereby recommend that the Authority issue the following order designed to effectuate the purposes and policies of the Statute.[10]

---

[9] Based upon my observation of the witnesses and their demeanor I credit Mr. Gutkind's testimony that he was never informed of any restriction on Mr. Biggar's apparent bargaining authority. Mr. Biggar's hesitant testimony appeared to be tailored so as not to prejudice Respondent Union's case.

[10] Although I recognize that ordering the Respondent Union to execute the memorandum of understanding may turn out to be a futile act since the memorandum of understanding may well conflict with the terms of the national collective bargaining agreement, the fact remains that an authorized representative of Respondent Union negotiated and reached agreement on conditions of employment and is therefore required by the Statute, upon request, to sign a written document embodying the agreed upon terms.

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO, shall:

1. Cease and desist from:

a. Refusing to bargain in good faith with Region III, Social Security Administration by refusing to sign the January 21, 1985 written memorandum of understanding embodying terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

a. Upon request, sign the January 21, 1985, memorandum of understanding reached with Region III Social Security Administration which embodies terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

b. Post at its business offices and normal meeting places including all places where notice to members are customarily posted throughout Region III of the Social Security Administration copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Regional Vice President of the National Council of Social Security Administration Field Operations Locals - Council 220, American Federation of Government Employees, AFL-CIO, and shall be posted by him for 60 consecutive days. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

c. Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: August 21, 1985
Washington, DC

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain in good faith with Region III, Social Security Administration by refusing to sign the January 21, 1985, written memorandum of understanding embodying terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement has been reached.

WE WILL sign the January 21, 1985 memorandum of understanding reached with Region III, Social Security Administration which embodies terms and conditions of employment concerning overtime distribution and compensatory leave on which full agreement had been reached.

National Council of Social Security
Administration Field Operations
Locals - Council 220, American
Federation of Government Employees,
AFL-CIO

Dated: ____________________ By: ____________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 2, whose address is: 26 Federal Plaza, Room 2237, New York, NY 10278, and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. SOLDIERS' AND AIRMEN'S HOME
WASHINGTON, D.C.

Respondent

and

Case No. 3-CA-20561
(15 FLRA No. 26)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3090, AFL-CIO

Charging Party

SUPPLEMENTAL DECISION AND ORDER

On June 26, 1984, the Authority issued its Decision and Order in the above-entitled proceeding in which it found that the Respondent had not failed and refused to comply with the provisions of section 7122(b) of the Federal Service Labor-Management Relations Statute[1] and therefore had not violated section 7116(a)(1) and (8) of the Statute.[2] U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26 (1984).

---

[1] Section 7122(b) provides:

> § 7122. Exceptions to arbitral awards
>
> . . . .
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

[2] Section 7116(a)(1) and (8) provides:

(Continued)

Thereafter, on November 22, 1985, the U.S. Court of Appeals for the District of Columbia Circuit set aside the Authority's Decision and held that the Respondent was required to comply with the terms of an arbitrator's award, notwithstanding that timely exceptions had been filed with the Authority pursuant to section 7122(b) of the Statute, because the Respondent had failed to request a stay of the arbitrator's award as required by section 2429.8 of the Authority's Rules and Regulations (codified in 5 C.F.R. § 2429.8). American Federation of Government Employees, AFL-CIO, Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985).

The Authority accepts the court's opinion as the law of the case and, consistent with that opinion, shall issue the following remedial order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Soldiers' and Airmen's Home, Washington, D.C. shall:

1. Cease and desist from:

(a) Failing to comply with the provisions of section 7122(b) of the Federal Service Labor-Management Relations

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(Continued)

§ 7116. Unfair labor practices

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter[.]

Statute by refusing to implement an arbitrator's award notwithstanding that no request for a stay of the arbitration award had been filed pursuant to section 2429.8 of the Authority's Rules and Regulations.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply fully with the award of Arbitrator Nicholas H. Zumas dated March 22, 1982, to the extent that such compliance has not been previously effectuated.

(b) Post at its facility where employees in the bargaining unit are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. April 17, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A SUPPLEMENTAL DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to comply with the provisions of section 7122(b) of the Federal Service Labor-Management Relations Statute by refusing to implement an arbitrator's award notwithstanding that no request for a stay of the arbitrator's award had been filed pursuant to section 2429.8 of the Authority's Rules and Regulations.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply fully with the award of Arbitrator Nicholas H. Zumas dated March 22, 1982, to the extent that such compliance has not been previously effectuated.

(Activity)

Dated: ______________ By: ______________________

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, N.W., Room 700, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2782, AFL-CIO

Respondent

and Case No. 3-CO-50002

DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the American Federation of Government Employees, Local 2782, AFL-CIO, shall:

1. Cease and desist from:

(a) Unilaterally refusing or failing to proceed to arbitration regarding three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984, contrary to the requirements of section 7121 of the Federal Service Labor-Management Relations Statute, after receiving timely notice of the Department of Commerce, Bureau of the Census' desire to invoke arbitration.

(b) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Department of Commerce, Bureau of the Census, are customarily posted, copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 2782, AFL-CIO, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Director, Bureau of the Census, for posting in conspicuous places where the unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 18, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT unilaterally refuse or fail to proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984, contrary to the requirements of section 7121 of the Federal Service Labor-Management Relations Statute, after receiving timely notice of the Department of Commerce, Bureau of the Census desire to invoke arbitration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984.

____
(Labor Organization)

Dated: ________________ By: __________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region III, whose address is: P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

[21 FLRA No. 45]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2782, AFL-CIO

Respondent

and

DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

Charging Party/Agency

Case No.: 3-CO-50002

. . . .

Erica F. Cooper, Esquire
Bruce D. Rosenstein, Esquire
For the General Counsel

Ruth A. Sanders
Russ Davis
For the Respondent

Paul A. Bath
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, *et seq.*, and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on October 3, 1984, by the Department of Commerce, Bureau of Census, (hereinafter called the Charging Party or Bureau), a Complaint and Notice of Hearing was issued on December 31, 1984, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint, which was amended at the hearing, alleges in substance that the American Federation of Government Employees, Local 2782, AFL-CIO, (hereinafter called the Union), violated Sections 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in failing and refusing to proceed to arbitration on three grievances filed by the Bureau.

A hearing was held in Washington, D.C. on February 20, 1985. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel submitted a post hearing brief on March 20, 1985, which has been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The Union is and has been the exclusive collective bargaining representative of two units of the Bureau's employees stationed in the Washington, D.C. Metropolitan Area. On June 23, 1977, the Union and the Bureau executed a collective bargaining agreement covering the above mentioned employees. The agreement was to be effective for a period of three years and from year to year thereafter absent appropriate notice by either party to the contrary.2/ Article 7 of the collective bargaining agreement sets forth a grievance procedure, the last step of which is binding arbitration. If the parties can not mutually agree on the selection of an arbitrator, then, in accordance with the grievance procedure, a list of seven arbitrators is to be secured from Federal Mediation and Conciliation Service (FMCS). Upon the receipt of the list from FMCS, the parties will alternately take turns striking single names from the list until only one arbitrator's name remains on the list. The grievance procedure further provides that either party to the collective bargaining agreement may "as the final step in the grievance procedure" invoke arbitration following the receipt of the opposing parties decision pursuant to Section 7.10 of the grievance procedure which is entitled "Formal Grievance".

On or about October 28, 1983, after approximately six months of bargaining by Mr. David Warner on behalf of the Bureau and Mr. Edward Hanlon, then Chief Steward and Chief Negotiator for the Union, Mr. Hanlon and Mr. Warner initialed off on a new collective bargaining contract.3/

1/ In the absence of any objection, the General Counsel's Motion to Correct Transcript is hereby granted.

2/ The 1977 contract was amended in 1979 to conform to the provisions of the Civil Service Reform Act.

3/ The new contract contained a grievance procedure similar to the one contained in the old contract. However, rather than using such terms

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The collective bargaining contract was subject to ratification by the Union membership, and a 30 day period thereafter for final approval by higher representatives of the Bureau.

Also on October 28, 1983, Mr. Hanlon and Mr. Warner entered into a Memorandum of Understanding (MOU) wherein the Union agreed to withdraw "all unfair labor practices which have been filed and are currently pending, including those being investigated and those already scheduled for hearings". The Union also agreed to abide by Article 30 of the "proposed new agreement" pending ratification of the Agreement. Article 30 of the new Agreement provides, among other things, that the Union will give the Bureau 30 days notice prior to filing any unfair labor practice charge.

According to the credited testimony of Mr. Warner, the Union ratified the new October 28, 1983 collective bargaining agreement between the parties on or about November 9 or 10, 1983. On or about December 10, 1983, approximately 30 days following ratification, the Bureau began to implement the contract. Thus, the Bureau established an alternate work schedule, provided Union access to the mails, prepared a survey concerning employee interest in a day care center, effected changes in employees' work space, etc.

However, despite the fact that the Bureau had been implementing the terms of the new collective bargaining agreement, the Union, due to a controversy surrounding Article 19.2 of the new collective bargaining agreement which pertained to alternate work schedules for unit employees in the Bureau's Computer Services Division, refused to formally sign the new collective bargaining agreement.

By separate Memorandums date March 8, 1984, the Bureau filed three separate "Formal" grievances against the Union. Two of the grievances concerned alleged violations of the October 28, 1983 MOU and the third grievance concerned an alleged "intentionally false, inflammatory letter" from the Union to unit employees in connection with a pending representa-

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(continued)

as informal grievance, formal grievance, etc., the new contract set forth the progression of the grievances by steps. Thus, step 5 of the new grievance procedure was equivalent to the "formal grievance" in the old contract and like the "formal grievance" was the last chance for discussion between the parties prior to submission of the matter to arbitration. With respect to arbitration, the new contract called for the establishment of a permanent panel of arbitrators which would handle cases on a rotating basis. The procedure for establishing the panel of arbitrators was set forth in the contract. Finally, like the old contract, either party was given access to arbitration.

tion matter before the Federal Labor Relations Authority.4/ When the Union failed to respond to the grievances, the Bureau by three separate letters dated April 14, 1984, consistent with applicable provisions of both the 1977 and 1983 collective bargaining contracts, invoked arbitration on each of the grievances. Attached to each of the three April 14, letters invoking arbitration was a copy of the original grievance, a proposed settlement and a Form R-43 which was utilized under the 1977 contract to obtain a list of arbitrators from the FMC. Neither the March 8, 1984 grievances nor the April 13, 1984, letters invoking arbitration specifically mentioned which contract the Bureau was proceeding under.

On April 23, 1984, the Union responded to the Bureau's request for arbitration taking the position that the November, 1983 collective bargaining contract was "void, null, and without any legal meaning whatsoever" due to pending litigation thereon before the Federal Labor Relations Authority, and that in such circumstances the grievances were "not grievable or arbitrable at this time". The Union closed its letter stating as follows:

> However, if the Agency wishes to seek enforcement of any provision of the 1977 agreement currently in legal effect, it may do so pursuant to the negotiated grievance procedure of that contract. The Union will, of course process any management grievance pursuant to the 1977 contract.

By memorandum dated May 4, 1984, the Bureau notified Mr. Hanlon, then president of the Union, that it was unaware of any authority for the Union's position that it could make a unilateral determination concerning the arbitrability and/or grievability of any matter. The memorandum further advised the Union that the Bureau intended to proceed "independently to arbitration" and give serious thought to filing an unfair labor practice predicated upon the Union's refusal to process grievances. Four days later, on May 8, 1984, the Bureau filed a completed FMCS Form R-43, entitled "Request For Arbitration Panel". On May 14, 1984, the FMCS forwarded a panel of arbitrators to both the Union and the Bureau.

On July 19, 1984, the Bureau and the Union entered into a Memorandum of Agreement covering the disputed language appearing in Article 19.2 of the new collective bargaining agreement which pertained to alternative

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4/ As authority for the grievance, the Bureau cited Article 1.1 which provides in both the 1977 and 1983 contracts that the basic purpose of the collective bargaining agreements is ". . . to provide for constructive and cooperative labor-management relations between the parties".

work schedules for unit employees in the Bureau's Computer Division. Paragraphs (a), (b) and (c) dealt solely with Article 19.2. Paragraphs (d), (e) and (f) read as follows:

> (d) Immediately sign the current (November 9, 1983) contract without the article 19.2.
>
> (e) The contract is effective as of the date of signature of this memorandum. However, any agency actions taken under the November 9 contract must be considered as if the contract had taken effect when implemented by the agency. The agency will not raise the defense of timeliness with respect to grievances concerning the issues of physical relocation, or the impact of reorganization under article 23 and 24, respectively, occurring between December 10, 1983 and July 19, 1984.
>
> (f) The Agency will withdraw the unfair labor practice charge filed in Case No. 3-CO-40019 now pending.

On July 23, the Bureau sent a memorandum to the Union wherein it requested the Union's position on the Bureau's March 8, 1984 grievances.

By Memorandum dated August 13, 1984, the Union requested that the parties take immediate steps to form a five member arbitration panel pursuant to Sections 9.3 and 10.3 of the new contract. The Union proposed September 10, 1984, as the date the parties would each submit a list of 10 arbitrators.[4]

By Memorandum dated August 14, 1984, the Bureau reiterated its request for the Union's position on the Bureau's three pending grievances and asked for a response by August 17, 1984.

On August 17, 1984, the Union replied to the Bureau's July 3, 1984 memorandum stating in pertinent part as follows:

> Obviously, the confusion over which contract was in effect from December 10, 1983, to July 19, 1984, made the processing of any grievance very difficult -- Union, Agency, or employee. That confusion has now, hopefully, been cleared up.

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[4] On August 15, the Bureau sent a reply memorandum wherein it suggested October 31, 1984, as the date for exchanging lists of arbitrators.

> I have not made a final determination of arbitrability or grievability on your grievance. However, to provide an answer to your July, 1984, letter and consider your grievances, I require reasonable official time. Article 5 did not contemplate the right of management to file a grievance. No such management right is required by law.
>
> I am willing to consider a final response to your March, April, and July correspondence and forward it to you within 10 workdays if in return you recognize that the Union president or designees are entitled to reasonable amounts of official time over and above that contained in Article 5 to process management grievances.

By Memorandum dated August 15, 1984, the Bureau replied to the Union's August 13, 1984, letter concerning its request that the parties take immediate steps to form a permanent arbitration panel by September 1, 1984. The Bureau, pointing out that there would not be sufficient time to review the qualifications of the arbitrators, suggested October 31, 1984, as the date to select a panel of arbitrators. On August 17, 1984, the Union answered the Bureau's August 15, 1984, memorandum. The Union accused the Bureau of stalling on the matter and suggested September 17, 1984 as an alternate date for exchanging lists of arbitrators.

On August 20, 1984, the Union again wrote the Bureau concerning its pending grievances. Thus, the Union agreed to process the pending grievances filed by the Bureau through Articles 8, 9 and 10 of the new 1983 contract provided it was allowed additional official time to perform such activities. Articles 8, 9 and 10 of the new contract are the grievances and arbitration provisions of the new contract.

On September 7, 1984, the Bureau sent a memorandum to the Union wherein it set forth its position on the official time provisions of the contract. By a separate memorandum, also dated September 7, 1984, the Bureau informed the Union that while it expected to have its list of arbitrators ready for exchange by the end of October, it was of the opinion that the establishment of a panel should not prevent the parties from proceeding immediately to arbitration on the unresolved grievances.

On October 26, 1984, the Bureau notified the Union that it was prepared to meet for purposes of establishing the arbitration panel called for in the new contract.

As of the date of the hearing, the Union had not agreed to proceed to arbitration on the Bureau's three grievances.

Discussion and Conclusions

The General Counsel takes the position that the record supports a conclusion that the Union failed and/or refused to participate in the submission of the Bureau's three grievances to arbitration and thereby violated Sections 7116(b)(1) and (8) of the Statute. In support of this position the General Counsel points out that none of the three grievances were predicated solely upon provisions of the 1983 contract and as such were actionable under the grievances and arbitration provisions of either the 1979 or 1983 contract. In such circumstances according to the General Counsel, even if it be concluded as contended by the Union that the 1983 contract was not in effect at the time of the initial request for arbitration of the three grievances, then then Union was under an obligation to process the grievances under the 1979 contract, which by its terms remained in effect until superseded by a new collective bargaining contract. In this latter context the General Counsel points out, and I so find, that both the form and procedures utilized in the processing of such grievances comported in all respects with the grievance and arbitration provisions of the 1979 collective bargaining contract.

The Union's sole defense to the instant complaint appears to be that due to various disagreements concerning the wording of various provisions of the 1983 contract, including the provisions dealing with grievances and arbitration, the 1983 contract was not in effect at the time the Bureau requested arbitration of its grievances. In such circumstances, since the Bureau was in fact requesting arbitration under the provisions of the 1983 contract, it, the Union, was under no obligation to process the grievances. According to the Union it was always willing to process the grievances under the 1979 collective bargaining agreement.

The Authority has held that an agency has a right under the Statute to process grievances through the negotiated grievance and arbitration procedures. Laborer's International Union of North America, AFL-CIO-CLC, Local 1267, and Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 686. The Authority has further held that once arbitration is invoked by one party to a collective bargaining agreement, the other party is obligated to proceed to, and participate in, the requested arbitration proceedings. A failure of a party to so participate, is violative of Section 7121 of the Statute and constitutes an unfair labor practice. Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C. and AFGE, Local 12, AFL-CIO, 10 FLRA 316. The obligation to participate in arbitration also applies to threshold questions concerning grievability and arbitrability, Department of Labor, Employment Standards, et al, supra.

In view of the foregoing state of the law, it is obvious that resolution of the instant complaint turns on whether or not the Union did, as alleged in the complaint, refuse to proceed to arbitration on the Bureau's three grievances.

A thorough review of the record, particularly the Union's responses to the Bureau's request for arbitration, makes it clear that the Union had no intention of cooperating in the requested arbitration proceedings. Thus, the Union in its first response dated April 23, 1984, took the position that the grievances were not arbitrable since they concerned issues covered by the November 1983 collective bargaining agreement, which, according to the Union, was "null and void, and without any legal meaning whatsoever". In line with such position, the Union made it clear that it would only honor grievances predicated on the 1979 collective bargaining agreement and then only under the grievance and arbitration provisions of such agreement. Thereafter, when the Bureau subsequently, in accordance with the past practice under the grievance and arbitration provisions of the 1979 agreement, requested and received a list of arbitrators from the Federal Mediation and Conciliation Service, the Union, which had been furnished a copy of the list of arbitrators supplied by the Federal Mediation and Conciliation Service, made no effort whatsoever to participate in the selection of an arbitrator.

Even after July 19, 1984, when all the problems with the 1983 collective bargaining agreement had apparently been worked out by the parties, the Union while still contesting the grievability and arbitrability of the Bureau's grievances, refused to pursue the matter any further unless the Bureau recognized that the Union was entitled to a "reasonable amount of official time over and above that contained in Article 5 to process management's grievances".

While it is true that in the interim, the Union did propose that steps be taken to establish the permanent panel of arbitrators called for in the 1983 collective bargaining agreement, at no time did it indicate any willingness to participate in the submission of the Bureau's grievances to arbitration under either of the two collective bargaining contracts.

Based upon the foregoing, I find that the Union has failed and/or refused to participate in any arbitration proceedings concerning the Bureau's grievances. Rather, the Union has usurped the powers of an arbitrator and unilaterally determined that the grievances are not arbitrable.

There is no doubt that as of April 14, 1984, the date the Bureau invoked arbitration, one of the two collective bargaining contracts was in effect. If the Union's position that the 1983 contract was "null and void" is accepted, then the 1979 collective bargaining contract by its terms remained in effect. In such circumstances the Union was obligated to proceed to arbitration pursuant to the grievance and arbitration provisions of such collective bargaining contract. However, despite the fact that the Bureau followed the existing past practice and successfully secured a list of arbitrators from the FMCS, the Union, which was also furnished with a copy of the list of arbitrators, made no attempt to meet with the Bureau for purposes of perfecting the Bureau's request for arbitration. In fact, the Union as late as August 17, 1984, some two months later, admittedly had made no attempt to even investigate the merits of the grievances.5/

Accordingly, I find that the record supports the conclusion that the Union has failed to comply with Section 7121 of the Statute and by such act has violated Sections 7116(b)(1) and (8) of the Statute.

Having found that Respondent violated Sections 7116(b)(1) and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the American Federation of Government Employees, Local 2782, AFL-CIO, shall:

1. Cease and desist from:

(a) Unilaterally refusing or failing to proceed to arbitration regarding three grievances filed by the Department of Commerce, Bureau of the Census on March 8, 1984, contrary to the requirements of Section 7121 of the Statute, after receiving timely notice of the Department of Commerce, Bureau of the Census' desire to invoke arbitration.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census on March 8, 1984.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Department of Commerce, Bureau of the Census are customarily posted, copies of the attached Notice, on forms to be furnished by the

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5/ To the extent that it is the Union's position that the October 28, 1983, MOU, on which two of the Bureau's grievances are predicated, is part and parcel of the 1983 collective bargaining agreement and like the 1983 agreement is null and void, I find that this is a threshold determination to be made by an arbitrator, and not the Union.

Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the President of the American Federation of Government Employees, Local 2782, AFL-CIO, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and to other employees are customarily posted. The President of the American Federation of Government Employees, Local 2782, AFL-CIO, shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director of Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: April 19, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT refuse to proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984, contrary to the requirements of Section 7121 of the Federal Service Labor-Management Relations Statute, after receiving timely notice of the Department of Commerce, Bureau of the Census' desire to invoke arbitration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, proceed to arbitration regarding the three grievances filed by the Department of Commerce, Bureau of the Census, on March 8, 1984.

____
(Labor Organization)

Dated: __________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, NW., Suite 700, Washington, D.C. 20036 and whose telephone number is: (202) 653-8452.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

and

Case Nos. O-NG-930
O-NG-931

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

These cases are before the Authority because of two separate negotiability appeals filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concern the negotiability of two proposals submitted in response to a proposed reduction-in-force (RIF) in the Agency.

II. Procedural Issues

The Agency moved that the Authority consolidate the two separate appeals filed by the Union for purposes of Authority review. These two appeals arose out of the same set of collective bargaining negotiations between the same parties and concern two portions of a larger article declared nonnegotiable by the Agency. Thus, in the interest of expeditious processing of these two appeals which concern a common subject, the Authority grants the Agency's motion to consolidate.

The Agency contends that each Union petition should be dismissed as untimely filed because the Agency had orally stated earlier in the negotiations that an entire article, which included the two disputed portions appealed to the Authority, was nonnegotiable. This contention cannot be sustained. It is well established that the time limit for filing a negotiability appeal pursuant to section 2424.3 of the Authority's Rules and Regulations runs from the date an agency's allegation is served in writing upon a union. See American Federation of Government Employees, AFL-CIO, Local 3385 and Federal Home Loan Bank Board, District 7, Chicago, Illinois, 7 FLRA 398 (1981).

The Agency also contends that the Union's appeal as to Proposal II should be dismissed under section 2424.4(a)(2) of the Authority's Rules and Regulations because the proposal is vague, ambiguous and unsupported by sufficient explanation as to its meaning. Contrary to the position of the Agency the Authority finds that the Union did sufficiently explain the meaning of Proposal II in the context of the negotiations in which it was offered. Thus, the Agency's contention cannot be sustained.

III. Union Proposal I

> Prior to conducting any reduction-in-force in any competitive area in Headquarters, management shall conduct a cost-benefit analysis to consider if a furlough and/or a retraining program for affected unit employees would be less costly than conducting a reduction-in-force.
>
> Management shall consider the following in conducting its analysis:
>
> (The cost savings of) All bargaining unit employees in Headquarters shall be furloughed according to the following schedule:
>
> (1) GS-5 and below for 5 days on Mondays or Fridays which are not holidays starting the fifth pay period of the fiscal year and continuing every fourth pay period until the 5 days of furlough are completed.
>
> (2) GS-10 to GS-6, inclusive, for 10 days of furlough on Mondays or Fridays which are not holidays starting the fifth pay period of the fiscal year and continuing every fourth pay period until the 10 days of furlough are completed.

(3) GS-15 to GS-11, inclusive, 15 days of furlough beginning as soon as practicable after the beginning of the fiscal year but in no event later than the fifth pay period of the fiscal year and continuing every pay period until the fifteen days of furlough are completed.

A. Positions of the Parties

The Agency contends that Proposal I is inconsistent with section 7106(a) and (b) of the Statute because it interferes with the internal deliberation process in which management engages before management implements decisions concerning rights reserved to it under section 7106(a) and (b) of the Statute.

The Union contends, in essence, that Proposal I constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. In support of its position, the Union cites the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

B. Analysis

According to its language and the Union's interpretation, which interpretation the Authority adopts, Proposal I would require the Agency to conduct a cost study to determine whether instituting a furlough or retraining program for affected employees would be less costly than conducting a RIF. In addition, Proposal I provides a suggested furlough schedule as a part of the cost study by which management would calculate the cost savings of temporarily laying off employees according to their GS grade.

Contrary to the Agency's claim, the disputed proposal would not require the Agency to take or refrain from taking any action whatever with regard to the retention of employees. Rather, the proposal requires management to consider certain alternative courses of action, without placing any obligation on the Agency to adopt any of the specified actions in lieu of a RIF. That is, Proposal I merely requires management to consider various options before reducing the workforce, and does not interfere with the exercise of management's right. As such it constitutes an appropriate arrangement for employees adversely affected by the Agency's right to conduct a RIF and therefore is within the duty to bargain under section 7106(b)(3). Because Proposal I does not interfere at all with the Agency's right under section 7106 to conduct a RIF or retain employees, it is not necessary to apply any test for determining "excessive interference" with the relevant management right under section 7106(b)(3). National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986) (Provision 2).

C. Conclusion

The Authority finds, for the foregoing reasons, that Proposal I does not interfere with the exercise of management rights. Rather, it constitutes an appropriate arrangement for employees adversely affected by the Agency's decision to conduct a RIF and, therefore, is within the duty to bargain.

IV. Union Proposal II

> For the purposes of this article, wage grade employees shall be considered GS employees, GS-5 or below. Printing employees shall be considered GS-10 and below.

A. Positions of the Parties

The Agency argues that because Proposal II involves matters relating to the classification of positions which are excluded from the definition of conditions of employment under section 7103(a)(14)(B) of the Statute, it is nonnegotiable.

The Union contends that Proposal II merely concerns how wage grade and printing employees will be covered under the furlough formula set out in Proposal I.

B. Analysis

The Authority finds that the Agency misinterpreted the meaning of Proposal II. According to its language and the Union's interpretation, which interpretation the Authority adopts, Proposal II would merely require that in conducting the cost study contemplated by Proposal I the Agency would calculate the cost savings of furloughing wage grade and printing employees in the same manner as specified GS employees. Thus, the Agency's claim that Proposal II is excluded from the definition of conditions of employment as defined by section 7103(a)(14)(B) of the Statute cannot be sustained.

C. Conclusion

The Authority finds, for the foregoing reasons, that Proposal II does not concern classification matters and is within the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals I and II.*/

Issued, Washington, D.C., April 21, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals within the duty to bargain the Authority makes no judgment as to their merit.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

and

Case No. 2-CA-40021

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1917, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. The complaint in this case alleged a violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when the Respondent unilaterally ceased issuing "blackjacks" to detention officers at its Brooklyn, New York facility and thereafter refused to negotiate over the impact and implementation of such change with the Charging Party.

II. Background

The facts are fully set forth in the Judge's Decision. Briefly stated, the record indicates that there was a practice of issuing blackjacks to detention officers at the Respondent's Brooklyn facility. The blackjacks were either issued or authorized by the Chief Detention Officer. At a certain point in time, however, the newly assigned Chief Detention Officer denied a request by a newly assigned detention officer that the latter be issued a blackjack. Repeated requests were similarly denied as was a request to negotiate made by the Charging Party after the change in practice had been implemented. There is no dispute that the Respondent changed its practice of issuing blackjacks to detention officers.

III. Judge's Decision

The Judge concluded that the Respondent's failure to bargain over the impact and implementation of its decision to discontinue the past practice of issuing blackjacks to detention officers at the Brooklyn, New York, facility violated section 7116(a)(1) and (5) of the Statute. To remedy such conduct, the Judge ordered the Respondent to bargain, upon request, to the extent consistent with law and regulation, concerning the impact and implementation of the change. However, the Judge rejected the General Counsel's request for a status quo ante remedy on the basis that continued use of blackjacks by detention officers might be illegal under New York state law. The Judge did not pass upon the lawfulness of such a practice because, in his view, the unfair labor practice proceeding was not the proper forum in which to resolve that question.

IV. Positions of the Parties

The only exceptions to the Judge's findings and conclusions were made by the General Counsel and related to the Judge's recommended remedy. The General Counsel argued that the Judge was obligated to determine whether the practice of issuing blackjacks is legal; that, based upon the record, the practice is legal; and, further, that issuance of a status quo ante remedy is warranted under Federal Correctional Institution, 8 FLRA 604 (1982).

In its opposition to the General Counsel's exceptions with regard to the status quo ante remedy issue, the Respondent essentially argued the propriety of issuing blackjacks to detention officers. The Respondent also asserted that subsequent to the unfair labor practice hearing in this case, the parties at the national level executed a collective bargaining agreement which, it argued, gives to management the sole discretion to determine which employees are authorized to carry various weapons.

V. Analysis

It is undisputed that the Respondent had a practice of issuing blackjacks to detention officers at the Brooklyn, New York facility, and that the Respondent unilaterally discontinued this practice. We find, in agreement with the Judge, that this change had more than de minimis impact on unit employees' conditions of employment. Therefore, the Respondent was obligated to notify the Charging Party and afford it an opportunity to bargain over the procedures to be observed in implementing such change and appropriate arrangements for unit employees adversely affected by its decision to change the practice of issuing blackjacks. This the Respondent failed to do. As noted above, the Respondent did not except to the Judge's conclusion that the failure to provide the Charging Party with such opportunity was a violation of the Statute.

VI. Remedy

As noted, the Judge declined to issue a status quo ante remedy, a conclusion to which the General Counsel excepted. In our view, a status quo ante remedy is warranted in this case. First, in Federal Correctional Institution, the Authority held that the appropriateness of a status quo ante remedy is to be determined on a case-by-case basis, carefully balancing the nature and circumstances of the violation against the degree of disruption in government operations which would be caused by such a remedy. The Judge stated generally that there were factors both for and against a status quo ante remedy, but did not identify or weigh such factors because of the basis for his ultimate disposition of the issue. As to the question of the legality of the unilaterally discontinued practice of issuing blackjacks to detention officers, the Respondent essentially conceded, in its opposition to the exceptions, that the New York state law upon which the Judge based his conclusion was not applicable to the employees in this case.[1] Accordingly, it must now be determined whether a status quo ante remedy is warranted under Federal Correctional Institution. In this regard, the Authority notes the Judge's uncontradicted finding that there was no notice given to the Charging Party concerning the discontinuance of the practice of issuing blackjacks to detention officers, that there was no bargaining opportunity afforded concerning this change in practice, and that the Respondent refused the Charging Party's request for negotiations after implementation of the change. With respect to the impact experienced by the employees, the Authority notes the uncontradicted findings of the Judge with respect to the use of the blackjacks and the fact that other detention officers at the Brooklyn facility retained possession of their previously issued blackjacks. Finally, the Authority finds nothing in the record which would indicate that the Respondent's operations would be disrupted by reinstating the issuance of blackjacks consistent with preexisting practice, along with the affirmative order that the Respondent negotiate consistent with the requirements of the Statute.2/

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[1] The Respondent has not demonstrated any other basis on which to conclude that issuance of a status quo ante remedy under the Statute would be unlawful.

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings and conclusions, and his recommended Order as modified to include the status quo ante remedy. Therefore, we find that the Respondent has violated section 7116(a)(1) and (5) of the Statute and shall order that the Respondent restore the past practice of issuing blackjacks to the detention officers involved in this case.3/

2/ As to the Respondent's arguments concerning the propriety of issuing blackjacks to detention officers, the Authority of course makes no judgment on that issue but addresses only the question of whether reinstatement of the past practice as a part of the remedy will disrupt or impair efficiency of the Respondent's operations. As to the Respondent's assertion concerning the substance of a subsequently negotiated agreement arguably giving management the sole discretion to determine which employees are authorized to carry various weapons, the Authority finds it unnecessary to determine what, if any, effect this agreement may have concerning management's right to make such determinations. Rather, the issues before the Authority in this proceeding are whether the Respondent failed to fulfill its bargaining obligation under the Statute, and the appropriate remedy for such unlawful conduct.

3/ The Authority notes that it appears the Respondent's Brooklyn, New York facility has relocated to a facility in Manhattan. The Authority's order is of course intended to apply to the detention officers involved herein regardless of their change in physical location.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Unilaterally discontinuing the practice of issuing blackjacks to detention officers at its Brooklyn, New York, facility without affording the American Federation of Government Employees, Local 1917, AFL-CIO, notice and an opportunity to bargain over the procedures to be observed in implementing such change and appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Restore the practice of issuing blackjacks to detention officers of the Brooklyn facility.

(b) Notify the American Federation of Government Employees, Local 1917, AFL-CIO, concerning any proposed discontinuance of the practice of issuing blackjacks to detention officers at the Brooklyn, New York facility, and, upon request, negotiate with such representative concerning the procedures to be observed in implementing such change and appropriate arrangements for employees adversely affected thereby.

(c) Post at the Immigration and Naturalization Service facility which currently houses detention officers formerly located at the Brooklyn facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the Immigration and Naturalization Service, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., April 21, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally discontinue the practice of issuing blackjacks to detention officers at the Brooklyn, New York, facility without affording the American Federation of Government Employees, Local 1917, AFL-CIO, notice and an opportunity to bargain over the procedures to be observed in implementing such change and appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL restore the practice of issuing blackjacks to detention officers of the Brooklyn facility.

WE WILL notify the American Federation of Government Employees, Local 1917, AFL-CIO, concerning any proposed discontinuance of the practice of issuing blackjacks to detention officers at the Brooklyn, New York facility, and, upon request, negotiate with such representative concerning the procedures to be observed in implementing such change and appropriate arrangements for employees adversely affected thereby.

____
(Activity)

Dated:________________ By: ____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278, and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1917, AFL-CIO

Charging Party

Case No.: 2-CA-40021

Steven Muir
For the Respondent

Alan W. Stadtmauer, Esq.
For the General Counsel

James Lane
Joseph Girlando
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 28, 1983, by the Acting Regional Director for the Federal Labor Relations Authority, Region II, a hearing was held before the undersigned on March 6, 1984 at New York, NY.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based upon a charge filed on October 18, 1983 by American Federation of Government Employees, Local 1917, AFL-CIO (herein called the Union) against Immigration and Naturalization Service (herein called Respondent).

The Complaint alleged, in substance, that on or about the July 15, 1983 Respondent unilaterally discontinued the issuance of blackjacks to its Detention Officers assigned to its Detention Center in Brooklyn, NY; that on or about that date and at all times thereafter Respondent has failed and refused to negotiate the impact and implementation of the change in conditions of employment for unit employees - all in violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated January 20, 1984, denied the aforesaid allegations of the Complaint as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed with the undersigned which have been duly considered.[1]

Subsequent to the hearing General Counsel filed with the undersigned a Motion to Strike portions of Respondent's brief, contending they referred to facts not contained on the record. Respondent filed a response thereto as well as a motion to reopen the record and admit specific documents into the record. Opposition to the motion to reopen the record was thereafter filed by Respondent. The motions involve the following:

> 1) On page 1, paragraph 2 of its brief, Respondent refers to various classifications within its agency. General Counsel moves to strike such evidence as not being in the record. Respondent states that 8 CFR 103.1(q) lists the types of classifications within the agency, and therefore it is a matter of public record.
>
> 2(a) On page 5, paragraph 3 of its brief Respondent asserts that:

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[1] In its brief Respondent asserts the General Counsel's case in procedurely defective. It is contended that General Counsel altered his argument, in his opening statement, to conform to the original complaint. Further Respondent maintains this was done at the prompting of the undersigned. The undersigned rejects this contention and finds it lacking in substance. The Complaint herein was predicated on a change in a condition of employment which occurred without negotiating said changes with the Union. The undersigned suggested that the Complaint, in conformance with the opening remarks re a practice existing for five years, might well have so pleaded. Nevertheless, the Complaint is sufficient as a pleading to encompass the existence of a past practice (condition of employment) and its subsequent discontinuance.

> "In January of 1984, six months after this incident, the National Immigration and Naturalization Service Council, parent of Local 1917 (the Charging Party) formally requested negotiations upon the impact and implementation of an Agency-wide proposal to discontinue the practice of issuing blackjacks."

(b) On page 6, paragraph 2 of its brief Respondent mentions that the National Council of the Union formally requested national negotiations 6 months later, in January, 1984.

(c) On page 8, paragraph 1 of its brief Respondent states that the impact and implementation of this change in policy is currently the subject of ongoing negotiations between the National Council of the union in the Respondent's national headquarters.[2]

3) On page 6, paragraph 4 of its brief Respondent refers to a settlement agreement in the case of Man Chung et. al. v. William French Smith, et. al., Civil Action No. CV-79-0795 (EDNY) which allegedly impacted upon a decision to cease issuing blackjacks. General Counsel asserts it is not part of the record and moves to strike all references thereto. Respondent contends it is a public record and moves to introduce same herein which is amended to is brief as Attachment IV.

4) On page 7, last sentence of its brief Respondent refers to changes in the Immigration Detention Officer's Handbook dated July 30, 1983 which proscribes the use of blackjacks. General Counsel asserts the Handbook was not introduced in evidence and no evidence appears as to any such change in policy. It moves to strike

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[2] With respect to the references in the brief concerning request for negotiation, as well as ongoing negotiation, General Counsel asserts there is no evidence or testimony in the record in support thereof. It moves to strike such reference on page 5, 6, and 8 of the brief. While conceding the record does not include evidence re negotiations between the parent of Local 1917 and Respondent, the latter contends the correspondence postdated the charge and thus was not introduced into evidence. Respondent moves to now introduce such material as follows: A letter dated November 23, 1983 from Respondent to the president of the Union's Council, marked Attachment I; the Proposed Policy of Respondent re service employees carrying weapons to which the Union was invited to respond, marked Attachment II; the Response of the Union to such proposal, marked Attachment III.

all references to said Handbook. Respondent maintains the Handbook was not put in evidence since it postdates the charge. It moves to introduce the same herein which is annexed to a brief as Attachment V.

In respect to the foregoing motions on the part of both General Counsel and Respondent, the undersigned rules as follows:

1) General Counsel's motion to strike from Respondent's brief all references to the job clarification in the agency is denied. A reading of 8 CFR 103.1(q) discloses that such data is contained therein and hence the classifications are a matter of public record. Accordingly, the motion to strike such reference is denied.

2) General Counsel's motion to strike from Respondent's brief all references to the request for negotiations by the National Immigration and Naturalization Council (parent of Local 1917), as well as references to ongoing negotiations between the said parent and Respondent, is granted. There is no evidence in the record to support such reference in Respondent's brief as set forth on pages 5, 6 and 8 thereof. Respondent's argument that it did not introduce such evidence at the hearing because the correspondence postdated the charge is not persuasive. Nothing in the Statute or the Rules and Regulations precludes the introduction in evidence of relevant material which is dated or effective after a charge is filed. Since it appears, moreover, that such evidence existed and was available at the time of the hearing, the cross motion by Respondent to reopen the record and introduce such evidence - Attachment I, II and III is denied.

3) Respondent's motion to introduce into evidence Attachment IV, the Stipulation of Agreement in the case of Man Chung et. al. v. William French Smith et. al. Civil Action, No. CV-79-0795 (EDNY) is denied. While official notice might be taken of the proceeding in the District Court action, the stipulated facts therein are not relevant to the instant matter. Settlement of a cause of action involving persons not part of the instant proceeding, and containing a commitment between Respondent and such persons, do not relate to the obligation of the agency to fulfill its obligation under the Federal Service Labor-Management Relations Statute.

4) General Counsel's motion to strike from Respondent's brief references to the Immigration Detention Officer's Handbook, as set forth on page 7 thereof, is granted. The fact that the document postdates the filing of the charge is not legal justification for failing to introduce same into evidence during the hearing. Inasmuch as the Handbook was in existence and available at the time of the hearing, the motion by Respondent to reopen the record and introduce it into evidence as Attachment V is denied.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the American Federation of Government Employees (National Council of Immigration and Naturalization Service Locals) has been, and still is, the exclusive representative for a nationwide unit of all Respondent's employees, excluding those employees assigned to Border Patrol Sectors and those excluded from coverage by the Civil Service Reform Act.

2. At all times material herein Respondent has recognized American Federation of Government Employees, Local 1917, AFL-CIO (the Union) as the agent of the exclusive representative for the purpose of bargaining on behalf of its employees in the Respondent's New York District.

3. Respondent is responsible for the control of aliens coming to reside in the United States from foreign countries. It maintains, within the New York District, a Service Processing Center at Brooklyn, NY. This center is also known as the Detention Center. Aliens who are illegally present in the United States are detained thereat until accorded a hearing or other due process.

4. Employed at the Detention Center are about 80 Immigration Detention Officers, of whom about 30 are female. These Officers are responsible for the control, upkeep, health and maintenance of the aliens detained at the Center. They also perform escort duties when aliens are moved to and from consulates, hospitals, prisons and airports. In connection with the performance of their duties, the Detention Officers are issued various types of weapons. While guns may be issued if an assignment is dangerous, the Officers are usually provided restraining items as leg weights, handcuffs, riot batons, and billy chains. Prior to July, 1983 the Detention Officers at the Brooklyn Detention Center were also issued blackjacks. This item is a piece of lead about 1/2 inch long wrapped in leather, and with a leather strap about 6-8 inches long. The blackjack, which is wrapped around a thumb and rests in one's hand, is used to poke someone or strike the legs or knees of an alien causing trouble.3/ Record facts show training in the use of blackjacks has varied from a minute or so to two hours.

5. Detention Officer Frank Marino testified, and I find that in 1973 he was a supply clerk at the district office in New York City; that he gave out equipment to the Detention Officers, which included blackjacks. The

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3/ In 1980 Detention Officers were escorting some Cuban aliens who were alighting from a bus. When the aliens grabbed several of the Officers, other Detention Officers were required to use their blackjacks to control the situation.

Chief Detention Officer authorized the issuance of blackjacks to those Officers and this equipment was given out at the New York supply room. This continued until 1980 when the blackjacks were issued from the Brooklyn location. The issuance of blackjacks to the Detention Officers, with the approval of the Chief Detention Officer, continued until about May, 1983.

6. In May, 1983 Mae Saccamano was assigned to the Detention Center as a Detention Officer. She was given a manual as well as handcuffs and keys. Some other Officer mentioned that she should have a blackjack also. Saccamano approached Chief Detention Officer Roger Mayo who assumed that role on April 17, 1983. She asked Mayo for the blackjack and the Chief Officer advised Saccamano that its use was illegal in New York State. Hence he refused to furnish her with a blackjack. In June[4] Saccamano went to Glynco, Georgia for training in forearms. Upon her return in July she again asked Mayo for a blackjack but he refused to issue one to her. Although Saccamano repeated the request again, it was not issued.

7. Between May-July several Detention Officers informed James A. Lane, shop steward, that blackjacks had not been issued to them. He suggested they speak to Mayo in this regard. Since their efforts were fruitless, Lane went to see Mayo in July and asked why the blackjacks were not given to the Detention Officers. Mayo told the steward that the employees are not supposed to have them - it is so provided in the Handbook, and Mayo doesn't like them. Lane told the Chief Officer this was a change in practice, and the union official suggested they discuss the matter. Upon Mayo's refusal to do so, Lane mentioned he would have to file an unfair labor practice charge. Mayo stated that Lane should do as he must; that the Chief Officer would do what's required of him.

8. Record testimony reflects that Mayo made the decision, shortly after assuming the position of Chief, not to issue blackjacks to Detention Officers. He based his decision on the fact that such item was illegal in New York and no training[5] was provided for its use. Mayo was aware of the past practice at the Center to issue the blackjacks. The Chief testified he made the decision without consulting the Union or negotiating the matter in any respect with the bargaining agent. He further testified he was not aware of any obligation to notify the Union before discontinuing the issuance of blackjacks at the Center.

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[4] Unless otherwise specified all dates hereinafter mentioned occur in 1983.

[5] Training was provided in the use of night sticks, although it appears from the record that no training was given in respect to the use of riot batons.

9(a). Article 10, Section 10(12) of the Criminal Procedure Law of the State of New York, provides as follows:

> "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switch blade, knife, gravity knife, dagger, billy, blackjacks, or metal knuckles. (underscoring supplied).

(b) Article 2, Section 2.10 of the Criminal Procedure Law of the State of New York, entitled "Peace Officers" sets forth a list of those persons who shall have the powers of, and be deemed, peace officers.[6]

(c) Article 2, Section 2.15 of the Criminal Procedure Law of the Statute of New York, entitled "Federal law enforcement officers; powers," lists the federal law enforcement officers who shall have the powers set forth in subdivision 1 (with certain exceptions), 2, 3, and 8 of Article 2, Section 2.20 of this Criminal Procedure Law. While no reference is made specifically to Immigration Detention Officers, the said list in Section 2.15 does name: "Immigration and Naturalization Service Special agents, investigators and patrol officers."

(d) Article 2, Section 220 of the Criminal Procedure Law, entitled "Powers of peace officers," provides that such officers shall have certain powers. Subdivisions 1, 2, 3, and 8 grant them the following:

> 1. The power to make warrantless arrests. . . .
>
> 2. The power to use physical force and deadly physical force in making an arrest or preventing an escape pursuant to section 35.30 of the penal law.
>
> 3. The power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties.
>
> . . .
>
> 8. The power to possess and take custody of firearms not owned by the peace officer, for the purpose of disposing, guarding, or any other lawful purpose, consistent with his duties as a peace officer. (underscoring supplied)

6/ While no specific reference is made to Immigration Officers in said section, General Counsel concedes that, based on 8 USCA 1357 which sets forth the powers and duties of these officers and the weapons made available to them, the Immigration Officers may be called "peace officers."

Conclusions

Respondent does not dispute the fact that a past practice existed at the Brooklyn, NY Processing Center whereby blackjacks were issued to the Immigration Officers. Further it does not deny that the issuance of blackjacks was in connection with the primary duties of these officers in escorting and controlling illegal aliens who are detained in this country. It is contended, however, that the practice was discontinued on April 17, 1983 by the new Chief Detention Officer based on his conclusion that it violated the Criminal Code of New York State, and there was no training for use of the blackjacks. Respondent also maintains that there was no wilful intent on its part when the practice was terminated, nor did Chief Mayo harbor any animus toward the Union. Finally, it is contended that any impact occasioned by the change is minimal.

It is quite clear that, despite the right of an agency to make certain decisions affecting employees, an obligation remains to notify the bargaining agent and afford it an opportunity to bargain re the impact and implementation thereof. Even though an agency may under, Section 7106(b) (1) of the Statute, institute a change involving a reserved management right, it still must bargain concerning its impact and implementation. Social Security Administration, 16 FLRA No. 17; Internal Revenue Service, (District, Region and National Office and Service Center Unit), 10 FLRA 326.

Respondent's chief contentions in support of its discontinuing the practice of issuing blackjacks to Detention Officers, rests on the alleged illegality of their use under the NY Criminal Code. This argument is rejected. The Authority has concluded that while management may be required to correct an unlawful practice once discovered, it still must give notice of the change and, upon request, bargain as to the impact and implementation, where possible, of such change. Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA No. 65 (footnote 9). The parties disagree as to whether the issuance of blackjacks does flout the NY State Criminal Procedure Law. Assuming arguendo that the penal law in New York does outlaw the use of such an item by the Detention Officers herein, it was still incumbent upon Respondent to notify the Union of its intention to discontinue the use of blackjacks and negotiate the impact and implementation of such discontinuance. It is conceded by Respondent that it failed to do either.

While it is argued that the impact of the change or discontinuance of the blackjack is de minimis, record facts persuade me to the contrary. Some of the illegal aliens handled by the Detention Officers have criminal backgrounds, and these individuals are enacted to and from the airport by the officers. In 1980 several officers were grabbed by some Cuban aliens, and it was necessary for other officers to use their blackjacks to restore order. Moreover, some of the escort services rendered by the Detention Officers require escorting aliens to and from prisons. It thus appears that the duties performed by the Officers are fraught with some danger and may well be hazardous in nature. Further, since the aliens outnumber the Officers in many instances, the carrying of a blackjack as a defensive weapon could be very necessary at times. Respondent asserts that other weapons, as night sticks or riot batons, are available as weapons. However, such items may not be issued in advance for particular assignments, and yet the need for some articles, as a blackjack, may well arise in certain circumstances. It seems clear to the undersigned that the change in the past practice of issuing blackjacks to Detention Officers impacted upon these employees. Where a change does result in an impact which is more than *de minimis*, as in the instant case, there is a statutory duty to negotiate. See *U.S. Government Printing Office*, 13 FLRA No. 39.

Having failed and refused to bargain re the impact and implementation of the change in the past practice of issuing blackjacks to its Detention Officers, Respondent has violated Section 7116(a)(1) and (5) of the Statute.

Remedy

General Counsel seeks a *status quo ante* remedy whereby Respondent be required to issue blackjacks to Detention Officers who desire them. In citing *Federal Correctional Institution*, 8 FLRA 604, to support this remedy, General Counsel stresses the failure by Respondent to give notice of its action and its refusal to fulfill an obligation to negotiate, as well as the fact that such a remedy will not impair the effectiveness of Respondent's operation. Contrariwise, Respondent opposes a *status quo ante* remedy, emphasizing its lack of wilfulness and the fact that returning the blackjacks would require Respondent to commit an unlawful act.

Upon careful consideration of this particular issue, I am constrained not to recommend the requested remedy. Note is taken that several factors listed in the *Federal Correctional Institution*, case, *supra*, favor the position of either party in respect thereto. However, I consider it determinative in disposing of this issue that the continued use of blackjacks by the Detention Officers *might be* illegal. A tenable argument may be advanced that the Detention Officers herein do not fall within the term "Immigration and Naturalization Service Special agents, investigators and patrol officers" as set forth in Article 2, Section 2.15 of the N.Y. Criminal Procedure Law. In such instance, it is arguable, these officers would not have the powers granted to peace officers under Article 2, Section 220 of said Criminal Procedure Law.[7] A *status quo ante* remedy should not place the employer in a position where it may be subject to civil liability or criminal prosecution based on an existing law, despite controversy as to its application. In my opinion, it would not accord with the purposes and policies of the Statute to grant said remedy, and I conclude it is unwarranted herein.

Accordingly, and in view of the foregoing conclusions that Respondent violated Section 7116(a)(1) and (5) of the Statute, it is recommended that the Federal Labor Relations Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the Immigration and Naturalization Service shall:

1. Cease and desist from:

    (a) Instituting changes in established conditions of employment at its New York District without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the designated representative of its employees of the New York District, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, concerning the impact and/or implementation of such changes.

    (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

    (a) Upon request by American Federation of Government Employees, Local 1917, AFL-CIO, the designated representative of its employees of the New York District, bargain, to the extent consonant with law and regulation, concerning the impact and/or implementation of a change in the past practice of providing blackjacks to its Immigration Detention Officers.

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[7] It does not appear that an extra-agency decision or determination has been made as to whether the use of blackjacks by the Respondent's Detention Officers is legal under the NY Criminal Procedure Law. I do not believe the present proceeding is the proper forum for such determination. Hence, I do not pass upon whether such use is legal or illegal under said state law.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of the forms they shall be signed by the Chief Detention Officer, New York District, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Chief Detention Officer shall take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Rules and Regulations notify the Regional Director, Region II, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: December 24, 1984
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our employees that:

WE WILL NOT institute changes in established conditions of employment at our New York District without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the designated representative of its employees of the New York District, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, concerning the impact and/or implementation of such changes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request by American Federation of Government Employees, Local 1917, AFL-CIO, the designated representative of our employees of the New York District, bargain, to the extent consonant with law and regulation, concerning the impact and/or implementation of a change in the past practice of providing blackjacks to its Immigration Detention Officers.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 24-102, New York, NY 10278 and whose telephone number is: (212) 264-4934.

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NEGOTIABILITY CASE

21 FLRA No. 48 (April 21, 1986)

National Association of Government Employees, Local R14-87 and Department of the Army, Kansas Army National Guard, Topeka, Kansas, Case No. 0-NG-874

ARBITRATION CASES

21 FLRA No. 49 (April 21, 1986)

National Treasury Employees Union and NTEU Chapter 224 and Office of Hearings and Appeals, Social Security Administration (Cushman, Arbitrator), Case No. 0-AR-875

21 FLRA No. 50 (April 21, 1986)

Veterans Administration Medical Center, Brockton, Massachusetts and National Association of Government Employees, Local R1-25 (Lubow, Arbitrator), Case No. 0-AR-990

21 FLRA No. 51 (April 21, 1986)

Social Security Administration and American Federation of Government Employees, AFL-CIO (Berkeley, Arbitrator), Case No. 0-AR-994

21 FLRA No. 52 (April 21, 1986)

U.S. Department of Commerce, Patent and Trademark Office and The Patent Office Professional Association (Ables, Arbitrator), Case No. 0-AR-1019

21 FLRA No. 53 (April 21, 1986)

Social Security Administration and American Federation of Government Employees, Local 1760, AFL-CIO (Golob, Arbitrator), Case No. 0-AR-1020

21 FLRA No. 54 (April 22, 1986)

General Services Administration, Region 8 and American Federation of Government Employees, AFL-CIO, Council 236 (Smedley, Arbitrator), Case No. 0-AR-927

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21 FLRA No. 55 (April 22, 1986)

Naval Air Rework Facility, Norfolk, Virginia and International Association of Machinists and Aerospace Workers, Local Lodge No. 39 (Rosen, Arbitrator), Case No. 0-AR-1006

21 FLRA No. 56 (April 22, 1986)

American Federation of Government Employees, Local 3258 and U.S. Department of Housing and Urban Development (Hoban, Arbitrator), Case No. 0-AR-1026

21 FLRA No. 57 (April 22, 1986)

Veterans Administration Medical and Regional Office Center San Juan, Puerto Rico (Siegel, Arbitrator), Case No. 0-AR-1044

21 FLRA No. 58 (April 22, 1986)

Bureau of Reclamation, Upper Colorado Region, Colorado River Storage Project, Power Operations Office, U.S. Department of the Interior and International Brotherhood of Electrical Workers, AFL-CIO, Local Union 2159 (Weiss, Arbitrator), Case No. 0-AR-1055

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

April 16, 1986

0-AR-1041 0-AR-1083 0-AR-1096
0-AR-1098 0-AR-1099 0-AR-1108

April 17, 1986

0-AR-1095

April 24, 1986

0-AR-1114

21 FLRA No. 48

Federal Labor Relations Authority

NAGE, Local R14-87 and Dep't of the Army, Kansas Army National Guard, Topeka, Kan., Case No. 0-NG-874 (Decided April 21, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2150 Management Rights	7106(a)(2)(A) and (C)
2152.05 Assign Employees	7106(b)(3)
2152.60 Fill Positions	
2210 Mandatory Subjects of Bargaining	
2210.05 Appropriate Arrangements	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Management Rights
    Assign Employees
      Reassignment of Employees to Former Job Location
    Fill Positions
      Reassignment of Employees to Former Job Location
  Mandatory Subjects of Bargaining
    Appropriate Arrangements
      Reassignment of Employees to Former Job Location
      "Adversely Affected"
        Involuntary Assignment to Another Job Location

DIGEST NOTES

A proposal is an appropriate arrangement under § 7106(b)(3) that would require the agency to select employees who were involuntarily reassigned to a position of equal grade without personal cause for return to their former positions at their former duty stations if and when such positions are vacant and the agency makes the determination to fill them. Contrary to the agency's contention, employees who were involuntarily reassigned to positions of equal grade in a different duty station were adversely affected since the reassignment, perhaps across the state, causes significant negative impact on affected employees. The burden placed by the proposal on management's right to select individuals to fill vacant positions under § 7106(a)(2)(C) is not so significant as to outweigh the disruption to an employee's life cause by assignment to a new duty station and the benefit conferred by the proposal of an opportunity for the employee to return to his or her former duty station. Likewise, the proposal does not add to the weight of management's practical needs in the exercise of its right to assign employees under § 7106(a)(2)(A).

21 FLRA No. 49

NTEU and NTEU Chapter 224
and Office of Hearings and
Appeals, SSA (Cushman, Arbitrator)
Case No. 0-AR-875 (Decided April
29, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS

1000 ARBITRATION
  1600 Grounds for Review
    Award Conflicts with Applicable Law

STATUTE

7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Modified
    Contrary to Federal Travel Regulations [41 C.F.R. part 101-7]
  Exceptions Asserted in Appeal
    Award Conflicts with Applicable Law
      Travel Expense Act [5 U.S.C. § 5701 et seq.]
  Remedy
    Travel and Per Diem Expenses Awarded
  Official Time
    Travel and Per Diem Expenses
      Collective Bargaining Agreement Provision

DIGEST NOTES

A payment of travel and per diem expenses, as provided by the parties' collective bargaining agreement was not contrary to the Travel Expense Act. The Activity contended that a specific agency head determination that the travel was performed in the primary interest of the Government had not been made, as required by the Travel Expense Act. However, the provisions of the Travel Expense Act do not prohibit an agency from exercising through negotiations the discretion which it possesses to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of appropriate travel expenses. The arbitrator concluded, as did the Authority, that contrary the Activity's contention above, the parties' agreement provision as to the payment of travel and per diem expenses constituted the determination by the Activity that travel attendant to representing an exclusive representative in negotiations is sufficiently within the interest of the United States so as to constitute official business. Accordingly, the Authority found no basis for the Activity's exception.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Since the arbitrator did not expressly provide in the award that the payment of travel and per diem expenses sought must comport with applicable regulatory requirements and restrictions, *i.e.* the Federal Travel Regulations (FTRs), the Authority modified the award to assure that it would be consistent with the FTRs.

Federal Labor Relations Authority

21 FLRA No. 50

VA Medical Center, Brockton, Mass. and NAGE, Local R1-25 (Lubow, Arbitrator), Case No. 0-AR-990
(Decided April 21, 1986)

DIGEST HEADINGS

1000 ARBITRATION
    1600 Grounds for Review
        Award Conflicts with Applicable Law
7500 OFFICIAL TIME

STATUTE

7106(a)(2)(B)
7112(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to the Statute
      7106(a)(2)(B)
  Official Time
    Reasonable Amount
    Recrediting of Annual Leave
  Remedy
    Grant Reasonable Amount of Official Time
    Recredit Annual Leave where Official Time was Withheld

DIGEST NOTES

The issue before the arbitrator was what was a reasonable amount of official time under the parties' collective bargaining agreement. The activity had directed the union representative to reduce official time from 100 percent to 15 percent because of workload demands. The arbitrator found that the decision to impose the 15 percent official limitation was arbitrary, capricious, discriminatory, retaliatory and unreasonable. As his award, the arbitrator ordered that sufficient time be granted the union representative to perform appropriate union work for reasonable periods of time, provided there is no work emergency; the activity may require a log of official time use; the parties to negotiate the appropriate amount of official time in good faith; and annual leave be recredited to the union president for periods when official time should have been granted.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions, the agency alleged that the award was contrary to management's right to assign work under § 7106(a)(2)(B). The Authority held that the award was not contrary to management's right to assign work. Also the Authority held that the award of recrediting annual leave was not deficient.

Federal Labor Relations Authority

21 FLRA No. 51
SSA and AFGE (Berkeley, Arbitrator), Case No. 0-AR-994
(Decided April 21, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7122(a)
1600 Grounds for Review	7131
1601 Award Conflicts with Applicable Law	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - 41 CFR part 101-7 [Federal Travel Regulations]
  - Exceptions Asserted in Appeal
    - Arbitrator Exceeded His Authority
    - Award Based on Nonfact
    - Award Fails to Draw its Essence from the Agreement
    - Award is Contrary to Applicable Law
      - 5 U.S.C. § 5701 *et seq*. [Travel Expense Act]
    - Award is Contrary to the FSLMR Statute
      - § 7131
    - Award is Incomplete
  - No Basis for Review
    - Disagreement with Arbitrator's Interpretation of CBA
  - Remedy
    - Reimburse Union Negotiators for Travel and Per Diem Expenses
  - Official Time
    - Travel and Per Diem
      - Payment Must Be Consistent with Federal Travel Regulations

DIGEST NOTES

The arbitrator determined that the agency violated the parties' collective bargaining agreement when it terminated the payment of travel and per diem expenses of employees who served as union negotiators in bargaining sessions. As his remedy, the arbitrator ordered the agency to reimburse union negotiators for travel and per diem expenses incurred retroactive to the date the agency ceased making such payments. He also retained jurisdiction over implementation of the award for the limited purpose of resolving any reimbursement questions.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its initial exceptions, the agency contended that the award was incomplete; that the award failed to draw its essence from the agreement; that the award was based on a nonfact. The Authority concluded that these exceptions constituted nothing more than disagreement with the arbitrator's interpretation and application of the parties' agreement which provides no basis for finding an award deficient. Also the agency failed to establish that the arbitrator exceeded his authority, as alleged, by retaining jurisdiction for the limited purpose of resolving any reimbursement questions during implementation of the award.

In its final exception, the agency contended that the award was contrary to § 7131 and travel statutes. The Authority concluded that this exception failed to establish that the award was deficient. The arbitrator's interpretation of the parties' agreement is not contrary to § 7131. Moreover, the award is not contrary to the Travel Expense Act, 5 U.S.C. § 5701 et seq. The arbitrator's interpretation of the agreement effectively constitutes the requisite determination that the travel was sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of travel expenses. However the award does not expressly provide for agency determinations regarding the propriety under the Federal Travel Regulations [41 CFR part 101-7] of those expenses. Accordingly, the Authority modified the award to provide agency determination of the propriety under the FTRs of the travel expenses.

Federal Labor Relations Authority

21 FLRA No. 52

Dep't of Commerce, Patent and Trademark Office and The Patent Office Professional Association (Ables, Arbitrator), Case No. 0-AR-1019 (Decided April 21, 1986)

DIGEST HEADINGS

1000 ARBITRATION
    1600 Grounds for Review
        Award Conflicts with Applicable Law
    1750 Remedies
        1751 Arbitrator's Authority

STATUTE

7106(a)(2)(C)
7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Set Aside
    Contrary to § 7106(a)(2)(C)
    Contrary to the Back Pay Act [5 U.S.C. 5596]
  Backpay
    "But For" Test
  Exceptions Asserted in Appeal
    Award Contrary to 5 U.S.C. § 7106(a)(2)(C)
    Award Contrary to the Back Pay Act
  Promotion
    Failure to Promote [Career Ladder]
  Remedy
    Retroactive Promotion with Backpay
Management's Rights
  Promote
    Arbitration Award of a Retroactive Promotion

DIGEST NOTES

The grievance in this case concerned the refusal of a supervisor to recommend the grievant, a patent examiner, for a career-ladder promotion. The arbitrator concluded that the supervisor was arbitrary. The arbitrator found that an examiner could expect to be promoted unless management showed a substantial basis for withholding the promotion, and that management had not made such a showing in this case. As his award, the arbitrator directed the agency to promote the grievant retroactively with backpay.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. 5596 and § 7106(a). The Authority concluded that the arbitrator did not made the necessary finding under the Back Pay Act that but for the unjustified or unwarranted personnel action, the grievant would not have suffered a withdrawal or reduction of pay. The arbitrator's finding that the supervisor's failure to recommend the grievant for promotion does not constitute the requisite finding.

The Authority also concluded that the arbitrator's award directing the agency to promote the grievant was contrary to management's rights to promote under § 7106(a)(2)(C). The Authority has previously held that an award of a retroactive promotion under the Back Pay Act is authorized only if the arbitrator finds that the employee was affected by an improper agency action that directly resulted in the failure of the employee to be promoted when the employee otherwise would have been. In this case the arbitrator did not make such a finding.

21 FLRA No. 53

Federal Labor Relations Authority

SSA and AFGE, Local 1760 (Golob, Arbitrator), Case No. 0-AR-1020 (Decided April 21, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7106(a)(2)(A) and (B)
1650 No Basis for Review	7122(a)
1652.01 Disagreement with Arbitrator's Reasoning	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Exceptions Asserted in Appeal
    - Award Based on Nonfacts
    - Award Fails to Draw it Essence from the Parties' Agreement
    - Award Is Contrary to FSLMR Statute
      - § 7106(a)(2)(A) and (B)
    - Award is Contrary to Government-wide Rule or Regulation
      - 5 C.F.R. § 430.201(c)(3)
  - No Basis for Review
    - Disagreement with Arbitrator's Interpretation of the CBA
    - Disagreement with Arbitrator's Reasoning and Conclusions
- Performance Appraisals
  - Annual vs. More Frequent Performance Appraisals
  - Exclusion - 5 C.F.R. § 430.201(c)(3)
- Remedy
  - New Performance Appraisal

DIGEST NOTES

The grievant in this case objected to the performance rating given her under new performance standards. The arbitrator concluded that the agency violated the parties' agreement by rating the grievant's performance at the end of the agency rating cycle rather than at the end of 12 months. He found a further violation of the agreement in the agency's failure to inform the grievant that her performance was not at the previous level of "Excellent." As his award, the arbitrator ordered that the ten-month rating be stricken from the grievant's personnel records and be used only as a progress review and that the grievant be given a new appraisal for the requisite 12-month period.

In one exception the agency contended that the award violated § 7106(a)(2)(A) and (B) because the arbitrator substituted his judgment for that of management with respect to the grievant's performance appraisal. The Authority found that the arbitrator did not substitute his judgment for that of management as to what the grievant's performance appraisal should be, but merely directed that the grievant be reevaluated by management for the requisite period under established elements and standards.

In another exception, the agency contended that the award was contrary to 5 C.F.R. § 430.201(c)(3), a Government-wide regulation. The Authority concluded that the agency failed to show that the negotiated provision, as interpreted by the arbitrator to require appraisals on an annual basis, violated the Statute or the cited regulation. Further there is nothing in 5 CFR part 430 which imposes a specific requirement that performance appraisals must be accomplished on particular dates.

In other exceptions, the agency contended that the arbitrator's finding that the appraisal should cover a 12-month period and that the grievant was not given required counselling was based on nonfacts and, further, that the award failed to draw its essence from the parties' agreement. The Authority concluded that the agency's allegations merely constituted disagreement with the arbitrator's interpretation of the collective bargaining agreement.

Federal Labor Relations Authority

22 FLRA No. 54

GSA and AFGE, Council 236 (Smedley, Arbitrator), Case No. 0-AR-927 (Decided April 22, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7122(a)
1650 No Basis for Review	7131
1652 Disagreement with Arbitrator's Reasoning	

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Exceptions Asserted in Appeal
    Award Fails to Draw its Essence from the Parties's Agreement
    Award Contrary to the FSLMR Statute
      § 7131
    Award Contrary to Applicable Law
      5 U.S.C. § 5701 et seq. [Travel Expense Act]
    Award Contrary to Government-wide Rule or Regulation
      5 C.F.R. part 101-7 [Federal Travel Regulations]
  No Basis for Review
    Disagreement with the Arbitrator's Interpretation of the CBA
Official Time
    Travel and Per Diem Expenses
      Collective Bargaining Agreement Provision
Remedy
    Reimburse Union Representative for Travel and Per Diem

DIGEST NOTES

The arbitrator concluded that the parties had negotiated and agreed upon the payment of travel and per diem expenses for union representatives engaged in representational activities on official time. As his award, the arbitrator directed that the grievant be reimbursed for her reasonable and necessary travel and per diem expenses for the representational functions she performed on official time upon compliance with the provisions of the parties' agreement regarding such claims. The parties agreement subjects a claims for travel and per diem expenses to the exercise of sound discretion of both the union and management.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its first exception, the agency contended that the arbitrator's award failed to draw its essence from the parties' agreement. The Authority held that the agency's exception constituted nothing more than disagreement with the arbitrator's interpretation of the agreement which does not provide any basis for finding the award deficient.

In its second exception, the agency contended that the award was contrary to § 7131. The Authority concluded that the arbitrator's award, based upon his interpretation of the parties' agreement that the agency had agreed to pay travel and per diem expenses, was not contrary to § 7131.

In its third exception, the agency contended that the award was contrary to the Travel Expense Act, 5 U.S.C. § 5701 *et seq.*, and Federal Travel Regulations (FTRs), 5 CFR part 101-7. The Authority concluded that the arbitrator found that the agency had exercised its discretion under the Travel Expense Act through negotiations by making the determination that the representational activities were sufficiently within the interest of the United States so as to constitute official business. Moreover, the arbitrator clearly directed the payment of travel and per diem expenses only to the extent the expenses are consistent with legal and regulatory requirements and restrictions. According, the Authority concluded that the award was consistent with the Travel and Expense Act and the FTRs.

21 FLRA No. 55

Federal Labor Relations Authority

Naval Air Rework Facility, Norfolk, Va. and IAM, Local Lodge No. 39 (Rosen, Arbitrator), Case No. 0-AR-1006 (Decided April 22, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1600 Grounds for Review
    1601 Award Conflicts with Applicable Law

STATUTE

7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Set Aside
    Award Contrary to the Back Pay Act [5 U.S.C. § 5596]
  Exceptions Asserted in Appeal
    Award Contrary to the Back Pay Act
  Remedy
    Backpay - Overtime

DIGEST NOTES

The arbitrator determined that the activity violated the parties' agreement by allowing a temporary foreman to do the work of nonsupervisory personnel during periods of overtime. However, the arbitrator noted that it was not clear what impact this had on possible overtime for the three grievants. Nevertheless, the arbitrator awarded backpay for overtime not worked. In its exceptions, the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. § 5596. In setting aside the award, the Authority held that because the arbitrator failed to find that but for the violation the grievants would have in fact performed the overtime work and received overtime pay, the award was contrary to the Back Pay Act.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In the first exception, the agency contended that the arbitrator's award failed to draw the essence from the parties' [illegible] the agency's exception [illegible] agreement [illegible] with the [illegible] that [illegible] prov[illegible]

In the second exception, the agency contended that the award was contrary to § 7131. The Authority [illegible] arbitrator's award, based upon his interpretation [illegible] agreement, that the agency was required to pay [illegible] expenses, was not contrary to § 7131.

In the third exception, the agency contended that the award was contrary to the Travel Expense Act, 5 U.S.C. [illegible] and Federal Travel Regulations (FTR). [illegible] The Authority concluded that the [illegible] agency had exercised its discretion under the Travel [illegible] through negotiations by making the determination that the representational activities were sufficiently within the [illegible] States so as to constitute official business. Moreover, the arbitrator clearly directed the payment of travel and per diem expenses only to the extent the expenses are consistent with law and regulations. [illegible] Authority concluded that the award was not contrary to the Travel and Expense Act and the FTR.

21 FLRA No. 56

Federal Labor Relations Authority

AFGE, Local 3258 and HUD (Mohan, Arbitrator), Case No. 0-AR-1026
(Decided April 22, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7106(a)(2)(B)
1600 Grounds for Review	7121(c)(5)
1601 Award Conflicts with Applicable Law	7122(a)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Arbitrability
    - Position Classification [§ 7121(c)(5)]
  - Award Modified
    - Contrary to § 7106(a)(2)(B)
  - Exceptions Asserted in Appeal
    - Award Contrary to the FSLMR Statute
      - § 7106(a)(2)(B)
      - § 7121(c)(5)
  - Promotion
    - Opportunity to Demonstrate Ability re Promotion
  - Remedy
    - Restore Former Duties to Grievant
    - Provide Opportunity to Demonstrate Ability re Promotion
- Negotiability
  - Management Rights
    - Assign Work

DIGEST NOTES

After a reduction in the grievant's assigned duties and based on the findings of a classification desk audit, the grievant was not given a noncompetitive career ladder promotion. The arbitrator acknowledged that he had no jurisdiction over a classification matter but found that the dispute was arbitrable because the essence of the grievance was that the agency violated the parties' collective bargaining agreement when it changed the grievant's duties and prevented him from demonstrating that he could perform satisfactorily at the higher level. As his award, the arbitrator ordered, among other things, the agency to restore the duties which the grievant previously performed or in some other way provide him with the same opportunities he previously had to demonstrate that he is able to satisfactorily perform at the higher level.

In its first exception, the agency alleged that the award was contrary to § 7121(c)(5) which precludes grievances concerning the classification of any position that does not result in the reduction in grade or pay of an employee. The Authority found that the grievance and the award pertained to whether the grievant was entitled to a noncompetitive promotion and did not directly concern the classification of his position.

In its second exception, the agency contended that the award interfered with management's right to assign work under § 7106(a)(2)(B). The Authority has previously held that § 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. Therefore, the Authority found that to the extent the award restricts the assignment of duties to the grievant or directs the agency to restore the mix of higher and lower-rated duties which the grievant previously performed, the award was deficient as contrary to management's right to assign work under § 7106(a)(2)(B).

Federal Labor Relations Authority

21 FLRA No. 57

VA Medical and Regional Office Center, San Juan, P.R. and AFGE, Local Union No. 2408 (Siegel, Arbitrator), Case No. 0-AR-1044 (Decided April 22, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1600 Grounds for Review
    1601 Award Conflicts with Applicable Law

STATUTE

7106(a)(2)(C)
7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Modified
    Contrary to § 7106(a)(2)(C)
  Exceptions Asserted in Appeal
    Award Contrary to § 7106(a)(2)(C)
  Promotion
    Discrimination for "Whistleblowing" Alleged
  Remedy
    Promote Grievant or Give Priority Consideration
Negotiability
  Management Rights
    Make Selections for Appointments
      Award Directing Selection of Grievant

DIGEST NOTES

The grievant alleged that she was not selected for a vacant position because of discrimination over an alleged "whistleblowing" incident. The arbitrator concluded that the activity violated the parties's agreement by repeatedly denying her applications for the desired position, and that the agency's actions were discriminatory and based upon non-merit reasons rather than job related selection criteria. As his award, the arbitrator ordered the agency to immediately select the grievant for the position or, if the position was not available, to grant the grievant priority consideration for the next like position that became available.

In its exceptions, the agency alleged that the award was contrary to § 7106(a)(2)(C) as it interfered with management's right to select. The Authority concluded that the arbitrator failed to make the necessary finding of a direct connection between improper agency action and the failure of the grievant to be selected for promotion. Consequently, the Authority found that portion of the award directing the immediate selection of the grievant to be deficient as contrary to § 7106(a)(2)(C).

Federal Labor Relations Authority

21 FLRA No. 38

**Bureau of Reclamation, Upper Colorado Region, Colorado River Storage Project, Power Operations Office, Dep't of the Interior and IBEW, Local Union 2159 (Weiss, Arbitrator), Case No. 0-AR-1055
(Decided April 22, 1986)**

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7106(a)
1600 Grounds for Review	7122(a)
1602 Award Conflicts with Appropriate Regulation	7131(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
Award Modified
Award Contrary to 41 C.F.R. part 101-7
Exceptions Asserted in Appeal
Arbitrator Erred
By Finding that the Parties had "Negotiated"
In Interpreting the Supreme Court's BATF Decision
Arbitrator Exceeded His Authority
By Determining a Negotiability Issue
Official Time
Travel and Per Diem
Collective Bargaining Agreement Provision
Federal Travel Regulations [41 C.F.R. part 101-7]
Primary Interest of Government
Travel Expense Act, [5 U.S.C. § 5701 *et seq.*]
Remedies
Reimburse Grievants for Travel and Per Diem
FPM Letter 711-162

DIGEST NOTES

The parties submitted to arbitration the stipulated issue of whether the union's claim for travel and per diem expenses for union negotiators were arbitrable and, if so, whether the applicable provision in the parties' agreement was null and void or unenforceable. The arbitrator held that the grievances were arbitrable disputes over the interpretation and application of the agreement provision. On the substantive issue, the arbitrator found, contrary to the agency's contentions, that nothing in

Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) (BATF) prohibited agencies and unions from entering into an agreement to reimburse employee union negotiators for travel and per diem expenses. He also found that the guidance in FPM Letter 711-162 did not apply to prevent payment of travel and per diem in this case. Accordingly, the arbitrator sustained the grievances and directed the activity to make the grievants whole for any losses they may have suffered.

In its first exception the agency contended that the arbitrator erred in finding that the agreement provision was "negotiated", and further that the contract language was not the product of bargaining but merely incorporated the existing statutory entitlement. In its second exception the agency contended that the arbitrator improperly resolved an issue relating to the duty to bargain. The Authority held that the arbitrator did not resolve a negotiability issue but rather, the arbitrator interpreted an agreement provision which had been approved by the agency head. Both exceptions, the Authority found, constituted nothing more than disagreement with the arbitrator's interpretation and application of the parties' agreement which does not provide a basis for finding an award deficient.

In the remaining exceptions, the agency alleged that the arbitrator erred in his interpretation and application of the Supreme Court's decision in BATF. Although the Supreme Court in BATF held that there was no entitlement to travel and per diem expenses under § 7131(a), the Authority found that the decision did not pertain to circumstances where, as here, an agency was found to have negotiated a binding agreement.

The agency also alleged that the arbitrator erred in his interpretation of BATF by failing to enforce the requirement that payment of travel and per diem expenses must be certified to be in the interest of the Government. However, the Travel Expense Act, 5 U.S.C. § 5701 *et seq.*, does not prohibit an agency from exercising through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses.

In directing the payment of travel and per diem expenses, the arbitrator did not provide for agency determination of the propriety of the particular travel and per diem expenses under the Federal Travel Regulations [41 C.F.R. part 101-7]. Consequently, the Authority modified the award to assure that it is consistent with the requirements of the FTRs.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R14-87

Union

and

Case No. 0-NG-874

DEPARTMENT OF THE ARMY,
KANSAS ARMY NATIONAL GUARD,
TOPEKA, KANSAS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union Proposal.

Union Proposal

> Affected individuals will be returned non-competitively to the specific location and position from which they were RIF'ed when the position is vacated and being filled.

The proposal was submitted with regard to a Reduction-in-Force (RIF) whereby employees were involuntarily reassigned to positions of equal grade at different duty stations.

II. Positions of the Parties

The Union argues that the proposal constitutes an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute for employees adversely affected by the exercise of management's rights. It refers to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government

Employees, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

The Agency states that employees covered by the proposal will not be adversely affected by any reduction in force (RIF) because they will have been placed into positions of equal grade. The Agency also alleges that the proposal is nonnegotiable because it interferes with management's right under section 7106(a)(2)(C) to fill positions by making selections from any appropriate source. Finally, the Agency alleges that the proposal violates management's right to assign employees under section 7106(a)(2)(A) by requiring the reassignment of employees.

III. Analysis

The Union Proposal would require the Agency to select employees who were involuntarily reassigned to a position of equal grade without personal cause for return to their former positions at their former duty stations if and when such positions are vacant and the Agency makes the determination to fill them. The basic issue in this case is whether the proposal constitutes a negotiable appropriate arrangement for employees adversely affected by the exercise of management's rights under section 7106(b)(3) of the Statute. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), the Authority stated that henceforth the Authority will determine whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute by determining whether the proposal "excessively interferes" with the exercise of management's rights. In making such a determination, the Authority will first examine the record in each case to ascertain as a threshold question whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. If the Authority concludes that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes.

With regard to the threshold question, the Agency contends that the employees subject to the proposal are not adversely affected because they were reassigned to positions of equal grade in a different duty station. We disagree. Employees subject to a RIF in this case could be reassigned to any duty station within the State of Kansas. A change in duty station could require an employee to move or could result in a significant change of commute. We find that effect to be sufficient to meet the first requirement under section 7106(b)(3). Therefore, we find the proposal to be an "arrangement" for employees adversely affected by the exercise of a management right. According to the Union, the proposal is clearly intended to mitigate against an involuntary change in an employee's duty station by requiring selection of the employee for his or her previous position at his or her prior duty station when it is vacant and the Agency decides to fill it.

The issue thus becomes whether the proposal excessively interferes with management's right to select individuals to fill positions or management's right to assign employees. In this case it is a question of whether the right afforded employees under the proposal to return to their previous duty station is outweighed by the effect of the proposal on those management rights. As detailed above, the only effect of the proposal is to require management to select for a vacant position the employee who would still be in that very position if he or she had not been reassigned in a RIF.

In our decision in Kansas Army National Guard we held that a similar requirement was not a substantial burden on management when compared to the detriment suffered by employees demoted in a RIF and the benefit of repromotion conferred by the proposal in that case. While employees covered by the proposal in this case have not been demoted, we conclude that the necessity to relocate as a result of a permanent lateral involuntary reassignment, perhaps across the State, like a demotion causes significant negative impact on affected employees. See Union Statement of Position at 1. With this proposal, as with the one we considered in Kansas Army National Guard, the burden placed by the proposal on management's right to select is not so significant as to outweigh the disruption to an employee's life caused by assignment to a new duty station and the benefit conferred by the proposal of an opportunity for the employee to return to his or her former duty station. For the foregoing reasons, we find that the Union's proposal does not excessively interfere with management's right, under section 7106(a)(2)(C), to select individuals to fill vacant positions from any appropriate source.

The selection of employees to fill the positions they previously held at their former duty stations may entail a reassignment of those employees to their former duty station and thus may also have an effect upon management's right to assign employees. However, we find that this fact would not change the above analysis in that there would not be any different or additional substantive effect, nor would it add to the weight of management's practical needs.

IV. Conclusion

Having found that the employees involuntarily reassigned by RIF in this case were adversely affected by a management decision and that the Union Proposal does not excessively interfere with management's rights, under sections 7106(a)(2)(A) and (a)(2)(C) to assign employees and to fill vacant positions by making selections from any appropriate source, we hold that the proposal is an appropriate arrangement under section 7106(b)(3) and therefore negotiable.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union Proposal.*/

Issued, Washington, D.C., April 21, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In deciding that the proposal is negotiable, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 224

Union

and

Case No. 0-AR-875

OFFICE OF HEARINGS AND APPEALS,
SOCIAL SECURITY ADMINISTRATION

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Bernard Cushman filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The Union filed a grievance in this case alleging that the Activity violated Article 22, Section 4 of the parties' collective bargaining agreement by refusing to pay the travel and per diem expenses of the chapter president and chief steward for attendance at a one-day negotiation session in Arlington, Virginia, held at the request of the Activity. The Arbitrator noted that Article 22 of the parties' agreement pertinently provides that "[t]he Employer shall pay travel and per diem costs incurred by the employee negotiators unless a statute or court order mandates otherwise." The Arbitrator further noted that the president had claimed expenses of $662.60 and the steward had claimed expenses of $75.02 and that the Activity had denied the claims. In denying the claims the Activity took the position that after the U.S. Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), payment of travel and per diem expenses was not required under the parties' agreement provision and that under the Travel Expense Act, 5 U.S.C. § 5701 et seq., payment was precluded because there had been no specific agency head certification that the travel served the convenience of the agency or was otherwise in the primary interest of the Government. The Arbitrator, however, rejected the Activity's position. He found that the requirement of the parties' agreement to pay travel and per diem expenses was unaffected by the decision in BATF. He further found that payment of the expenses was not precluded by the lack of a specific agency head certification that the disputed travel served the convenience of the agency. In this regard he essentially concluded that consistent with the decision in BATF, the parties' agreement constituted the determination by the Activity that travel attendant to representing an exclusive representative in negotiations is sufficiently within the interest of the United States so as to constitute official business. Accordingly, as his award, the Arbitrator sustained the grievance and, in doing so, in effect found that management was obligated to pay the grievants' travel and per diem expenses for attendance at the negotiation session in question.

III. EXCEPTION

As its exception the Activity contends that the award is contrary to law, specifically, the Travel Expense Act. In support of this exception, the Activity essentially repeats its position before the Arbitrator by arguing that payment of the travel and per diem expenses is precluded by the Travel Expense Act because there had not been a specific agency head certification that the travel was performed in the primary interest of the Government.

IV. ANALYSIS AND CONCLUSIONS

The Authority finds that the Agency's exception fails to establish that the Arbitrator's award is contrary to the Travel Expense Act. The agreement provision enforced by the Arbitrator is essentially the same as the proposal found by the Authority to be within the duty to bargain in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). In that decision the Authority pertinently ruled that provisions of the Travel Expense Act do not prohibit an agency from exercising through negotiations the discretion which it possesses to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of appropriate travel expenses. Id. at 6. As has been noted, the Arbitrator in this case similarly found that the parties' agreement provision as to the payment of travel and per diem expenses constituted the determination by the Activity that travel attendant to representing an exclusive representative in negotiations is sufficiently within the interest of the United States so as to constitute official business. Thus, in view of the Authority's decision in U.S. Customs Service, no basis is provided for finding the award deficient as alleged by the Activity.

In finding the proposal in U.S. Customs Service to be within the duty to bargain, however, the Authority concluded that the proposal would not require the agency to authorize the payment of expenses which do not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowledgment that payment of any travel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the Federal Travel Regulations (FTRs).*/ In this case, the Arbitrator in directing that the claimants are entitled to payments for travel and per diem expenses for attendance at the negotiation session has not expressly addressed whether the claimants are to be authorized and paid the full amount of their respective claims and has not expressly provided for agency determinations regarding the propriety under the FTRs of those respective claims. Consequently, the Authority must modify the award to assure that it is consistent with the requirements of the FTRs.

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

V. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, the award is modified to provide as follows:

> The grievance is sustained. The claimants are entitled to payment of their travel and per diem expenses for attendance at the negotiation session in question insofar as consistent with applicable requirements of the Federal Travel Regulations.

Issued, Washington, D.C. April 21, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, BROCKTON, MASSACHUSETTS

Activity

and

Case No. 0-AR-990

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-25

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Martin Lubow filed by the Veterans Administration (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator arose when the Activity notified the local union president, the grievant, that official time for his representational activities was to be reduced from 100 percent to 15 percent because of workload demands. The grievant was instructed to return to his duties as a housekeeping aid for 85 percent of his work time. The Arbitrator identified the basic issue in the dispute as what was a reasonable amount of official time under the parties' collective bargaining agreement for the union president to carry out appropriate representational activities.

The Arbitrator issued a nine paragraph award in the matter. In paragraph 1, the Arbitrator determined that under the parties' national and local supplemental collective bargaining agreements the Activity was required to provide union officers with a reasonable amount of official time to enable them to carry out appropriate representational activities while not neglecting their responsibilities as employees to their assigned departments. In paragraphs 4, 5 and 6, here in dispute, the Arbitrator essentially provided as follows:

> 4. The supervisors shall grant sufficient [official time] to the grievant and other union officers to perform appropriate union work for reasonable periods of time, provided there is no work emergency. . . .
>
> 5. The decision to impose a 15% limitation of [official time] on the union president was arbitrary, capricious, discriminatory, retaliatory and unreasonable. It is revoked. While not granting 100% of official time, 50%, or 80%, I am holding that if the union president's list of anticipated representational duties and time required is 40 hours or more for a given time and if the matters listed are appropriate and the times required are reasonable, that he be granted such [official] time . . . not to exceed 40 hours a week. However, each week should stand on its own. If an anticipated event is cancelled, it shall be the union representative's responsibility to bring that to the attention of his supervisor and to make himself available for his regular duties. The VA may monitor the union official's duties by requiring a log after the fact of how time was actually spent. If a pattern of abuse is found, the VA would then not be acting arbitrarily to take that into account in considering future requests for [official time]. If the parties differ as to what is "appropriate" to work on or what is a "reasonable" amount of time to perform the task, they should negotiate such matters in good faith.

> 6. For each day of annual leave that [the grievant] can prove he spent a full day performing appropriate union work for reasonable periods of time, or part thereof, he shall be provided a substitute day, or part thereof, of annual leave. On the other hand, I see no reason why the grievant should not take a turn at weekend and holiday work, though I think it would impede his effectiveness as union president to put him into the normal shift rotation. The parties are directed to negotiate the details of such an arrangement.

III. EXCEPTION

As its exception, the Agency contends that the paragraphs 4, 5, and 6 of the award are deficient because they contravene management's right under section 7106(a)(2)(B) of the Statute to assign work. In support of its exception, the Agency argues that the disputed paragraphs are deficient because they prohibit the assignment of work to union officials engaged in representational activities except in emergencies and also prohibit the assignment of work to the union president on weekends and holidays except in emergencies. The Agency further argues that paragraph 6 of the award is also deficient because, by requiring the cancellation of annual leave taken by the union president, the award imposes a retroactive prohibition on management's right to assign work.

IV. ANALYSIS AND CONCLUSIONS

The Authority finds that the Agency has misconstrued the Arbitrator's award. In paragraph 1 of the award, the Arbitrator expressly provides that Union officials are to receive only a reasonable amount of official time to carry out appropriate union activities, while not neglecting their assigned duties. Additionally, in paragraph 4, the Arbitrator only requires that supervisors grant "sufficient" time to enable union officers to carry out appropriate activities and then only if there is no work emergency.

Further, in paragraph 5 of the award, the Arbitrator again only provides for granting reasonable amounts of official time for appropriate representational activities, with any differences as to what is "reasonable" and "appropriate" subject to negotiation by the parties. Moreover, contrary to the Agency's second contention, the Arbitrator in paragraph 6 of the award clearly states that there is no reason why the grievant should not be assigned weekend and holiday work, even though, in the Arbitrator's view, it might impede his effectiveness as union president. Thus, the Authority finds, contrary to the Agency's assertions, that the Arbitrator's award does not in any way improperly interfere with management's right to assign work. *American Federation of Government Employees, AFL-CIO, New York-New Jersey Council of District Office Locals, Social Security Administration and Department of Health and Human Services, Social Security Administration District Office Operations*, 7 FLRA 413 (1981). Furthermore with regard to paragraph 6 of the award, the Authority finds that the recrediting of annual leave taken for periods when official time should have been granted and was improperly denied is not deficient. *See, e.g.*, *American Federation of Government Employees, Local 1395 and Department of Health and Human Services, Social Security Administration*, 10 FLRA 18 (1982). The Authority therefore concludes that the Agency has failed to establish that the Arbitrator's award is deficient as alleged.

V. DECISION

Accordingly, for the above reasons, the Agency's exception is denied.

Issued, Washington, D.C., April 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-994

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Arthur Eliot Berkeley filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The issues presented to the Arbitrator concerned, among other things, whether the Agency violated certain provisions of the parties' national agreement when it terminated the payment of travel and per diem expenses of employees who served as union negotiators in bargaining sessions. The Arbitrator noted that Article 4, section 4 of the agreement provided that travel and per diem would be authorized for union negotiators as required by the Federal Service Labor-Management Relations Statute. In interpreting this provision, the Arbitrator considered the decision of the U.S. Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), and determined that nothing in BATF precluded the Agency from agreeing to the payment of the travel and per diem expenses of union negotiators. Thus, he found that the Agency had bargained over and agreed to pay travel and per diem and that the Agency therefore was bound by its agreement. Consequently, the Arbitrator determined that the Agency violated Article 4, section 4 of the agreement and as a remedy ordered the Agency to reimburse union negotiators for travel and per diem expenses incurred retroactive to the date the Agency ceased making such payments. The Arbitrator also retained jurisdiction over implementation of the award for the limited purpose of resolving any reimbursement questions.

III. FIRST, SECOND, THIRD, AND FOURTH EXCEPTIONS

A. Contentions

In its initial exceptions, the Agency contends that the award is incomplete; that the award fails to draw its essence from the agreement; that the award is based on a nonfact; and that the Arbitrator exceeded his authority by retaining jurisdiction during implementation of the award.

B. Analysis and Conclusions

The Authority concludes that these exceptions fail to establish that the award is deficient on any basis as contended by the Agency. The first three exceptions constitute nothing more than disagreement with the Arbitrator's interpretation and application of the collective bargaining agreement. The Agency in these exceptions is clearly seeking to have its own interpretation of the parties' agreement substituted for that of the Arbitrator and the Authority has held that such exceptions provide no basis for finding an award deficient. National Federation of Federal Employees, Local 1418 and U.S. International Communication Agency, Voice of America, 9 FLRA 980 (1982). Similarly, the Agency fails to establish that the retention of jurisdiction by the Arbitrator for the limited purpose of resolving any reimbursement questions in implementation of the award is deficient. See American Federation of Government Employees, AFL-CIO, National Immigration and

Naturalization Service Council and U.S. Immigration and Naturalization Service, 15 FLRA 355 (1984). Accordingly, these exceptions must be denied.

IV. FINAL EXCEPTION

A. Contentions

In its final exception, the Agency contends that the award is contrary to applicable law. The Agency mentions in this regard, section 7131 of the Statute and applicable travel statutes.

B. Analysis and Conclusions

The Authority concludes that this exception fails to establish that the award is deficient as alleged by the Agency. In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), the Authority found the following proposal to be within the duty to bargain:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In finding the proposal to be within the duty to bargain, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activities are payable from Federal funds. Id. at 3. The Authority concludes that the Arbitrator's interpretation of the parties' agreement in this case to find management's termination of the payment of travel and per diem expenses constituted a violation of the agreement is not contrary to section 7131 of the Statute.

Moreover, the Authority also ruled in U.S. Customs Service that the proposal in dispute was not inconsistent with the Travel Expense Act, 5 U.S.C. § 5701 et seq., because that Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of the travel expenses. Id. at 6. The Authority similarly concludes that the Arbitrator's award in this case is not contrary to the Travel Expense Act. The Arbitrator ruled that the Agency agreed in the collective bargaining agreement to pay the travel and per diem expenses of employees serving as union negotiators. The Authority finds that the Arbitrator's interpretation of the agreement effectively constitutes, in terms of U.S. Customs Service, a determination under the agreement that the representational activities involved were sufficiently within the interest of the United States so as to constitute official business.

However, in finding the proposal in U.S. Customs Service to be within the duty to bargain, the Authority concluded that the proposal would not require the agency to authorize the payment of expenses which did not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowledgment that the payment of any tavel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the Federal Travel Regulations.*/ In this case, the Arbitrator, in directing the reimbursement of union negotiators for travel and per diem expenses retroactive to the date the Agency ceased making such payments, has not expressly provided for agency determinations regarding the propriety under the FTRs of those expenses. Consequently, the Authority must modify the award to assure that it is consistent with the requirements of the FTRs.

V. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, the Agency's first four exceptions are denied and that portion of the award directing the reimbursement of travel and per diem expenses is modified to provide as follows:

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

Due to the violation of the National Agreement found above, the Agency shall reimburse, insofar as consistent with applicable requirements of the Federal Travel Regulations, union negotiators for travel and per diem expenses retroactive to the date the Agency ceased making such payments and shall pay same pursuant to the agreed upon contract language.

Issued, Washington, D.C. April 21, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE

Agency

and Case No. 0-AR-1019

THE PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Robert J. Ables filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance protested the refusal of a supervisor to recommend the grievant, a GS-12 patent examiner, for a career-ladder promotion to GS-13. The grievant had been eligible for promotion for about two years, his productivity for the most recent six-month period had risen to the point where it was deemed sufficient for promotion to the next higher grade, and the supervisor had rated the grievant's performance as "fully satisfactory" in his most recent performance appraisal. However, the supervisor determined that he could not recommend the grievant for promotion to GS-13 because of the quality of his work. The supervisor based his determination upon a review of a six-case sample of the grievant's work. The Arbitrator found that the work contained a number of errors and insufficiencies and concluded that the grievant still required close review and further instruction.

The Arbitrator identified the immediate issue in the case as whether the grievant had demonstrated the ability to perform examiner duties at the GS-13 level. The Arbitrator found that while an eligible examiner in a career-ladder plan had a right under the parties' collective bargaining agreement to be "considered" for promotion, the terms of the agreement clearly implied that not all examiners could expect to be promoted. The Arbitrator noted that the parties estimated that promotions from GS-12 to GS-13 are authorized about 90 percent of the time. The Arbitrator further found that there was no evidence that the parties had agreed that satisfactory performance of all performance standards of an examiner's position required a decision that the examiner be promoted. The Arbitrator determined that the parties' agreement contemplated that management officials have the discretion to judge the ability of a career-ladder examiner to perform at the next higher level, but that the discretion was limited by a requirement that the exercise of that judgment not be arbitrary or capricious.

The Arbitrator concluded that the supervisor was arbitrary in this case. In reaching that conclusion, the Arbitrator found that the supervisor's review of the sampling of the grievant's work was made in anticipation of grievance litigation and after the six cases had already been routinely cleared in the usual course of business of the office. The Arbitrator further found that the time to judge the quality of the work was when it was first done, and he also noted that the supervisor himself had previously cleared four of the six cases that he afterwards subjected to the more careful quality review.

As to the quality of the grievant's work, the Arbitrator found that it was not essential to make a determination on the relative merits of the technical position of the parties as to each of the grievant's cases reviewed by the supervisor. The Arbitrator determined that it was sufficient to conclude, without an ultimate finding on the technical aspects of the grievant's work, that there was a sizable question as to whether the grievant's work performance was below the level of other GS-12 examiners, almost all of whom had been routinely promoted to GS-13.

The Arbitrator found that an examiner could expect to be promoted unless management showed a substantial basis for withholding the promotion, and that management had not made such a showing in this case. Consequently, the Arbitrator decided that the Agency was arbitrary in withholding the grievant's promotion to GS-13. The Arbitrator therefore sustained the grievance and, as his award, directed the Agency to promote the grievant to GS-13 retroactively with backpay.

III. EXCEPTION

In its exception, the Agency essentially contends that the Arbitrator's award is contrary to law. In support of this contention, the Agency primarily argues that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator failed to make the necessary finding that but for the Agency violation of the parties' agreement, the grievant would have been promoted. The Agency further notes that an arbitrator can abridge management's right to promote under section 7106(a) of the Statute only if the arbitrator finds a direct connection between an improper agency action and the failure to promote the aggrieved employee.

IV. ANALYSIS AND CONCLUSIONS

In order for an award of backpay to be authorized under the Back Pay Act, the arbitrator must find that an agency personnel action was unjustified or unwarranted, that such personnel action directly resulted in the withdrawal or reduction of the aggrieved employee's pay, allowances, or differentials and that but for such action, the grievant would not have suffered such a withdrawal or reduction. U.S. Army Missile Command Redstone Arsenal and American Federation of Government Employees, Local 1858, 19 FLRA No. 38 (1985). In this case, the Authority concludes that the Arbitrator has not made the findings necessary for a proper award of backpay. The Arbitrator acknowledged that not all eligible GS-12 examiners could expect to be promoted to GS-13. In such circumstances, the Arbitrator's finding that the supervisor's failure to recommend the grievant for promotion was arbitrary does not constitute the requisite determination that but for the unwarranted or unjustified action, the grievant definitely would have been promoted to

GS-13. *American Federation of Government Employees, Local 2502 and U.S. Department of Justice, Federal Prison System, Federal Correctional Institution*, 17 FLRA No. 61 (1985). Accordingly, the Authority concludes that the Arbitrator's award of backpay is contrary to the Back Pay Act.

Moreover, with regard to filling positions, the Authority has specifically held that section 7106(a)(2)(C) of the Statute reserves to management the right to make the actual substantive determination to select or not to select employees for promotion. *See, e.g., Army and Air Force Exchange Service, Fort Knox Exchange, Fort Knox, Kentucky and American Federation of Government Employees, Local 2303, AFL-CIO*, 8 FLRA 256 (1982). In conjunction with the decisions of the Authority specifying when an award of a retroactive promotion is authorized under the Back Pay Act, the Authority has held that management's right may be constrained consistent with section 7106(a)(2)(C) and an agency ordered to select a particular employee for promotion only if the arbitrator finds that the employee was affected by improper agency action that directly resulted in the failure of the employee to be promoted when the employee otherwise would have been. *American Federation of Government Employees, Local 3553, AFL-CIO and Veterans Administration Medical Center, New Orleans, Louisiana*, 18 FLRA No. 65 (1985). In this case, as indicated above, the Arbitrator did not make the findings necessary to constrain management's right to determine not to promote the grievant. The Authority therefore concludes that the Arbitrator's award directing the Agency to promote the grievant retroactively to GS-13 is contrary to section 7106(a)(2)(C) of the Statute.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified by striking the provisions for retroactive promotion and backpay.

Issued, Washington, D.C., April 21, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and Case No. 0-AR-1020

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760, AFL-CIO

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Howard M. Golob filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant objected to her performance evaluation rating of "Fully Satisfactory," under new performance standards, for a ten-month period ending on September 30, 1984, the end of the rating cycle established by the Agency. The grievant had received a rating of "Excellent" under previous standards. Article 21, Section 6A of the parties' collective bargaining agreement provided as follows:

> A. Performance appraisals are normally prepared on a regular cycle. For employees other than seasonal employees this will be a twelve (12) month cycle except for certain situations as set forth in SSA policy.

The Arbitrator found that under the agreement the grievant was entitled to receive a performance appraisal covering a full 12 months regardless of whether that period coincided with the rating cycle followed by the Agency. The Arbitrator concluded that the Agency violated the parties' agreement by rating the grievant's performance at the end of the regular Agency rating cycle rather than at the end of 12 months. He found a further violation of the agreement in the Agency's failure to provide informal discussions and progress reviews to inform the grievant that her performance was not at the previous level of "Excellent." As his award, the Arbitrator ordered that the ten-month rating be stricken from the grievant's personnel records and be used only as a progress review and that the grievant be given a new appraisal for the requisite 12-month period.

III. FIRST EXCEPTION

A. Contentions

In its primary exception, the Agency contends that the award is contrary to law and Government-wide regulation. More specifically, the Agency contends that the award violates section 7106(a)(2)(A) and (B) of the Statute because the Arbitrator substituted his judgment for that of management with respect to the grievant's performance appraisal. As to its Government-wide regulation contention, the Agency specifically contends that the award violates 5 C.F.R. § 430.201(c)(3), which provides that positions for which employment is not reasonably expected to exceed 120 days in a 12-month period may be excluded from the requirement for a performance appraisal. In support of this latter contention, the Agency in essence argues that the regulation requires it to appraise an employee who is in a position for more than 120 days, does not require that an employee be in the position for a full 12 months before a performance rating can be made, and permits the appraisal of an employee after 120 days in a particular position.

B. Analysis and Conclusions

The Authority finds that the Agency fails to establish that the award is contrary to the Statute or Government-wide regulation. The Authority first concludes that the Arbitrator did not substitute his judgment for that of management as to what the grievant's performance appraisal should be, but merely directed that the grievant be reevaluated by management for the requisite period under the established elements and standards. Such an award is not contrary to the Statute as alleged. Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO, 20 FLRA No. 39 (1985).

Second, the Authority has previously decided that a proposal requiring annual performance appraisals is consistent with law and Government-wide rules and regulations and is within the duty to bargain. American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service, 13 FLRA 697 (1984); American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981), affirmed as to other matters sub nom. AFGE, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). The Arbitrator concluded in his interpretation of Article 21, Section 6A of the parties' agreement that the grievant was entitled to an annual performance appraisal covering the full 12 months. The Agency fails to show that the negotiated provision, as interpreted by the Arbitrator to require appraisals on an annual basis, is violative of the Statute or the cited regulation. Further, there is nothing in 5 C.F.R. part 430 which imposes a specific requirement that performance appraisals must be accomplished on particular dates. The Authority concludes that the Agency is merely disagreeing with the Arbitrator's reasoning and conclusions and with his interpretation of the parties' agreement. It is well-established that such disagreement provides no basis for finding an award deficient. E.g., Federal Correctional Institution, Petersburg, Virginia and American Federation of Government Employees, Local 2052, Petersburg, Virginia, 13 FLRA 108 (1983).

IV. OTHER EXCEPTIONS

A. Contention

In its other exceptions, the Agency contends that the Arbitrator's finding that the appraisal should cover a 12-month period and that the grievant was not given required counselling is based on nonfacts and, further, that the award fails to draw its essence from the parties' agreement.

B. Analysis and Conclusion

The Authority concludes that the Agency's allegations merely constitute disagreement with the Arbitrator's interpretation of the collective bargaining agreement and as already indicated above, such disagreement provides no basis for finding the award deficient.

V. DECISION

Accordingly, for the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., April 21, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION,
REGION 8

Agency

and Case No. 0-AR-927

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Robert W. Smedley filed by the Agency pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The issue before the Arbitrator was whether the grievant was entitled to travel and per diem expenses when she performed certain representational activities on official time. The Arbitrator concluded that the parties had negotiated and agreed upon the payment of travel and per diem expenses for union representatives engaged in representational activities. In reaching that conclusion, the Arbitrator cited and discussed Article 27, Section 10 of the parties' collective bargaining agreement, which provided that travel would be paid in accordance with the Federal Service Labor-Management Relations Statute; Article 6, wherein the parties had negotiated expense report requirements as set forth in Appendix A of the agreement; and Appendix A itself, which included provision for travel and per diem expense claims. As to Appendix A, the Arbitrator found that merely filling out the form did not guarantee payment of the expenses, but that a claim for such expenses is subject to the exercise of the sound discretion of both the union and management. The Arbitrator determined, however, that management cannot simply deny all payments when it definitely made a contractual commitment to pay the expenses in proper cases. As his award, the Arbitrator directed that the union representative be reimbursed for her reasonable and necessary travel and per diem expenses for the representational functions involved, upon submission of the information required in Appendix A.

II. FIRST EXCEPTION

A. Contention

In its first exception, the Agency contends that the Arbitrator's award fails to draw its essence from the parties' agreement. In support of this contention, the Agency argues that the Arbitrator did not set forth specifically where in the parties' agreement the Agency's obligation to pay travel and per diem is contained, other than Appendix A. The Agency further argues that the Arbitrator placed a great deal of weight on Appendix A and ignored language in the Appendix that it was not to be read as source of rights to official time or travel and per diem expenses.

B. Analysis and Conclusion

It is well-established that in order for an award to be found deficient as failing to draw its essence from the parties' agreement, the party making the allegation must demonstrate that the award cannot in any rational way be derived from the agreement; or that the award is so unfounded in reason and fact, so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator; or that the award evidences a manifest disregard for the agreement; or that the award does not represent a plausible interpretation of the agreement. E.g., American Federation of Government Employees, National Border Patrol Council and U.S. Immigration and Naturalization Service, Southern Region, Dallas, Texas, 3 FLRA 540, 543 (1980). In this case, the Authority finds that the Agency has failed to demonstrate that the Arbitrator's award does not draw its essence from the parties' agreement under any of the tests described. Rather, the exception merely constitutes disagreement with the Arbitrator's interpretation of the agreement and therefore does not provide any basis for finding the award deficient. E.g., The Philadelphia Regional Office, District Office Operations, Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3186, 15 FLRA 211 (1984).

III. SECOND EXCEPTION

A. Contention

In its second exception, the Agency in effect contends that the Arbitrator's award is contrary to section 7131 of the Statute because, as interpreted by the U.S. Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), the Agency is not obligated under that provision to pay travel and per diem expenses for union representatives on official time.

B. Analysis and Conclusion

The Arbitrator in this case found that the Agency had agreed to pay the travel and per diem expenses of union representatives performing labor-management relations activities. The Authority therefore finds that while the Agency is correct in stating that section 7131 of the Statute does not require agencies to pay travel and per diem to union representatives on official time, in this case, as determined by the Arbitrator, the Agency negotiated and agreed to pay such expenses. In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), the Authority found the following union proposal to be within the duty to bargain under the Statute:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In finding the proposal to be within the duty to bargain, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activities are payable from Federal funds. Id. at 3. In this case, the Authority concludes that the Arbitrator's award, based upon his interpretation of the parties' agreement that the Agency had agreed to pay travel and per diem expenses, is not contrary to section 7131 of the Statute as alleged by the Agency in its exception.

IV. THIRD EXCEPTION

A. Contentions

In its third exception, the Agency contends that even assuming that the Arbitrator was correct in finding that the Agency had agreed to pay the travel and per diem expenses of union representatives on official time, any such agreement is void because the subject of travel and per diem is outside the duty to bargain under the Statute. In support of its contention, the Agency argues that the duty to bargain only extends to matters which are not inconsistent with Federal law and Government-wide rules and regulations, and that negotiation of travel and per diem is inconsistent with the Travel Expense Act, 5 U.S.C. § 5701 et seq., and Federal Travel Regulations (FTRs), 5 CFR part 101-7, which govern payment of such expenses. The Agency further argues that the Travel Expense Act requires an evaluation of each individual travel situation and a case-by-case determination by an agency as to whether an employee's travel is sufficiently within the interest of the Government so as to constitute official business warranting payment of related expenses and, moreover, that any blanket requirement to pay expenses such as the Arbitrator found the Agency had agreed to in this case would be contrary to that law.

B. Analysis and Conclusions

As indicated above in the analysis and conclusion concerning the Agency's second exception, the Authority expressly held in U.S. Customs Service that a proposal essentially to the same effect as the Arbitrator's interpretation of the parties' agreement here involved was within the duty to bargain under the Statute. Moreover, the Authority also expressly found that the proposal was not inconsistent with the Travel Expense Act because that Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses. Id. at 6. In this case, the Arbitrator determined that the Agency agreed to pay the travel and per diem expenses related to labor-management relations activities. The Authority finds that the Arbitrator's determination effectively constitutes, in terms of U.S. Customs Service, a finding that the Agency had exercised its discretion under the Travel Expense Act through negotiations and had determined that the representational activities were sufficiently within the interest of the United States so as to constitute official business.

Additionally, in finding the proposal in U.S. Customs Service to be within the duty to bargain, the Authority concluded that the proposal would not require the agency to authorize the payment of expenses which did not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowlegment that the payment of any travel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the FTRs.*/ In this case, the Arbitrator provided that the travel and per diem expense claim of the union representative was subject to the review of the union and management in their sound discretion and expressly directed reimbursement of only reasonable and necessary expenses of the representative. Thus, the Arbitrator clearly directed the payment of travel and per diem expenses only to the extent the expenses are consistent with legal and regulatory requirements and restrictions. Accordingly, the Authority concludes that the Arbitrator's award is consistent with the Travel Expense Act and the FTRs and that the Agency has failed to establish that the award is deficient as alleged in this exception.

V. DECISION

Based on the foregoing analysis and conclusions, the Agency's exceptions are denied.

Issued, Washington, D.C., April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR REWORK FACILITY
NORFOLK, VIRGINIA

Activity

and Case No. 0-AR-1006

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL LODGE NO. 39

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator H. Morton Rosen filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance alleged that the Activity failed to allocate overtime impartially, in accordance with the parties' collective bargaining agreement, during a three-month period. The grievance claimed that an individual who had been temporarily promoted to foreman for the months in question, performed the work of a machinist during overtime, thereby depriving three other machinists of overtime work.

The Arbitrator determined that the Activity had violated the agreement by allowing the temporary foreman to do the work of nonsupervisory personnel during periods of overtime. The Arbitrator noted that it was not clear from the overtime record whether the entries constituted overtime that might have been offered and declined and, further, that there was no evidence that any of the three employees were actually available and willing to work on each occasion that the foreman worked overtime. Nevertheless, the Arbitrator found that the Activity's actions directly caused the three employees to be deprived of overtime pay that they might have earned had the foreman not worked overtime during that period. Accordingly, as his award, the Arbitrator awarded one hundred and six hours of retroactive overtime pay to be divided equally among the three affected employees.

III. EXCEPTION

In its exception, the Agency contends that the award violates the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator made no finding that any of the employees would have worked any specific overtime had the Activity not violated the agreement, and that he therefore improperly awarded them backpay for overtime that they might have worked.

IV. ANALYSIS AND CONCLUSIONS

It is well-established that in order for an award of backpay to be authorized under the Back Pay Act, the arbitrator must determine not only that the aggrieved employee was affected by an unjustified or unwarranted personnel action, but also that such personnel action directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the employee otherwise would have earned or received. E.g., U.S. Army Aberdeen Proving Ground and Local 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, 19 FLRA No. 35 (1985).

In this case, although the Arbitrator determined that the Activity violated the parties' agreement and that the violation directly affected the three employees, he failed to make all of the findings necessary for an award of backpay. Specifically, he failed to find that but for the violation the grievants would have in fact performed the overtime work and received overtime pay. *Jefferson Barracks National Cemetery, St. Louis, Missouri and National Association of Government Employees, Local R14-116*, 13 FLRA 703 (1984). On the contrary, the Arbitrator found that there was no evidence that any of the three employees were actually available and willing to work every time the foreman worked overtime. Consequently, there is an insufficient legal basis for an award of backpay in this case. The Authority therefore concludes that the Arbitrator's award of retroactive overtime pay is deficient as contrary to the Back Pay Act.

IV. DECISION

Accordingly, for the above reasons, the Arbitrator's award is set aside.

Issued, Washington, D.C., April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3258

Union

and

Case No. 0-AR-1026

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Albert J. Hoban filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant, a GS-9 support service specialist claimed that he should have received a noncompetitive, career ladder promotion to GS-11. His position had previously been graded GS-11 and was identified as one with promotion potential to GS-11, subject to further classification review. However, when funds for the Agency were reduced, the grievant was assigned a number of duties of lower-graded positions that had been eliminated, duties that were not within his position description. When the grievant was eligible for a career promotion to GS-11, his supervisor forwarded a recommendation that he be promoted to the Personnel Office for review. When no action was taken on the recommendation after almost five months, the grievance in this matter was filed. The supervisor's recommendation eventually was disapproved based upon the findings of a classification desk audit that the grievant was working most of the time on duties at or below the GS-9 level. The Agency argued before the Arbitrator that the grievance was not arbitrable because it involved the classification of the grievant's position and, further, that even if the grievance was arbitrable, the grievant was not entitled to a promotion because two conditions for promotion had not been met, i.e., that the employee must demonstrate the ability to perform at the next higher level and that there must be enough work at the higher level.

The Arbitrator acknowledged that he had no jurisdiction over a classification matter but found that the dispute was arbitrable because the essence of the grievance was that the Agency violated the parties' collective bargaining agreement when it changed the grievant's duties and prevented him from demonstrating that he could perform satisfactorily at the GS-11 level. The Arbitrator found that under Section 13 of the parties' agreement an employee such as the grievant in a career ladder position with potential for a higher grade was entitled to a chance to demonstrate ability to perform at the higher grade. As his award, the Arbitrator provided as follows:

1. The grievance is arbitrable.
2. The grievant's present classification is correct.
3. The Agency violated the rights of the grievant as a career employee by assigning him to duties which were not in his position description and altering the balance between higher and lower rated duties causing a reduction in his opportunities to demonstrate his ability to perform at the GS-11 level.

4. The Agency must comply with the letter and intent of the collective bargaining agreement, particularly Section 13, by restoring as near as practical, the balance of higher and lower rated duties which the grievant performed [previously]; or in some other way provide him with the same opportunities he then had to demonstrate that he is able to satisfactorily perform at the GS-11 level.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Agency contends that the award is contrary to section 7121(c)(5) of the Statute which precludes grievances concerning the classification of any position that does not result in the reduction in grade or pay of an employee. The Agency argues that this dispute concerns the classification of the grievant's position and, therefore, is not grievable or arbitrable.

B. Analysis and Conclusions

The Authority has held that a grievance and an award which pertain to whether a grievant is entitled to a noncompetitive promotion do not concern the classification of any position within the meaning of section 7121(c)(5). See, e.g., U.S. Army Missile Command and American Federation of Government Employees, Local 1858, 15 FLRA 286 (1984). The Authority finds that the grievance and award in this case pertain to whether the grievant was entitled to a noncompetitive promotion and do not directly concern the classification of his position. In that regard, and particularly in view of the Arbitrator's acknowledgement that he was without jurisdiction to consider classification matters, the Authority finds that the Arbitrator's statement in paragraph 2 of his award that "[t]he grievant's present classification is correct[,]" constitutes nothing more than a recognition of the fact that the desk audit had determined that based upon the duties assigned and performed the grievant's position was properly classififed at GS-9. The Authority concludes that the Agency has failed to establish that the award is deficient as alleged. Accordingly, this exception must be denied.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency contends that the award interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute.

B. Analysis and Conclusion

The Authority has repeatedly recognized that the plain language of section 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. E.g., American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70, 79 (1981), aff'd sub nom. AFGE Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). Therefore, the Authority has consistently held that an arbitration award may not interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under section 7106 or result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights. Id.; National Treasury Employees Union and U.S. Customs Service, 17 FLRA No. 12 (1985); U.S. Customs Service, Laredo, Texas and Chapter 145, National Treasury Employees Union, 17 FLRA No. 17 (1985). Section 7106(a)(2)(B) of the Statute, in particular, reserves to management officials the authority to assign work. In this case, to the extent that the Arbitrator restricts the assignment of duties to the grievant or directs the Agency to restore the mix of higher and lower-rated duties which the grievant had previously performed, the Arbitrator substituted his judgment for that of management as to the duties to be assigned to the grievant. Therefore, the Authority finds that to that extent the award is deficient as contrary to management's right to assign work pursuant to section 7106(a)(2)(B).

V. DECISION

Accordingly, based on the above reasons, the Arbitrator's award is modified by striking paragraphs 3 and 4 and substituting the following:

3. The Agency violated the rights of the grievant as a career employee by causing a reduction in his opportunities to demonstrate his ability to perform at the GS-11 level.

4. The Agency must comply with the letter and intent of the collective bargaining agreement, particularly Section 13, by providing him with opportunities to demonstrate his ability to perform satisfactorily at the GS-11 level.

Issued, Washington, D.C., April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
AND REGIONAL OFFICE CENTER,
SAN JUAN, PUERTO RICO

Activity

and Case No. 0-AR-1044

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION NO. 2408

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Richard H. Siegel filed by the Veterans Administration (Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant alleged that she was not selected for vacant claims examiner positions for which she applied over a three-year period because of discrimination over an alleged "whistleblowing" incident and over her activities as a union representative. The Arbitrator determined that the grievant was fully qualified for positions up to and including that of Claims Examiner GS-11. He found that the selecting officials had used highly subjective criteria and had selected persons who were no more experienced or less experienced than the grievant. The Arbitrator concluded that the Activity violated the parties' agreement by repeatedly denying her applications for the desired position, and that the Agency's actions were discriminatory and based upon non-merit reasons rather than job related selection criteria. In his award, the Arbitrator sustained the grievance in its entirety and, as a remedy, directed the Agency to immediately select the grievant for the position of GS-11 Claims Examiner in the Adjudication Division. The Arbitrator added that if there was no GS-11 Claims Examiner position vacant at the time of his award, then the grievant was to be granted priority consideration for such a position as soon as one became vacant. The Arbitrator also denied the grievant's request for retroactive promotion and backpay.

III. EXCEPTION

A. Contention

As its exception, the Agency alleges that the award is contrary to law. Specifically, the Agency contends the award violates management's right to select under section 7106(a)(2)(C) of the Statute in that the Arbitrator failed to determine that the grievant would have been selected for any of the positions for which she applied had the Activity not violated the agreement.

B. Analysis and Conclusion

The Authority has consistently held in cases of this nature that management's right to make the actual selections for promotion can only be abridged if the Arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected for promotion. E.g., Office of the Secretary, U.S. Department of Transportation and American Federation of Government Employees, Local 3313, AFL-CIO, 17 FLRA No. 14 (1985); American Federation of Government Employees, Local 12 and United States Department of Labor, 15 FLRA 543 (1984). In terms of this case, the Authority concludes that the Arbitrator failed to make the necessary finding. Although the Arbitrator found that the Activity had violated the parties' agreement by failing to select the grievant and by actions that were discriminatory in nature and based upon non-merit reasons rather than job related selection criteria, he did not find that the grievant would have been selected but for the unwarranted actions. Consequently, that portion of the Arbitrator's award directing the immediate selection of the grievant for the position of GS-11 Claims Examiner is deficient as contrary to section 7106(a)(2)(C) of the Statute.

IV. DECISION

Accordingly, based upon the above analysis and conclusions, the Arbitrator's award is modified by striking the portion found deficient.

Issued, Washington, D.C., April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF RECLAMATION, UPPER COLORADO
REGION, COLORADO RIVER STORAGE PROJECT,
POWER OPERATIONS OFFICE, U.S. DEPARTMENT
OF THE INTERIOR

Activity

and Case No. 0-AR-1055

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, LOCAL UNION 2159

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Leo Weiss filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The parties submitted to arbitration the stipulated issue of whether the Union's claim for travel and per diem expenses for union negotiators was an arbitrable matter and, if so, whether Article I, Section 1.8, paragraph 2 of the Basic Agreement is null and void or unenforceable. That provision in part provided that "[e]mployees authorized to represent the Union shall be granted official time, travel and per diem for negotiations . . . and related activities." According to the stipulated facts, the Basic Agreement was approved by the Agency contingent upon the understanding that travel and per diem payments under Article I, Section 1.8 meet certification requirements that the travel is in the primary interest of the Government and in accordance with rulings of the Comptroller General. Upon issuance of the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), and relying on Office of Personnel Management (OPM) guidance contained in Federal Personnel Manual Letter 711-162, the Agency declared the language of Article I, Section 1.8 relating to payment of travel and per diem expenses to be null and void. Following this action, the Activity denied the claims of three employees for their travel and per diem expenses in connection with negotiations. The employees filed the grievances which are the subject of this arbitration.

The Arbitrator held that the grievances were arbitrable disputes over the interpretation and application of Section 1.8 of the Agreement. On the substantive issue, the Arbitrator rejected the Activity's interpretation of the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF), and found that nothing in that decision prohibited agencies and unions from entering into an agreement to reimburse employee union negotiators for travel and per diem expenses. He also found that the guidance provided in FPM Letter 711-162 did not apply to prevent payment of travel and per diem in this case. Consequently, he ruled that Section 1.8 of the Basic Agreement was not null and void but an enforceable provision which the Activity had violated by refusing to pay the grievants for travel and per diem expenses related to attendance at negotiating meetings. He sustained the grievances and directed the Activity to make the grievants whole for any losses they may have suffered.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Agency contends that the Arbitrator erred by finding that Section 1.8 was "negotiated" into the Basic Agreement, and further argues that the contract language was not the product of bargaining but merely incorporated the existing statutory entitlement.

B. Analysis and Conclusions

The Authority finds that the Agency in this exception has in no manner shown how the Arbitrator's award, based upon his interpretation of the parties' agreement, is deficient. Instead, the exception constitutes nothing more that disagreement with the Arbitrator's interpretation of the parties' agreement and therefore does not provide any basis for finding the award deficient. *E.g.*, *The Philadelphia Regional Office, District Office Operations, Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3186*, 15 FLRA 211 (1984). Accordingly, this exception must be denied.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency contends that the Arbitrator failed to recognize that the Agency had constructively disapproved Section 1.8 as written, by making its approval contingent upon the understanding that any travel and per diem payments made pursuant to the provision must meet the certification requirements that travel is in the primary interest of the Government and in accordance with rulings of the Comptroller General. Consequently, the Agency maintains that the Arbitrator improperly resolved an issue relating to the duty to bargain.

B. Analysis and Conclusions

As to this exception, the Authority finds that contrary to the Agency's assertions, the issue decided by the Arbitrator in this case does not relate to the negotiability of a Union proposal or otherwise relate to the duty to bargain under the Statute. In this regard, the Agency's reliance on *Federal Correctional Institution, Texarcana, Texas, Federal Prison System and American Federation of Government Employees, Local 2429, Texarcana, Texas*, 19 FLRA No. 26 (1985) is misplaced. The dispute in that case specifically involved management's refusal to approve certain provisions in a supplemental agreement on the ground that they interfered with management's rights under section 7106(a) of the Statute. The Authority held that the award in that case was deficient because the arbitrator, by deciding that the agency had an obligation to bargain over the disputed provisions, had necessarily decided a negotiability dispute, and such disputes can only be resolved by the

Authority. In this case, however, the Arbitrator was asked to interpret a provision embodied in a negotiated agreement which had been approved by the agency head. The Authority therefore concludes that this exception constitutes nothing more than disagreement with the Arbitrator's interpretation and application of the parties' collective bargaining agreement and provides no basis for finding the award deficient. Id.; National Federation of Federal Employees, Local 1418 and U.S. International Communication Agency, Voice of America, 9 FLRA 980 (1982). Accordingly, this exception must be denied.

V. THIRD, FOURTH AND FIFTH EXCEPTIONS

In its third exception, the Agency alleges that the award is deficient because the Arbitrator erred in his interpretation and application of the Supreme Court's decision in BATF to the facts of this case. The Agency contends that the Arbitrator in making his award overlooked the essential requirement that before travel and per diem expenses can be approved an agency must make a determination that the travel serves the convenience of the agency or is in the primary interest of the Government. The Agency further contends that such a determination must be made on a case-by-case basis and, therefore, the provision in Section 1.8 of the agreement establishing a blanket policy of paying travel and per diem expenses is unenforceable.

Similarly, in its fourth and fifth exceptions, the Agency alleges again in essence that the Arbitrator erred in his interpretation of the BATF decision by failing to enforce the requirement that payment of travel and per diem expenses must be certified to be in the interest of the Government. The Agency maintains that Article I, Section 1.8 is unenforceable and therefore the Union's claim is not grievable or arbitrable and, further, the Arbitrator's award requires the performance of an illegal act, i.e., payment of travel and per diem without the required certification.

B. Analysis and Conclusion

In its decision in BATF, the Supreme Court held that there was no entitlement to travel and per diem expenses under section 7131(a) of the Statute, but the decision did not pertain to circumstances where, as here, an agency was found to have negotiated an agreement provision requiring it to pay such expenses. In this regard, Article 1, Section 1.8 of the parties' agreement in this case which the Arbitrator found to be binding on the Agency is essentially the same as the proposal found by the Authority to be within the duty to bargain in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The proposal in that case provided:

> The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of this agreement.

In that decision, which was rendered in light of the Supreme Court's decision in BATF, the Authority stated that the Statute is silent on whether travel expenses incurred in the conduct of labor-management relations activities are payable from Federal funds. Id. at 3.

Moreover, the Authority ruled in U.S. Customs Service, that the proposal in dispute was not inconsistent with the Travel Expense Act, 5 U.S.C. § 5701 et seq., because that Act does not prohibit an agency from exercising, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for purposes of reimbursement of related travel expenses. Id. at 6. In this case, the Arbitrator determined that the Agency agreed to pay the travel and per diem expenses related to the labor-management relations activities covered by the official time provision of the parties' agreement. The Authority finds that the Arbitrator's determination effectively constitutes, in terms U.S. Customs Service, a finding that the Agency had exercised its discretion under the Travel Expense Act through negotiations and had thereby determined that the covered activities were sufficiently within the interest of the United States so as to constitute official business. Therefore, the Agency's third, fourth and fifth exceptions also fail to establish that the award is deficient as alleged. Accordingly, these exceptions must also be denied.

Additionally, in finding the proposal in U.S. Customs Service to be within the duty to bargain, the Authority concluded that the proposal would not require the agency to authorize the payment of expenses which did not comport with regulatory requirements and restrictions. Id. at 6. The Authority based its conclusion on the union's acknowledgment that the payment of any travel expenses flowing from the proposal, if agreed upon by the parties, would be subject to the provisions of the Federal Travel Regulations (FTRs).[1] In this case, the Arbitrator in directing the payment of travel and per diem expenses in connection with the covered activities did not provide for the Agency to determine the propriety of particular travel and per diem expenses under the FTRs. Consequently, the Authority must modify the award to assure that it is consistent with the requirements of the FTRs.

VI. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, the Agency's exceptions are denied but that portion of the award directing payment of travel and per diem expenses is modified to provide as follows:[2]

---

[1] The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

> The Employer is hereby directed to make the Grievants whole for any losses they may have suffered as a result of its breach of Article 1, Section 1.6 of the Basic Agreement, insofar as consistent with applicable requirements of the Federal Travel Regulations.

Issued, Washington, D.C., April 22, 1986.

J. C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In view of this decision, the Authority finds that it is not necessary to rule on the Union's motion for leave to file a request for reconsideration of the Authority's Order of January 14, 1986, granting the Agency's request for a temporary stay of the Arbitrator's award.

? finding that the [illegible] the Travel Expense Act for [illegible] under Section [illegible] and had thereby determined that [illegible] within the [illegible] to constitute official business [illegible] fourth and fifth [illegible] award is deficient [illegible] must also [illegible]

Additionally, in view of the proposal's [illegible] Motor Service is [illegible] within the duty to bargain, the Authority concluded that the proposal [illegible] authorize the payment of expenses which did not comport with regulatory requirements and restrictions. Id. at [illegible]. The Authority based its conclusion on the Union's acknowledgement that the [illegible] expenses flowing from the proposal, if [illegible], would be subject to the provisions of the Federal Travel Regulations (FTRs). 1/ In this case, the Arbitrator [illegible] the payment of travel [illegible] in connection with the covered activities [illegible] the Agency to determine the necessity of [illegible] per diem expenses under the FTRs. Consequently, the Authority must modify the award [illegible] to the requirements of the FTRs.

VI. DECISION

Accordingly, pursuant to section 2425.[illegible] of the [illegible] of January 14, 1986, granting the Agency's request for a temporary stay of the Arbitrator's award.

1/ The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, [illegible] and U.S. Army Engineer District, Kansas City, Missouri, [illegible] FLRA [illegible], 24 ([illegible]).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 3399

Union

and

Case No. 0-AR-1041

HARRY S. TRUMAN MEMORIAL
VETERANS HOSPITAL,
COLUMBIA, MISSOURI

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert V. Penfield filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. PATENT AND
TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1083

PATENT OFFICE
PROFESSIONAL ASSOCIATION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Roger P. Kaplan filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923

Union

and

Case No. 0-AR-1096

HEALTH CARE FINANCING ADMINISTRATION,
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Millard Cass filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER,
PALO ALTO, CALIFORNIA

Activity

and

Case No. 0-AR-1098

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2110,
PALO ALTO, CALIFORNIA

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Frank B. Childs filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WARNER-ROBINS AIR LOGISTICS CENTER,
WARNER-ROBINS AIR FORCE BASE, GEORGIA

Agency

and

Case No. 0-AR-1099

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Sherman Dallas filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
LEAVENWORTH, KANSAS

Activity

and

Case No. 0-AR-1108

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 85

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Stanford C. Madden filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Activity

and

Case No. 0-AR-1095

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL,
PORTSMOUTH, VIRGINIA

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Sol M. Yarowsky filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 17, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, XVIII AIRBORNE CORPS
AND FORT BRAGG, FORT BRAGG, NORTH CAROLINA

Activity

and

Case No. 0-AR-1114

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1770, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator B. R. Skelton filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., April 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member
FEDERAL LABOR RELATIONS AUTHORITY

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Federal Labor Relations Authority

Washington, D.C. 20424

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NEGOTIABILITY CASE

21 FLRA No. 59 (April 22, 1986)

National Treasury Employees Union and Department of Health and Human Services, Case No. 0-NG-1020

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 60 (April 22, 1986)

Department of Health and Human Services, Region IV, Health Care Financing Administration and National Treasury Employees Union, Case No. 4-CA-50212

21 FLRA No. 62 (April 24, 1986)

National Weather Service, Silver Spring, Maryland and National Weather Service Employees Organization, MEBA, AFL-CIO, Case No. 7-CA-40783

21 FLRA No. 63 (April 24, 1986)

National Weather Service, Silver Spring, Maryland and National Weather Service Employees Organization (MEBA/AFL-CIO), Case No. 7-CA-40108

21 FLRA No. 64 (April 24, 1986)

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division and American Federation of Government Employees, Local 2513, AFL-CIO Case No. 2-CA-40354

ARBITRATION CASE

21 FLRA No. 61 (April 24, 1986)

Department of the Air Force, Flight Test Center, Edwards Air Force Base, California and Interdepartmental Local 3854, American Federation of Government Employees, AFL-CIO (Brewer, Arbitrator), Case No. 0-AR-887

3.F 31/21-3:

Federal Labor Relations Authority

21 FLRA No. 59

NTEU and HHS, Case No. 0-NG-1020 (Decided April 22, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(D)
2600 Conditions for Review	7117(a)(1) and (2)
2602 Proposal Inconsistent with Government-wide Regulation	
2650 Compelling Need	

SUBJECT MATTER INDEX ENTRIES

Negotiability
- Compelling Need
  - Maintenance of Merit Principles
    - Agency RIF Regulations
  - Outside Authority
    - 5 C.F.R. § 351.504(d) [OPM RIF Regulations]
- Conditions of Employment
  - Nonunit Employees
    - Outside Authority Governs All Employees
      - 5 C.F.R. § 351.504(d) [OPM RIF Regulation]
- Reductions-in-Force
  - Service Credit
    - Performance Based Additional Credit
      - 5 C.F.R. § 351.504(d) [OPM RIF Regulation]

DIGEST NOTES

A proposal is nonnegotiable that for RIF purposes would award employees four years of additional service credit for a rating of outstanding and three years for a rating of excellent. Under OPM's RIF regulation [5 C.F.R. 351.504(d), 51 Fed. Reg. 318-326 (1986)], a Government-wide regulation, employees are to be credited with twenty additional years of service for a performance rating of outstanding; sixteen additional years for a rating of exceeds fully successful; and twelve additional years of a rating of fully successful.

The agency had also alleged that the proposal conflicted with an agency regulation for which there was a compelling need to preserve the merit principle of equal treatment between present and former employees who did not receive the same service credit. In addition the agency alleged that the proposal would require it to treat nonunit employees covered by its regulation differently in a RIF than unit employees covered by the proposal. The Authority held, in light of OPM's RIF regulation, that the agency neither established the compelling need for its regulation nor that the proposal would require it to treat unit and nonunit employees differently.

Federal
Labor Relations
Authority

21 FLRA No. 60
HHS, Region IV, Health Care
Financing Admin. and NTEU
Case No. 4-CA-50212 (Decided
April 22, 1986)

DIGEST HEADINGS	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	7114(b)
4500. Refusal to Negotiate	7116(a)(1), (5) and (8)
4800. Otherwise Refuse to Comply with Statute	

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7114(b)
    Refusal to Negotiate
      Information
        Sanitized Copies of Performance Appraisals
Privacy Act

DIGEST NOTES

The Authority adopts the Judge's decision that the agency violated sections 7116(a)(1), (5) and (8) by refusing to furnish necessary information to the union as requested under section 7114(b). The Judge concluded that since the union had indicated to the agency that the information sought, the performance appraisals of all bargaining unit employees, would have allowed the union to determine whether certain employees' appraisals had been predetermined or based upon discriminatory considerations in violation of the parties' collective bargaining agreement, the union had not failed to provide the agency with sufficient reasons why the appraisals were necessary. The Judge also determined that the request for the appraisals was not burdensome and that it was not contrary to the Privacy Act because the Union clearly indicated to the Agency that it would accept the appraisals in a sanitized condition.

The Authority specifically did not adopt the Judge's dicta that "it is incumbent on the Respondent to offer some alternative means of providing the data pursuant to the request."

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

21 FLRA No. 60
HHS, Region IV, Health Care
Financing Admin. and NTEU
Case No. 4-CA-50297 [illegible]
April 22, 1986

DIGEST HEADINGS

	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	7114(b)
4500. Refusal to Negotiate	7116(a)(1), (5) and (8)
4800. Otherwise Refuse to Comply with Statute	

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7114(b)
    Refusal to Negotiate
      Information
        Sanitized Copies of Performance Appraisals
Privacy Act

DIGEST NOTES

The Authority adopts the Judge's decision that the agency violated sections 7116(a)(1), (5) and (8) by refusing to furnish necessary information to the union as requested under section 7114(b). The Judge concluded that since the union had indicated to the agency that the information sought, the performance appraisals of all bargaining unit employees, would have allowed the union to determine whether certain employees' appraisals had been predetermined or based upon discriminatory considerations in violation of the parties' collective bargaining agreement, the union had not failed to provide the agency with sufficient reasons why the appraisals were necessary. The Judge also determined that the request for the appraisals was not burdensome and that it was not contrary to the Privacy Act because the Union clearly indicated to the Agency that it would accept the appraisals in a sanitized condition.

The Authority specifically did not adopt the Judge's dicta that "it is incumbent on the Respondent to offer some alternative means of providing the data pursuant to the request."

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES

Federal Labor Relations Authority

21 FLRA No. 101

Dep't of the Air Force, Flight Test Center, Edwards Air Force Base, Cal. and Interdepartmental Local 1854, NFGE (Brewer, Arbitrator), Case No. 0-AR-987 (Decided April 21, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7106(b)(1)
1500 Review of Arbitration Awards	7114
1600 Grounds for Review	7116(a)(6) and (8)
1601 Award Conflicts with Applicable Law	7117(a)(2)
	7119
2000 NEGOTIABILITY	7122
2650 Compelling Need Determination	7122(a)(1)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Exceptions Asserted in Appeal
    - Award Conflicts with the FSLMR Statute
      - § 7106(b)(1)
      - § 7114
      - § 7117(a)(2)
  - Procedure
    - Forums
      - Review of an Interest Arbitration Award by a FSIP Member
- Telephone
  - Union's Use of Agency Telephone System
- Compelling Need
  - Limitations on Agency's Telephone System
- FSIP
  - Mediation/Arbitration
    - Where Arbitrator is a FSIP Member who Issues a Final Award

DIGEST NOTES

A final award by an individual arbitrator in interest arbitration is directly reviewable by the Authority even if the arbitration proceeding is at the direction of FSIP and the arbitrator is a FSIP Member. An impasse was reached in negotiations between the parties which was referred to the Panel under § 7119. The parties accepted the recommendation of the Panel that they submit the dispute to mediation-arbitration procedures in which the first attempt would be to resolve the matter through mediation. The Panel advised the parties that should the issue not be resolved in this manner, the mediator/arbitrator, who in this case was the Chairman of FSIP, would dispose of the matter by issuing a "final decision." Following a failure of the parties to resolve the dispute, the Chairman of FSIP issued an "Arbitrator's Opinion and Decision." The Authority held (that the decision was a final decision) that it was an interest arbitration award issued by an individual arbitrator and not a final action of the Panel under § 7119, and that the award was directly reviewable by the Authority on exceptions filed by the agency under § 7122.

As his award in an interest arbitration proceeding, the arbitrator directed that the union's proposal for a class A (AUTOVON) telephone line to be provided in the union's office at the employer's expense, be withdrawn. The arbitrator noted, however, that the union president who was located at another facility had an AUTOVON telephone line in his office and that the activity's labor relations officer used AUTOVON to communicate with him. Accordingly, the arbitrator directed that the union's chief representative be permitted to use the AUTOVON system for a reasonable amount of time for the purpose of communicating with the union's president.

In its first exception, the agency contended that the award was contrary to § 7106(b)(1) in that the award involves the technology of performing the work of the agency which is negotiable solely at the election of the agency. The Authority has previously held that a proposal, which would allow the union access to the agency's telephone system for purposes of administering the parties' agreement did not involve the technology of performing work because it did not determine whether the agency would adopt a particular technology, e.g., utilize telephones as opposed to some other communications technology.

In its second exception, the agency argued that the award violates § 7114 in that it deals entirely with matters pertaining to internal union business and does not deal with conditions of employment of bargaining unit employees. However, the award specifies that use of the AUTOVON by the union's chief representative at the activity is limited to communications concerning matters arising under the contract which affect bargaining unit employees at the activity. Therefore, the Authority concluded that the agency failed to establish that the award was contrary to § 7114.

In its third exception, the agency contended that the award is contrary to § 7117(a)(2) in that the award is inconsistent with a Department of Defense policy for which a compelling need exists. It was argued that the policy which limits the use of the AUTOVON system to primarily military operational needs, is essential to the accomplishment of the agency's mission. The Authority found that the agency did not demonstrate that the strictly limited award would interfere with the stated purposes of the agency policy.

Federal Labor Relations Authority

21 FLRA No. 62

Nat'l Weather Service, Silver Spring, Md. and Nat'l Weather Service Employees Organization MEBA, AFL-CIO Case No. 7-CA-40783 (Decided April 24, 1986)

DIGEST HEADINGS

4000. UNFAIR LABOR PRACTICE: AGENCY
    4500. Refusal to Negotiate
    4800. Otherwise Refuse to Comply with Statute

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7114(b)(4)
    Refusal to Negotiate
      Information
        Performance Appraisal Plans
  Remedy
    Posting of Remedial Notice
      Scope Limited
    Provide Performance Appraisal Plans

DIGEST NOTES

The Authority adopted the Judge's Decision that the Respondent violated sections 7116(a)(1), (5) and (8) when it failed and refused to provide the union with the requested performance appraisal plans of certain named unit employees for the purpose of bargaining over the impact and implementation of a new performance plan. The Authority found that the Respondent had agreed to bargain over the impact and implementation of the newly adopted performance rating system on the affected employees; that the request for information was made by the Union's properly designated representative, and that the information requested was necessary in order for the Union to intelligently engage in such bargaining. Thus, the Authority, in agreement with the Judge, concluded that the Respondent was obligated under section 7114(b)(4) to provide the Union with the information requested.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

matter through [illegible]. The Panel advised the parties that should the issue not be resolved in this manner, the mediator-[illegible] was the Chairman of FSIP, would d[illegible] Follow[illegible] resolve the dispute, the Chairman of [illegible] Arbitrator's Opinion and Decision. The Authority [illegible] was a final de[illegible] was an interest arbitration award issued by an individual arbitrator and not a final action of the Panel under § 7119; that the award was directly reviewable by the Authority on exceptions filed by the agency under § 7122.

As his award [illegible] interest arbitration proceedi[illegible] arbitrator directed that the union's proposal for a Class A (AUTOVON) tele[illegible] to be p[illegible] be withdrawn [illegible] however, that the union presi[illegible] facility had an AUTOVON telephone line in h[illegible] that the activity's labor relations officer used AUTOVON to communicate with him. Accordingly, the arbitrator [illegible] chief representative be permitted to use the AUTOVON system for a reasonable amount of time for the purpose of c[illegible] the union's president.

In its first exception, the agency contended that the award was contrary to § 7106(b)(1) in that the a[illegible] technology of performing the work of the agency [illegible] negotiable solely at the elect[illegible] Authority has previously held that a proposal, which would allow the [illegible] access to the agency's telephone sys[illegible] administering the parties' agreement did not in[illegible] technology of performing wo[illegible] whether the agency would adopt a particular technology, e.g., utilize telephones as opposed to some other communications tech[illegible]

In its [illegible] violated [illegible] to intern[illegible] employ[illegible] spec[illegible] repre[illegible] con[illegible] barg[illegible] Author[illegible] award [illegible]

In [illegible] contrary [illegible] Depa[illegible] It was argued that the policy which limits the use of the AUTOVON system to [illegible] the accomplishment of the agency's mission. The Authority found that the agency did not demonstrate that the strictly limited award would interfere with the stated purposes of the agency policy.

Federal
Labor Relations
Authority

21 FLRA No. 63

Nat'l Weather Service, Silver Spring, Md. and Nat'l Weather Service Employees Organization (MEBA). Case No. 7-CA-40106
(Decided April 24, 1986)

DIGEST HEADINGS

4000. UNFAIR LABOR PRACTICE: AGENCY
  4500. Refusal to Negotiate

STATUTE

7114(b)(4)
7116(a)(1), and (5)
7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal Negotiate
      Performance Evaluation Forms
Performance Appraisal System
  Evaluation Forms

DIGEST NOTES

The Authority found, contrary to the Judge, that agency did not violate section 7116(a)(1) or (5) when some supervisors began using a new instructor evaluation sheet (IES) to evaluate employees' without first notifying the union and affording it an opportunity to bargain over the impact and implementation. Although the IES form had a different format and was more specific than another form currently used as a checklist for recording evaluations, the same concepts of classroom presentation and delivery techniques were measured. Moreover, the agency continued its policy of permitting individual supervisors to use any form to record their observations of instructor's in-class performance. In fact, the IES was developed by a supervisor for his use and other supervisors decided to use the new form without its use being required by the agency. In developing the IES form, the existing form was used as a guide, and the IES conformed exactly to the rating elements set forth in "Sample Guidelines." The Authority, therefore, concluded that the General Counsel failed to sustain the burden of proving that there was any change in unit employees' conditions of employment caused by the distribution and use of the IES.

Federal
Labor Relations
Authority

21 FLRA No. 63

Nat'l Weather Service, Silver
Spring, Md. and Nat'l Weather
Service Employees Organization
(MEBA) Case No. 7-CA-40108
(Decided April 24, 1986)

DIGEST HEADINGS	STATUTE
4000. UNFAIR LABOR PRACTICE: AGENCY	7114(b)(4)
4500. Refusal to Negotiate	7116(a)(1), and (5)
	7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal Negotiate
      Performance Evaluation Forms
Performance Appraisal System
  Evaluation Forms

DIGEST NOTES

The Authority found, contrary to the Judge, that agency did not violate section 7116(a)(1) or (5) when some supervisors began using a new instructor evaluation sheet (IES) to evaluate employees' without first notifying the union and affording it an opportunity to bargain over the impact and implementation. Although the IES form had a different format and was more specific than another form currently used as a checklist for recording evaluations, the same concepts of classroom presentation and delivery techniques were measured. Moreover, the agency continued its policy of permitting individual supervisors to use any form to record their observations of instructor's in-class performance. In fact, the IES was developed by a supervisor for his use and other supervisors decided to use the new form without its use being required by the agency. In developing the IES form, the existing form was used as a guide, and the IES conformed exactly to the rating elements set forth in "Sample Guidelines." The Authority, therefore, concluded that the General Counsel failed to sustain the burden of proving that there was any change in unit employees' conditions of employment caused by the distribution and use of the IES.

21 FLRA No. 64

Federal Labor Relations Authority

Dep't of Labor, Employment Standards Administration, Wage and Hour Division and AFGE, Local 2513, Case No. 2-CA-40354 (Decided April 24, 1986)

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DIGEST HEADINGS

4000 UNFAIR LABOR PRACTICE: AGENCY
  4500 Refusal to Negotiate

STATUTE

7116(a)(1) and (5)
7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practices
  Conditions of Employment, Change In
    Interstation Transfer of Employees
  Refusal to Negotiate
    Procedures and Appropriate Arrangements
      Interstation Transfer of Employees
  Remedy
    Bargaining Order
  Waiver of Rights
    Dropping a Bargaining Proposal Not a Waiver
    Statutory vs. Contractual Rights

DIGEST NOTES

The union did not waive its right under the Statute to negotiate procedures and appropriate arrangements when the union dropped its contractual proposal that the agency bargain about the impact and implementation of interstation transfers of employees. Although the union agreed that two weeks notice would be sufficient notice of such transfers, nothing in the record established or implied that the union was in any way giving up its statutory rights. In the absence of such a waiver, the agency violated §§ 7116(a)(1) and (5) by refusing to negotiate with the union concerning procedures and appropriate arrangements for employees adversely affected by an interstation transfer that it implemented.

[This page has been purposely left blank to coordinate the pagination of those decisions (that have page numbers at the bottom of each page) with the pagination of the same decisions when later published by the Authority in a bound volume.]

21 FLRA No. 64

Dep't of Labor, Employment Standards Administration, Wage and Hour Division and AFGE, Local 2513, Case No. 2-CA-40354 (Decided April 24, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (5)
4500 Refusal to Negotiate	7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Conditions of Employment, Change In
    - Interstation Transfer of Employees
  - Refusal to Negotiate
    - Procedures and Appropriate Arrangements
      - Interstation Transfer of Employees
- Remedy
  - Bargaining Order
- Waiver of Rights
  - Dropping a Bargaining Proposal Not a Waiver
  - Statutory vs. Contractual Rights

DIGEST NOTES

The union did not waive its right under the Statute to negotiate procedures and appropriate arrangements when the union dropped its contractual proposal that the agency bargain about the impact and implementation of interstation transfers of employees. Although the union agreed that two weeks notice would be sufficient notice of such transfers, nothing in the record established or implied that the union was in any way giving up its statutory rights. In the absence of such a waiver, the agency violated §§ 7116(a)(1) and (5) by refusing to negotiate with the union concerning procedures and appropriate arrangements for employees adversely affected by an interstation transfer that it implemented.

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[This page has been purposely left blank to coordinate the pagination of those decisions (that have page numbers at the bottom of each page) with the pagination of the same decisions when later published by the Authority in a bound volume.]

21 FLRA No. 59

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. 0-NG-1020

DEPARTMENT OF HEALTH AND HUMAN
SERVICES

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the underscored portion of the following Union proposal:

> Any employee appraised as outstanding in his/her current appraisal will receive four (4) years creditable service for RIF purposes. Employees with an excellent rating will receive an additional three (3) years of service for RIF purposes.

II. Positions of the Parties

The Agency contends that the proposal conflicts with an internal regulation which provides that employees having performance ratings below outstanding are not entitled to additional service credit in a reduction-in-force. It claims that a compelling need exists for this regulation under the illustrative standard set forth at section 2424.11(b) of the Authority's Rules. It argues that the proposal is, therefore, outside the duty to bargain under section 7117(a)(2) of the Statute. The Agency also argues that the proposal is outside the duty to bargain because it would determine the conditions of employment of nonunit employees.

The Union contends that the Agency has not demonstrated a compelling need for its regulation, and that the proposal merely involves the right of the exclusive representative to negotiate conditions of employment for employees in the unit.

III. Analysis and Conclusions

A. OPM Regulations

The Authority finds that the proposal is nonnegotiable for a reason other than those raised by the Agency. The Office of Personnel Management (OPM) has issued new regulations concerning reductions-in-force (the RIF regulations) at 5 CFR Part 351. These regulations became effective February 3, 1986 and are published at 51 Fed. Reg. 318-326 (1986). The Authority has found that the OPM regulations concerning reductions-in-force are Government-wide rules or regulations within the meaning of section 7117(a)(1) of the Statute. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 18 FLRA No. 18 (1985). Although that case applied the previous OPM regulations, the revised RIF regulations similarly apply generally to civilian employees of the Federal government and are likewise Government-wide rules or regulations.

Section 351.504(d) of the RIF regulations provides that employees shall receive additional service credit for performance in the event of a RIF. That section states that employees are to be credited with twenty additional years of service for a performance rating of outstanding; sixteen additional years for a rating of exceeds fully successful; and twelve additional years for a rating of fully successful. The Union's proposal provides that employees shall receive four years of additional service credit for a rating of outstanding and three years for a rating of excellent. The proposal is inconsistent with section 351.504(d) and is, therefore, outside the duty to bargain under section 7117(a)(1) of the Statute.

B. Compelling Need

The Union's proposal conflicts with the Agency's regulation because the proposal would give employees with performance ratings below outstanding additional service credit in the event of a RIF. However, an agency regulation does not bar negotiation on a conflicting union proposal unless the agency demonstrates that its regulation is supported by a compelling need. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 3 FLRA 450, 454 (1980).

The Agency contends that a compelling need exists for its regulation because "[e]quity and the maintenance of merit principles require that Department employees be treated the same in determining retention and assignment rights in reduction-in-force." Agency Statement of Position at 3. It argues that employees with ratings below outstanding would receive additional service credit under the Union proposal that employees with similar ratings did not receive in earlier RIFs. However, section 351.504(d) of the revised RIF regulations also requires the Agency to provide additional service credit to employees in addition to those with outstanding ratings. Consequently, the Authority finds that the Agency has not shown a compelling need for its regulation.

C. Effect on Nonunit Employees

The Agency contends that the Union's proposal would require it to treat nonunit employees covered by its regulation differently in a RIF than unit employees covered by the proposal. It argues that this disparate treatment would prejudice the nonunit employees. However, as stated above, the revised RIF regulations would require the Agency to amend its current regulation to provide additional service credit to employees having a rating of fully successful and above. Consequently, the Authority cannot conclude on the basis of the Agency's current regulation that the Union's proposal would require it to treat unit and nonunit employees differently.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C. April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 60]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, REGION IV, HEALTH
CARE FINANCING ADMINISTRATION

Respondent

and

Case No. 4-CA-50212

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision, and the Charging Party filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings,*/ conclusions, and recommended Order.

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*/ However, in so concluding, the Authority specifically does not adopt the Judge's dicta that "it is incumbent on the Respondent to offer some alternative [means of providing the data pursuant] to the request."

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Region IV, Health Care Financing Administration shall:

1. Cease and desist from:

(a) Refusing to provide the National Treasury Employees Union, the employees' exclusive representative, with sanitized copies of each bargaining unit employee's performance evaluation for the evaluation period ending December 31, 1983, which are necessary for the National Treasury Employees Union to determine whether to process a grievance over alleged violations of the parties' collective bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, provide the National Treasury Employees Union, the employees' exclusive representative, with sanitized copies of each bargaining unit employee's performance evaluation for the evaluation period ending December 31, 1983, which are necessary for the National Treasury Employees Union to determine whether to process a grievance over alleged violations of the parties' collective bargaining agreement.

(b) Post at all facilities within Region IV, Health Care Financing Administration, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Regional Administrator for Region IV, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D. C. April 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to provide the National Treasury Employees Union, our employees' exclusive representative, with sanitized copies of each bargaining unit employee's performance evaluation for the evaluation period ending December 31, 1983, which are necessary for the National Treasury Employees Union to determine whether to process a grievance over alleged violations of the parties' collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, provide the National Treasury Employees Union, our employees' exclusive representative, with sanitized copies of each bargaining unit employee's performance evaluation for the evaluation period ending December 31, 1983, which are necessary for the National Treasury Employees Union to determine whether to process a grievance over alleged violations of the parties' collective bargaining agreement.

____
(Activity)

Dated: ________________ By: ____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, N.W., Suite 501 - North Wing, Atlanta, Georgia 30309, and whose telephone number is: (404) 347-2324.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES, REGION IV, HEALTH CARE FINANCING ADMINISTRATION

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Case No. 4-CA-50212

. . . .

Regina N. Kane, Esquire
For the General Counsel

Peter A. O'Donnell, Esquire
Mr. William Spates
For the Respondent

Keith Poole, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 *et seq.* and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on January 7, 1985, by the National Treasury Employees Union (hereinafter called the NTEU or Union), a Complaint and Notice of Hearing was issued on March 25, 1985, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that Department of Health and Human Services, Region IV, Health Care Financing Administration (hereinafter called the Respondent), violated Sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in refusing to furnish the Union with copies of the employees performance evaluations for the period ending December 31, 1983.

A hearing was held in the captioned matter on May 8, 1985, in Atlanta, Georgia. All parties were afforded the full opportunity to be heard, to examine and cross-examine witness, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs which have been duly considered.

Upon the basis of the entire record, including my observation of the witness and his demeanor, I make the following findings of fact,[1] conclusions, and recommendations.

Findings of Fact

The Union is the exclusive representative of a unit of Respondent's employees working in Atlanta, Georgia. As of September 1984, Respondent employed approximately 125 bargaining unit employees in its three divisions, namely, Division of Program Operations, Division of Financial Operations and Division of Health Standards and Quality Control. The Regional Administrator for Region IV was Mr. George Holland. Mr. Richard Morris was the Associate Regional Administrator for the Division of Program Operations, Mr. James Pirkle was the Associate Regional Administrator for the Division of Financial Operations and Mr. Clarence Boone was Associate Regional Administrator for the Division of Health Standards and Quality Control.

On February 10, 1984, Chief Steward Richard Edwards directed a letter to Mr. George Holland, with copies to the Associate Regional Administrators, wherein he requested, pursuant to Section 7114(b) of the Statute, that the appropriate official fill out an attached form with data to be obtained from the employees' current performance appraisals. The letter went on to state that the data would be used to determine whether the appraisals "were done as provided by Article 12 of the negotiated contract, and the laws, rules and regulations that govern performance appraisals of government employees."

By memorandum dated February 24, 1984, Mr. Holland replied to the Union's February 10, 1984 request for information as follows:

> Your request amounts to a complete statistical listing of all appraisals given HCFA employees in January 1984. They fail to provide any information by which the Agency could make a determination whether the requests are relevant or material to a specific grievance or the administration of the agreement. Therefore, your requests are denied.

---

[1] The facts are not in dispute. The record consists of seven exhibits and the unrefuted testimony of Mr. Richard A. Edwards the Chief Steward for the Union and a unit employee.

> We are, however, attaching a copy of our EPMS Data Form, showing results of appraisals for employees, by grade band.

According to Mr. Edwards, the EPMS Summary Data Form was not responsive to the Union's February 10, 1984 request.

On September 11, 1984, Mr. Edwards directed another letter to Mr. Boone which reads in pertinent part as follows:

> On February 10, 1984, we requested HCFA furnish data on a form designed by NTEU, Chapter 210. HCFA, in a letter dated February 24, 1984, denied our request. We subsequently filed an Unfair Labor Practice charge (ULP) with the Federal Labor Relations Authority (FLRA).
>
> The FLRA recently ruled that HCFA was not obligated per the CSRA of 1978 to furnish the information in the request since HCFA does not keep that information in the type form requested. The FLRA also said that that type of information should be provided to the union.
>
> Based on the FLRA ruling, we are requesting HCFA supply us with the copy of every employee's performance evaluation for the period ending December 31, 1983.
>
> I also request this information in order to carry out my duties and responsibilities identified in 5 U.S.C. Chapter 71 and in order to investigate a grievance.
>
> P.S. If HCFA desires, I hereby agree that employee names may be sanitized.

The Union did not receive a written response to its request.

According to Chief Steward Edwards the Union requested the appraisals due to complaints from approximately eight employees that their respective appraisals appeared to be contrary to Articles 12 and 42[2] of the collective bargaining agreement which guaranteed that appraisals would not be subjective, predetermined on the basis of a bell curve, or based upon

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[2] Article 42

SECTION 6. (A) The Employer will continue to promote and achieve equal opportunity in employment and personnel practices, without

(continued)

2/ (continued)

regard to race, color, religion, sex, age, marital status, or political affiliation. The Employer will promote full realization of equal employment opportunity for qualified handicapped persons.

(B) An employee who alleges discrimination may seek relief in accordance with the provisions of the negotiated grievance procedure contained in ARTICLE 60, GRIEVANCE PROCEDURE, or the statutory appeals procedure, but not both. However, the employee retains the right to appeal the final decision to the Merit Systems Protection Board, EEOC or U.S. Court of Appeals, as appropriate.

Article 12, Section (G)

(2) Performance standards will be specified in as objective, explicit and measurable terms as possible so that all parties officially concerned can reasonably agree that the performance expectation has or has not been satisfied.

Article 12, Section 2(G)

(3) Performance standards will be written to ensure accurate appraisals of performance.

(a) Objective means something which is observable or verifiable. Undefined concepts of quantity, quality, or timeliness would not meet this standard.

(b) They will ensure the accurate evaluation of job performance to the maximum extent feasible. They will be clearly worded so as to minimize potential for error or mistake to the maximum extent feasible in applying and interpreting them.

(c) To the maximum extent feasible and in accordance with the uniqueness of the position, performance expectations will be stated distinguishably and non-overlapping. They will recognize significant differences in the working conditions of employees who occupy the same position.

(continued)

discriminatory considerations. Mr. Edwards further testified that his appraisal had been based on predetermined considerations. He further testified that appraisals were generally about 12 pages in length.

According to Mr. Edwards, because the complaining employees worked in all three divisions of the Respondent and since there were approximately 15 different employee classifications in such divisions with differing performance standards, it was necessary to view all the appraisals in order to determine if there had been any contract violations.

Following the first request for information in February 1984, Mr. Edwards met with Mr. Peter O'Donnell, Regional Labor Relations Officer, on several occasions and informed him that the Union wanted the data in order to determine whether there had been any pre-determination of grades or any EEO violations.

Subsequent to the September 1984 request Mr. Edwards met with Mr. O'Donnell three or four times in September and October. Mr. Edwards again explained the reasons for the requested data and Mr. O'Donnell expressed concern about his having to pull 1600 to 1700 files in order to retrieve the requested information. Mr. Edwards informed Mr. O'Donnell that this would not be a problem since each of the three divisions retained separate copies of its employees' performance appraisals.

According to Mr. Edwards uncontroverted testimony the Respondent maintains the performance appraisals of the unit employees in the regular course of business at four separate locations within 101 Marietta Tower, Atlanta, Georgia. Mr. Edwards further testified that each Associate Regional Administrator had from two to four clericals and the Regional Personnel Officer, Mr. Robertson, had approximately 25 clericals. Additionally, copying machines were located in the Regional Personnel Office and the three divisional offices.

2/ (continued)

Article 12, Section 2(C)

(3)(C) To the maximum extent feasible appraisals of performance will be fair and accurate and relate to specific, written performance requirements. Employees will be measured against the established performance expectations based on observable performance.

Article 12, Section 5(L)

(4) There will be no pre-established bell curves or fixed distributions of ratings.

Finally, Mr. Edwards testified that asking individual employees to present copies of their respective appraisals would not be an effective means of acquiring the requested data since Respondent prohibits employees from discussing, showing or comparing their evaluations.

Discussion and Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1), (5) and (8) of the Act by refusing to make the performance appraisals available to the Union. In support of this position he points out that the requested material meets all the criteria set forth in Section 7114(b), namely, normally maintained by Respondent in the regular course of business, necessary for the Union to perform its representational responsibilities and does not constitute guidance, advice, etc.

Respondent, in substance, takes the position that it was not required to supply the requested information under Section 7114(b) since the request failed to spell out how it was necessary for the performance of the Union's representational responsibilities, violated the privacy rights of the employees and was burdensome.

With respect to Respondent's defenses predicated on privacy considerations and the burdensome nature of the request, I find such defenses to be without merit. While it is true that the Authority in a number of recent cases[3] has asserted that the Union's need for the information must be balanced against the "intrusion on the individual's privacy interests," in the instant case the Union made it clear that it would take the requested information in a sanitized state. In such circumstances there would be no need to balance the Union's need for information against the individual employees right to privacy.

With respect to Respondent's defense based on the "burdensome nature" of the request, the only evidence in the record bearing thereon is Mr. Edwards' testimony that his appraisal numbers approximately 12 pages and is typical of the size of the appraisals of the approximately 125 unit employees. Given the amount of clerical employees and their access to sophisticated copying machines I cannot find that the record supports the conclusion that the duplication of some 1500 pages is necessarily burdensome. Moreover, to the extent that a contrary conclusion be reached, it is incumbent on the Respondent to offer some alternative to the request. While the Respondent alleges in its statement of position that it did offer an alternative, namely union access to the appraisals, no sworn testimony to that effect appears in the record.

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[3] Army and Air Force Exchange Service (AAFES) Fort Carson, Colorado, and American Federation of Government Employees, AFL-CIO, Local 1345, 17 FLRA No. 92.

Turning now to the Respondent's third defense, i.e. that the Union's request did not demonstrate that the information was necessary in order to carry out its representational responsibility. While it is true that the Union's written request of September 18, 1984, did not set forth the exact reasons for the request and why the information was necessary, the ensuing conversation between Mr. O'Donnell and Mr. Edwards certainly cured any deficiency in the written request and put the Respondent on notice as to the concerns of the Union and the reasons for the request.

Thus as the Union pointed out it had received a number of complaints from its unit members that their appraisals had been predetermined or based upon discriminatory considerations in violation of the collective bargaining agreement. It was further pointed out that the only way for the Union to determine whether such allegations were true was to analyze the appraisals. Given the number of employee classification it would be impossible to determine same on the basis of a random sampling. Accordingly, I find that the appraisals of all unit employees were necessary for the Union to perform its representational responsibilities and determine whether or not the Respondent was abiding by the collective bargaining agreement. Having failed and refused to provide the Union with sanitized copies of the appraisals, I further find that the Respondent by refusing to abide by Section 7114(b) of the Statute has violated Sections 7116(a)(1), (5) and (8) of the Statute.

Having found that the Respondent has violated the Statute I hereby recommend that Authority issue the following order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Region IV, Health Care and Financing Administration shall:

1. Cease and desist from:

    (a) Failing and refusing to furnish to the National Treasury Employees Union, the employees' exclusive representative, a sanitized copy of every unit employee's performance evaluation for the period ending December 31, 1983.

    (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to affectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the National Treasury Employees Union, the exclusive representative of its employees, a sanitized copy of every unit employee's performance evaluation for the period ending December 31, 1983.

(b) Post at all facilities within Region IV copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by Regional Administrator for Region IV and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region IV, Federal Labor Relations Authority, in writing within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Burton S. Sternburg
BURTON S. STERNBURG
Administrative Law Judge

Dated: July 26, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the National Treasury Employees Union, the employees' exclusive representative, sanitized copies of every unit employee's performance evaluation for the period ending December 31, 1983.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the National Treasury Employees Union a sanitized copy of every unit employee's performance evaluation for the period ending December 31, 1983.

____
(Agency or Activity)

Dated: ________________ By: ________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, N.W., Suite 501 - North Wing, Atlanta, Georgia 30309, and whose telephone number is: (404) 881-2324.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE,
FLIGHT TEST CENTER,
EDWARDS AIR FORCE BASE,
CALIFORNIA

Activity

and

Case No. 0-AR-887

INTERDEPARTMENTAL LOCAL 3854,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the interest arbitration award of Arbitrator and Chairman of the Federal Service Impasses Panel Roy M. Brewer filed by the Department of the Air Force (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute[1] and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition to the Agency's exceptions. The Federal Service Impasses Panel filed a submission on a jurisdictional issue raised by the Union in the case and the Agency filed a response to the Panel's submission.

---

[1] Section 7122 of the Statute provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7122(f) of this title). If upon review the Authority finds that the award is deficient--
>
> (1) because it is contrary to any law, rule or regulation; or

(Continued)

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before Mr. Brewer involved an impasse in negotiations between the parties concerning a Union proposal that a "class A (AUTOVON) telephone line be provided in the union office at the employer's expense (installation and monthly charge)." The impasse was referred to the Federal Service Impasses Panel under section 7119 of the Statute.[2] The parties subsequently accepted the recommendation

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(Continued)

> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations; the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

[2] Section 7119 of the Statute provides, in pertinent part:

> **§ 7119. Negotiation impasses; Federal Service Impasses Panel**
>
> . . . .
>
> (b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse--
>
> (1) either party may request the Federal Service Impasses Panel to consider the matter; or
>
> (2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.
>
> . . . .
>
> (c)(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--

(Continued)

of the Panel that they submit the dispute to Mr. Brewer for "med-arb" (mediation-arbitration) procedures, under which procedures he would first attempt to resolve the matter through mediation. The Panel advised the parties: "Should the issue concerning the Union's use of a telephone not be resolved in this manner, he [Mr. Brewer] will dispose of it by issuing a final decision." The dispute persisted after mediation and Mr. Brewer proceeded through arbitration to decide the matter. In an "Arbitrator's Opinion and Decision," Mr. Brewer found that he was not persuaded that an AUTOVON (an acronym for the Department of Defense's "Automatic Voice Network") phone line should be installed in the Union's office as proposed. However, the Arbitrator also found that the Union's president, who was located at another Air Force base in California, had an AUTOVON phone in his office and that

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(Continued)

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

the Activity's labor relations officer used AUTOVON to communicate with him. The Arbitrator concluded that the Union's chief representative at the Activity should have access to the system for reasonable periods of time for the same limited purpose, i.e., to discuss issues arising under the parties' collective bargaining agreement affecting bargaining unit employees at the Activity which must be decided by the Union president. Therefore, as his award, the Arbitrator directed that the Union's proposal be withdrawn and that the parties adopt wording in their agreement to the effect the Union's chief representative at the Activity be permitted to use the AUTOVON system for a reasonable amount of time for the purpose of communicating with the Union's president about matters arising under the parties' agreement which affect Activity employees represented by the Union. Mr. Brewer issued his decision as "Arbitrator and Chairman, Federal Service Impasses Panel."

The Agency then filed its exceptions and a request for a stay of the Arbitrator's decision with the Authority. In its opposition, the Union raises a threshold issue concerning the jurisdiction of the Authority in this matter. As indicated above, the Federal Service Impasses Panel filed a submission on that issue and the Agency filed a response to the Panel's submission.

III. JURISDICTIONAL ISSUE

A. Positions Presented

1. Union Position. The Union's position is that the Arbitrator's decision is an action of the Panel under section 7119 and, therefore, not reviewable by the Authority on exceptions filed under section 7122 of the Statute. The Union further maintains that such actions are reviewable only through unfair labor practice procedures on an alleged violation of section 7116 of the Statute[3] for non-compliance with the Panel action.

---

[3] Section 7116(a)(6) and (8) of the Statute provide:

> (a) . . . it shall be an unfair labor practice for an agency--
>
> (6) to fail or refuse to cooperate in impasse decisions as required by this chapter;

(Continued)

2. FSIP Position. The Panel's position is that the Arbitrator's decision is not a final action of the Panel. In the Panel's view, since the Air Force rejected the Arbitrator's decision, the impasse remains unresolved and the next appropriate step is for the Panel to take whatever action is necessary to end the impasse. The Panel contends that any review of Mr. Brewer's decision can be achieved only through unfair labor practice procedures after the Panel takes such final action. The Panel further expresses its opinion that Congress did not intend the arbitration award review procedures of section 7122 of the Statute to encompass decisions issued by Panel members or Panel staff employees pursuant to recommendations or directions of the Panel. The Panel concludes that filing exceptions to Mr. Brewer's decision is inappropriate and the Authority should decline jurisdiction over the matter.

3. Air Force Position. The Agency's position is that exceptions to awards which result from Panel-directed interest arbitration proceedings may properly be filed with the Authority under section 7122 of the Statute. The Agency contends that Panel Members who conduct such proceedings are not acting as Members of the Panel but, rather, as interest arbitrators the same as interest arbitrators who have been mutually selected by the parties and whose awards are subject to appeal under section 7122 of the Statute.

B. Analysis and Conclusions

Upon careful consideration of the positions presented, the relevant provisions of the Statute and related legislative history, the Authority concludes that it has jurisdiction to review the Arbitrator's Opinion and Decision under section 7122 of the Statute. In reaching this conclusion, the Authority determines as follows:

(Continued)

. . . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7116(b)(6) and (8) cover unfair labor practices of the same type by unions.

First, the Arbitrator's Opinion and Decision excepted to by the Agency in this case was final and not an intermediate or interlocutory ruling. In that regard, the Panel expressly advised the parties, in acknowledging their acceptance of the Panel's "med-arb" recommendation, that if Mr. Brewer's mediation efforts failed to resolve the impasse, "he will dispose of it by issuing a *final* decision." [Emphasis added.] There is no mention in the Panel's letter or in Mr. Brewer's decision that his decision was subject to further review or any action by the full Panel. Thus, it is clear that the Arbitrator's decision was a final disposition of the matter.

Second, the Authority finds that the Arbitrator's Opinion and Decision is an interest arbitration award by an individual arbitrator and not a final action of the Panel under section 7119 of the Statute. In that regard, there is no showing in the record before the Authority that the Panel as a body or institution decided the merits of the impasse nor does the decision itself expressly purport to be a Decision and Order or other final action of the Panel.

Third, and finally, the Authority finds that the Arbitrator's Opinion and Decision is directly reviewable by the Authority on the exceptions filed by the Agency under section 7122 of the Statute. As set forth in footnote 1 above, section 7122(a) of the Statute provides that "[e]ither party to arbitration under this chapter may file with the Authority an exception to *any* arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title)." [Emphasis added.] The legislative history of this provision reflects that Congress clearly intended that the Authority's review procedures set forth in section 7122 apply to interest arbitration awards resulting from impasse proceedings before the Panel under section 7119(b) of the Statute. The House Committee on Post Office and Civil Service, in reporting on the language that ultimately was enacted into law as section 7122 of the Statute, reported as follows:

> Section 7122 sets forth the procedures under which a party may obtain review by the Authority of an arbitrator's award. The procedures apply in the case of . . . an award in an arbitration resulting from an impasse proceeding under section 7119(b) . . . .

H. Rep. No. 95-1403, 95th Cong., 2d Sess. 54-55 (1978), *reprinted* in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 702 (1979).

The Authority has recognized the intent of Congress concerning interest arbitration awards resulting from Panel proceedings in a number of decisions. It is now well established that in impasses where the Panel grants the request of the parties for permission to refer their dispute to arbitration, any resulting interest arbitration award is reviewable by the Authority on exceptions filed under section 7122(a) of the Statute. *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and Council 214, American Federation of Government Employees, AFL-CIO*, 15 FLRA 151, 153-54 (1984); *Patent and Trademark Office and Patent Office Professional Association*, 15 FLRA 990 (1984). Additionally, it is now clear that in impasses where the Panel directs the parties to submit their dispute to mediation-arbitration, any resulting interest arbitration award by an arbitrator who is not also a Panel member is reviewable by the Authority on exceptions filed under section 7122(a) of the Statute. *Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council of Locals, No. 214*, 18 FLRA No. 81 (1985), request for clarification denied March 11, 1986; *Department of Housing and Urban Development and American Federation of Government Employees, Local 476, AFL-CIO*, 18 FLRA No. 95 (1985).

Neither the Statute nor the legislative history distinguishes between interest arbitration awards of individual Panel members and awards of other interest arbitrators. Nor do they provide any basis for excluding interest arbitration awards of individual Panel members from direct review by the Authority under section 7122(a) of the Statute.

Accordingly, the Authority concludes from the plain language of section 7122(a) of the Statute and the intent of Congress as expressed in the related legislative history that a party to an interest arbitration proceeding directed by the Panel may file exceptions to any final award of the arbitrator with the Authority, including an award of a Member of the Panel serving as the arbitrator. The Authority therefore confirms its jurisdiction to review the Arbitrator's Opinion and Decision excepted to by the Agency in this case and will proceed to resolve the exceptions on the merits.

IV. FIRST EXCEPTION

A. Contention

In its first exception, the Agency contends that the Arbitrator's award is contrary to section 7106(b)(1) of the Statute in that the provision ordered by the Arbitrator to be adopted by the parties involves the technology of performing the work of the Agency which is negotiable solely at the election of the Agency.

B. Analysis and Conclusions

In American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 610 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982), the Authority held that a proposal, which would allow the Union access to the Air Force telephone system for purposes of administering the parties' agreement did not involve the technology of performing the work of the agency because it did not determine whether the agency would adopt a particular technology of work, e.g., utilize telephones as opposed to some other communications technology. The Authority found that the proposal merely provided the union access to the system which the agency had selected and was in existence for use in connection with contract administration and other labor-management relations matters. The Authority therefore concluded that the provision did not concern a matter negotiable solely at the election of the agency. Accordingly, for the reasons set forth in Wright-Patterson, the Authority finds that the provision awarded by the Arbitrator in this case, which is materially the same as the pertinent proposal in Wright-Patterson, does not involve the technology of performing the work of the Agency and does not concern a matter negotiable solely at the election of the Agency. The Authority therefore concludes that the Agency has failed to establish that the award is contrary to section 7106(b) of the Statute as alleged.

V. SECOND EXCEPTION

A. Contention

In its second exception, the Agency argues that the award violates section 7114 of the Statute in that it deals entirely with matters pertaining to internal union business and does not deal with conditions of employment of bargaining unit employees.

B. Analysis and Conclusions

The Authority finds that the provision awarded clearly pertains to labor-management relations issues affecting bargaining unit employees arising under the parties' agreement and not to internal union business. Moreover, in American Federation of Government Employees, AFL-CIO, Local 3748 and Department of Agriculture, Science and Education Administration, Personnel Division, Hyattsville, Maryland, 11 FLRA 122 (1983), the Authority held that a proposal which would have permitted union use of the Federal Telecommunications System for labor-management relations purposes concerned a matter directly related to conditions of employment of bargaining unit employees and was within the duty to bargain under the Statute. In this case, the award specifies that use of the AUTOVON by the Union's chief representative at the Activity is limited to communications concerning matters arising under the contract which affect bargaining unit employees at the Activity. Thus, for the reasons set forth in Department of Agriculture, Science and Education Administration, the provision awarded by the Arbitrator in this case, which is materially the same as the proposal involved in the cited case, concerns a matter directly related to conditions of employment of bargaining unit employees. The Authority therefore concludes that the Agency has failed to establish that the award is contrary to section 7114 of the Statute as alleged.

VI. THIRD EXCEPTION

A. Contention

In its third exception, the Agency contends that the award is contrary to section 7117(a)(2) of the Statute. In support of its contention, the Agency argues that the provision imposed by the Arbitrator is inconsistent with a Department of Defense policy for which a compelling need exists. The Agency argues that the policy, which limits access to the AUTOVON system to military operational needs with certain exceptions, is essential to the accomplishment of the mission of the Agency and to the execution of Agency functions.

B. Analysis and Conclusions

The Authority finds that the Agency has not demonstrated that the strictly limited provision awarded by the Arbitrator would interfere with any of the stated purposes of the policy, particularly in view of the Arbitrator's finding that the Union's president had access to the AUTOVON system for labor-management relations purposes and that the system was otherwise used for such purposes. Therefore, without deciding whether the agency policy is a "rule, or regulation" within the meaning of section 7122(a)(1) of the Statute, the Authority concludes that the Agency has failed to establish that the award is contrary to section 7117(a)(2) of the Statute as alleged.

VII. DECISION

Accordingly, for the above reasons, the Agency's exceptions are denied. The Agency's request for a stay of the award is likewise denied.

Issued, Washington, D.C. April 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 62

[21 FLRA No. 62]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE
SILVER SPRING, MARYLAND

Respondent

and

Case No. 7-CA-40783

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision, and the General Counsel filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision and the entire record the Authority hereby adopts the Judge's findings,[1] conclusions, and recommended Order as modified herein.

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[1] The Respondent excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

The Authority agrees with the Judge that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to provide the Union with the requested performance appraisal plans of certain named unit employees, for the purpose of impact and implementation bargaining at its National Service Training Center, Kansas City, Missouri (the Center). Thus, we agree with the Judge that the Respondent had agreed to bargain as to the impact and implementation of the newly adopted performance rating system on employees at the Center; that the request for information was made by the Union's properly designated representative; and that the information requested was necessary in order for the Union to intelligently engage in such bargaining at the Center.

With regard to the posting of the remedial unfair labor practice notice, the Authority finds that a posting limited to the Respondent's Kansas City, Missouri facility, where the employees involved are located, will best effectuate the purposes and policies of the Statute, and we shall modify the Judge's recommended order accordingly.[2]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the National Weather Service, Silver Spring, Maryland shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Weather Service Employees Organization, MEBA, AFL-CIO, the employees' exclusive bargaining representative, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented on April 1, 1984.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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[2] See, e.g., United States Department of Transportation, Federal Aviation Administration, 18 FLRA No. 8 (1985).

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the National Weather Service Employees Organization, MEBA, AFL-CIO, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented on April 1, 1984.

(b) Post at its facilities at Kansas City, Missouri, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the National Weather Service Employees Organization, MEBA, AFL-CIO, the employees' exclusive bargaining representative, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented on April 1, 1984.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the National Weather Service Employees Organization, MEBA, AFL-CIO, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented on April 1, 1984.

____
(Activity)

Dated:____________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

[21 FLRA No. 62]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

NATIONAL WEATHER SERVICE,
SILVER SPRING, MARYLAND

Respondent

and

Case No. 7-CA-40783

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION,
MEBA, AFL-CIO

Charging Party

. . . .

C.J. Schmidt, Esq.
For the Respondent

Michael A. Silvestri
For the Charging Party

Nicholas J. LoBurgio, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by the National Weather Service Employees Organization, MEBA, AFL-CIO (hereinafter referred to as the Union or NWSEO) against the National Weather Service, Silver Spring, Maryland (hereinafter referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region VII, issued a Complaint and Notice of Hearing alleging Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to provide the Union with performance and appraisal information of three named unit employees.

A hearing on the Complaint was conducted in Washington, D.C. at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Counsel for the General Counsel and Respondent and have been carefully considered.

Upon the entire record in this matter,[1] my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact and Conclusions of Law

At all times since April 1981, the Union has been the exclusive collective bargaining representative of a nationwide unit of various of Respondent's employees including approximately 26 to 30 Instructors employed at the National Service Training Center, Kansas City, Missouri (herein the Center). The unit is not presently covered by a nationwide collective bargaining agreement although various elements of the unit, excluding the Center, are covered by agreements pre-dating unit consolidation. However, Respondent and the Union have been engaged in contract negotiations for a nationwide agreement since 1982, negotiations proceeding on a face to face basis in 1982 and early 1983 followed by negotiations by mail at least through 1984.

In early 1984 Respondent notified the Union that it was implementing a revision of its performance appraisal system. The new system restructured the prior plan by primarily providing a narrative description of performance standards as compared with the prior one word description; adding a new system of weighting standards; and adding a numerical scoring system. Information regarding the plan was given to the Union and the parties met on numerous occasions to discuss various aspects of the new plan. None of the discussions however dealt with specific application of the new system to Instructors at the Center. The new appraisal system was implemented agencywide on April 1, 1984 but Respondent and the Union continued to meet and discuss specific Union concerns regarding application of the plan. On May 26, 1984, representatives of Respondent met with Leo Harrison, President of the Union, and Richard Horn, the Union's General Counsel, to further discuss the matter. According to the testimony of Joseph Smith, Respondent's Chief of Workforce Management (Labor Relations Chief), during the meeting after the parties resolved a question concerning employee accountability, which apparently was the primary purpose of the meeting, the parties discussed core elements and performance standards for Meteorological Technicians. While weights were designated for some of the elements, one element did not contain any indication of the weight range to be assigned since the weight for that element would vary among the various field stations. According to Smith, Union President Harrison was concerned with this and the parties ". . . agreed at that meeting that there'd be no negotiation but the local union could discuss with the local supervisor that weight and then the supervisor would make the final decision on the weight for that particular element." Smith continued: "As I said we discussed this and agreed that local discussion would occur that was not negotiations on these particular weights or elements or standards." Smith went on to testify, without further explanation, that the parties agreed there would be no other negotiations at the local level concerning the appraisal system, but "(t)here would be discussion".2/

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[1] Unopposed motions to correct the transcript filed by Counsel for the General Counsel and Respondent are both hereby granted.

Labor Relations Officer Pauline Shanker testified, in conclusionary fashion with no referance to the question of weights, that at the conclusion of negotiations on employee responsibility she ". . . made very certain that we understood there would be no negotiations at any level below national but encouraged both management and the union to discuss . . . ."

Union President Harrison denied that he ever indicated there would be no negotiations, only discussions, below the national level on matters concerning the new appraisal plan. Harrison denied any agreement or even any discussion on this subject. He testified that when considering the weighting that was to be accorded critical elements, only the range of weights was discussed. Harrison explained that the assignment of specific weights could only be determined by workload and importance of a particular job in a particular station and accordingly he "assumed" that such matters would be left to local impact and implementation bargaining.3/

2/ Smith testified without contradiction that at some undisclosed time since May 26 a Union Regional Councilman in Tennessee attempted to meet with area managers to negotiate further on performance plans. According to Smith, subsequent communications between Respondent's Regional management and the Union's Regional Council Chairman indicated that use of the word "negotiate" was "unfortunate" and the parties agreed to "discussion" only.

3/ Harrison testified without contradiction that upon receiving information that a local unit in Alpena, Michigan had been denied "input" regarding the new performance plan and told Harrison had agreed to waive local bargaining, Harrison called Smith and denied any such agreement. According to Harrison, Smith indicated he would call Central Region Management to correct the situation.

Meanwhile, on March 9, 1984 Michael Silvestri, an Instructor at the Kansas City Training Center and the Union's Region 6 Chairman since October 1983[4] received from management the performance plan under the new system for which he would be rated for the April 1, 1984 through March 31, 1985 appraisal period. The plan set out specific performance elements and assigned designated numerical weights for those elements.[5] The other Instructors at the Center also received their particular performance plans around this time.

Sometime after March 9, 1984, Silvestri met Union President Harrison at a Union meeting and questioned whether there had been any discussion with management on the new performance appraisal plan. Harrison acknowledged he talked to management about the plan but added that Silvestri, as the representative of employees at the Center, was free to negotiate on the plan at the Center.[6]

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[4] The Union's Region 6 represented employees at the Center and other national elements in the Kansas City area and national headquarters elements in Washington, D.C. To "clarify" representative contacts at the Center, Harrison wrote Respondent on March 15, 1984 and notified Respondent, *inter alia*:

> "Mr. Silvestri will serve as my representative to receive notification of all proposed changes in working conditions at the Kansas City Training Center and other matters which may require impact and implementation bargaining. He is also designated by the national level of this organization to negotiate on its behalf on those proposed changes or impact and implementation bargaining peculiar to the Training Center, Reconditioning Center and NWS SELS.
>
> "Mr. Silvestri will also serve as the union representative for all other matters on behalf of those Weather Service Employees who are TDY at the Training Center and all permanent employees of the Reconditioning Center and SELS."

[5] The form states, *inter alia*: "Weights reflect the level of importance and/or amount of time devoted to accomplishing the element."

[6] Around the time of this conversation Silvestri was notified he would be a member of the Union's national bargaining team. Silvestri testified Labor Relations Chief Smith was notified of this in March or April 1984. Smith testified he first received such notification from Silvestri in July 1984. In any event, a letter from Smith to Silvestri dated July 25, 1984 indicates that Smith was aware of Silvestri's status as national bargaining team member at least by July 20. Written notification from the Union that Silvestri was a member of the national negotiating team was given to Respondent by letter dated December 17, 1984.

By letter of May 16, 1984 to B.L. Braden, Respondent's Labor-Management Relations Designee at Kansas City, Silvestri requested copies of the new performance appraisal plans of four named Center Instructors, all members of the bargaining unit. Silvestri indicated that the request was ". . . in accordance with U.S.C. Title 5, Chapter 71" and the information was ". . . needed for evaluation for the purpose of negotiations by NWSEO." Braden, on instructions from Labor Relations Chief Smith, responded on June 1, stating:

> "Before a response to your inquiry can be made, clarification is needed as to what "negotiations" you are referring to, and the stated purpose for which the documents are needed. The second paragraph in your letter reads, "This request is in accordance with U.S.C. Title 5, Chapter 71," but it is a section which encompasses many areas. Please be specific."

On June 18, 1984 the Union was notified by Respondent that it was changing its method of conducting business with NWSEO Region 6 and, in the future, the contact for all matters not covered by a negotiated agreement would be Labor Relations Chief Smith. Accordingly, by letter to Smith of August 12, 1984 Silvestri requested the new performance appraisal plans for three of the employees referred to in his prior letter of May 16,[7] again indicating the data was, ". . . requested pursuant to 5 U.S.C. of Chapter 71" and was ". . . necessary for review for possible submissions on negotiations." On August 21, 1984 Smith replied to Silvestri, with language identical to that in Braden's June 1 letter, supra.

At no time thereafter did the Union clarify or explain its need for the information nor did Respondent furnish the data to the Union.

Silvestri testified that he requested the performance plans of the three Instructors: to ascertain whether they varied in such matters as weighting factors for possible impact and implementation bargaining on the new performance appraisal system at the local level; to determine whether safety related items in the plans might require attention during national negotiations;[8] to determine whether the particular needs of unique and small groups of employees in the unit such as Instructors might require special provisions in a national contract; and, being of the opinion that the national agreement should contain some provision relating to performance plans, to prepare himself for those negotiations. Silvestri further testified that he did not respond to Smith's request that he clarify his need for the documents since Respondent was aware of Silvestri's authority to bargain on impact and implementation at the local level and that he was a member of the national negotiating team.

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[7] One of the four employees was no longer employed at the Center. The documents requested for the three employees (Kent Mills, Paul Haskins and Ron Richardson) totaled 30 pages.

[8] Face to face negotiations were tentatively scheduled in April 1984 to commence in late November 1984 or January 1985.

Smith gave the following reasons for the response given to Silvestri's request for the documents: a concern for the "privacy nature" of the information; no negotiations were being conducted at that time[9] except national negotiations which did not ". . . involve the training center per se except . . . from a general standpoint;" and, Respondent ". . . had already negotiated with Mr. Harrison over the implementation of this system."

Section 7114(b)(4) provides that an agency must:

> ". . . furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> "(A) which is normally maintained by the agency in the regular course of business; [and]
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]"

In the case herein Silvestri was an "authorized representative" of the Union within the meaning of the Statute. As the Union's Region 6 Chairman, Silvestri was authorized to engage in "impact or implementation bargaining peculiar to the Training Center," as Harrison's letter to Respondent of March 15, 1984, supra, clearly states. Further, Silvestri was also a member of the Union's national negotiating team whose function was to bargain with Respondent on a nationwide agreement which fact had been communicated to Smith by July 20, 1984. Accordingly, Respondent was aware of Silvestri's representative status on the local and national level on August 12, 1984 when Smith failed to comply with Silvestri's request for documents.

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[9] In January 1984 Respondent notified the Union that since the parties were engaged in negotiations for a nationwide agreement, Respondent did not intend to negotiate for an interim agreement relating to the Center.

Production of the documents was not prohibited by law notwithstanding that Smith testified he had "privacy concerns" with providing Silvestri the specific requested performance appraisal plans of named individuals. While providing unsanitized information to a union might, in some situations, run afoul of the Privacy Act,10/ in my view privacy considerations are not present herein. Thus, the performance plans requested do not contain any personal information other than the position and grade of the individual nor contain any "stigmatizing information"11/ concerning the employee. Rather, the documents only set forth the performance elements and objections for each position with an assigned weight for each particular element; the major activities or results which need to be accomplished in support of the performance element; and a blank item entitled "Criteria for Evaluation" for generic standards or supplemental performance standards. When Silvestri requested the documents none of the employees had yet been rated as to their particular job performance since the actual rating would not have taken place until March or April 1985.

Next for consideration is whether the information sought was necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.12/ The Union and the General Counsel contend the information requested was necessary for possible local negotiations on implementation and impact aspects of the new performance appraisal system and for possible negotiations at the national level. Respondent contends that Union President Harrison essentially waived the right to negotiate on impact and implementation aspects at local levels when he agreed on May 26, 1984 there would be no "negotiations," only "discussions" at local levels. With regard to use of the information by Silvestri in preparation for national negotiations, Respondent contends Smith did not formally know until December 1984 that Silvestri was a member of the Union's national negotiating team and, in any event, it was Smith's understanding that negotiations were conducted through the Union's chief negotiator. Accordingly, Respondent argues that in light of these circumstances Smith's request for clarification was reasonable regarding what negotiations Silvestri was referring to in his request for information.

10/ Silvestri testified he did not particularly need the plans to be identifiable to an individual employee.

11/ Cf. Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA No. 92 (1985) at 628.

12/ Clearly the performance plans were normally maintained by Respondent and were reasonably available and production of the data would not be burdensome to Respondent.

In my view the information requested by Silvestri was necessary for full and proper discussion, understanding and negotiation on the impact and implementation at the local level of the newly adopted performance rating system. At a minimum the information was necessary to ascertain whether the performance criteria in each of the Instructor's performance plans were uniform and whether the weights were uniformly applicable. Such information was therefore required before Silvestri could determine whether any employee was adversely affected and what, if any, proposals should be made.

I reject Respondent's contention that Harrison waived all rights of the Union to impact and implementation at the local level. Rather, I credit Union President Harrison's testimony over that of Labor Relations Chief Smith and Labor Relations Officer Shanker and find Harrison did not agree on May 26, 1984 that no negotiations, only discussions, would occur on all matters relating to performance plans at the local level. I found Harrison's testimony to have the "ring of truth" to it whereas Smith's and Shanker's did not. Thus, Harrison's testimony that while the range of weights was discussed, he, in fact, did not have sufficient specific knowledge to bargain on the application of the weights to particular job tasks and therefore assumed such matters would be left to negotiations at the local level. This approach is reasonable and understandable. On the other hand, Smith testified that the parties agreed, for some unstated reason, that only local discussion and not negotiation on weights or the appraisal system itself would be permitted at the local level. Shanker similarly gave no indication of why Harrison would enter into such an agreement. The record contains no evidence of a quid pro quo for such a waiver and one would expect to find some explanation or reason for a conscious yielding sufficient to establish a waiver as alleged.[13]

Even if I were to find that the parties agreed on May 26 that only discussion on the new performance plan would occur at the local level, I would conclude nevertheless that Respondent was obligated to provide Silvestri with the information he requested. Smith testified that there was agreement to discuss ". . . that weight and then the supervisor would make the final decision on the weight for that particular element." The discussion, which would have been a substitute for the Statutory right to negotiate, could only occur in an intelligent fashion if the local Union had knowledge of the elements and weights from which to make meaningful judgements. That knowledge could only come from viewing the elements and weights for each job, *i.e.* the performance plans themselves. Indeed, section 7114(b)(4) of the Statute specifically requires the production of data ". . . necessary for the full and proper *discussion*, *understanding* and negotiations" (emphasis supplied) of bargaining subjects. Further, there is neither claim nor evidence that Union President Harrison waived the Statutory right to information in connection with whatever "discussion" might take place as Respondent contends.

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[13] What might well have occurred on May 26 was an agreement on the range of weights to be applied to performance elements and objectives but no discussion or yielding on how the weights would be specifically distributed among the activities comprising that performance element. For example, Silvestri's performance plan, placed in evidence at the hearing, indicates "classroom Instructions" is a performance element with a total weight of 30. However, no distribution of this weight has been assigned to the "Major Activities" under this element such as "Lectures," "Discussions," "Technical Proficiency," etc.

Accordingly, I conclude Respondent violated section 7116(a)(1), (5) and (8) of the Statute by its failure to provide the Union with data as alleged. In view of this conclusion I need not treat the parties arguments regarding the information request for national negotiations preparations as it will have no impact on the remedy recommended herein. In any event, I reject Respondent's contention that in the circumstances herein Smith's request for clarification regarding what negotiations Silvestri was referring to in his request for information was "reasonable." Since the data Silvestri requested was necessary for *a* purpose relating to *a* subject within the scope of collective bargaining then, in my opinion, an agency is obligated to furnish the data upon demand without engaging in the type of "endless bickering and jockeying" referred to by National Labor Relations Board Chairman Guy Farmer, when discussing a similar issue in *Whitin Machine Works*, 108 NLRB 1537 at 1541 (1954), enf'd, *NLRB v. Whitin Machine Works*, 217 F. 2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955). In that case Chairman Farmer stated:

> "I would not require that the union show the precise relevancy of the requested information to particular current bargaining issues. It is enough for me that the information relate to the wages or fringe benefits of the employees. Such information is obviously related to the bargaining process, and the union is therefore entitled to ask and receive it.
>
> "My interpretation of the employer's obligation under Section 8(a)(5) in this respect, of course, also presupposes that the bargaining agent, in this area as in all others, will seek the wage-rate information as a good-faith act in the discharge of its duty as the representative of the employees. I would, therefore, hold that, short of evidence that union requests for wage data are used as an harassing tactic and not in good-faith effort to secure pertinent bargaining information, the employer has a continuing obligation to submit such data upon request to the bargaining agent of his employees. . . . I am

> convinced, after careful consideration of the impact of the problem on the collective-bargaining process, that this broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has theretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement."

Based upon the entire foregoing, I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the National Weather Service, Silver Spring, Maryland shall:

1. Cease and desist from:

   (a) Failing and refusing to furnish National Weather Service Employees Organization, MEBA, AFL-CIO, the employees exclusive representative, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented April 1, 1984.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and the policies of the Federal Labor-Management Relations Statute:

   (a) Furnish National Weather Service Employees Organization, MEBA, AFL-CIO, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented April 1, 1984.

(b) Post at its facilities in Kansas City, Missouri and where unit employees are located copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained by him for 60 consecutive days thereafter, excluding holiday and vacation periods, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The responsible official shall take reasonable steps to insure that notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director VII, Federal Labor Relations Authority, 1531 Stout Street, Suite 301, Denver, Colorado 80202, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 12, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish National Weather Service Employees Organization, MEBA, AFL-CIO, the employees exclusive representative, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented April 1, 1984.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish National Weather Employees Organization, MEBA, AFL-CIO, with the performance appraisal plans of Kent Mills, Paul Haskins and Ron Richardson implemented April 1, 1984.

_______________________ (Agency or Activity)

Dated: _______________ By: _______________________ (Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224 or FTS 8-564-5442.

21 FLRA No. 63 [21 FLRA No. 63]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE
SILVER SPRING, MARYLAND

Respondent

and Case No. 7-CA-40108

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION (MEBA/AFL-CIO)

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and the General Counsel filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

The complaint alleges that the Respondent, National Weather Service, violated the Statute when, in October 1981, it unilaterally implemented the use of an instructor evaluation sheet to evaluate unit employees at its National Weather Service Training Center (NWSTC) in connection with a critical element of their performance standards without first notifying the Charging Party and affording it an opportunity to bargain over the impact and implementation of such change. The Judge concluded that the Respondent's implementation of the use of such form was a violation of the Statute. The Authority disagrees.

The Authority finds that the General Counsel has failed to sustain the burden of proving that the Respondent unilaterally changed a condition of employment without notifying and bargaining with the Charging Party, as alleged in the complaint. The facts are essentially not in dispute. As found by the Judge, it had long been the practice of NWSTC supervisors to conduct in-class evaluations of instructors. Such practice allowed supervisors to use whatever methods they wished to accomplish these evaluations, including the use of "cuff" records, personal notes, "Sample Guidelines," forms such as an "Observation Report" (OR) and a lesson evaluation sheet, as checklists for recording such evaluations. Supervisor James Nelson developed the form at issue here, the Instruction Evaluation Sheet (IES), because he believed the OR form to be incomplete and not in the exact form he wanted to use. He distributed copies of the IES to some of the other supervisors, and started to use the form himself in October 1981. The Respondent thereafter continued to allow supervisors to use any or all of the above tools to record evaluations of instructors.

In the Authority's view, the General Counsel has not shown that the nature of the supervisory evaluations or the criteria to be applied in evaluating instructor performance changed because Nelson (and possibly other supervisors) began using the IES form. Although the IES had a different format and was more specific than the OR, the same concepts of classroom presentation and delivery techniques were measured. Thus, the record also shows that, in developing the IES form, Nelson used the OR form as a guide, and the IES conformed exactly to the rating elements set forth in the "Sample Guidelines." Additionally, the record indicates that, at all times material herein, there was no change in the Respondent's policy of permitting individual supervisors to use any form to record their observations of the instructors' in-class performance.

The Authority therefore concludes that it has not been demonstrated that there was a change in unit employees' conditions of employment caused by the distribution and use of the IES. Consequently, the Respondent was under no obligation to notify or bargain with the Charging Party concerning the use of such form. Thus, no violation of section 7116(a)(1) or (5) of the Statute has been established, and we shall order that the complaint be dismissed. See Social Security Administration, Baltimore, Maryland, 19 FLRA No. 79 (1985). See also United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois, 13 FLRA 636 (1984).

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-40108 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 24, 1986.

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 63]

OALJ-85-036

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NATIONAL WEATHER SERVICE,
SILVER SPRING, MARYLAND

Respondent

and

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION (MEBA/AFL-CIO)

Charging Party

Case No. 7-CA-40108

George E. Maden, Esquire
For the Respondent

Cathy A. Auble, Esquire
Joseph Swerdzewski, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Seven, Federal Labor Relations Authority, Denver, Colorado against the National Weather Service, Silver Spring, Maryland (Respondent), based on a charge filed by the National Weather Service Employees Organization (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by unilaterally implementing on or about October 1981, the use of an instructor evaluation sheet to evaluate unit employees in connection with a performance appraisal critical element without first notifying the Union and affording the Union an opportunity to bargain over the impact and implementation of such change. The complaint further alleged that the Union first discovered the unilateral change on or about September 1, 1983. Respondent's answer denied the unfair labor practice alleged in the complaint.

A hearing was held in Kansas City, Missouri. The Respondent, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record,[1/] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

In approximately May 1981, the Union was certified as the exclusive representative of a nationwide consolidated unit of Respondent's employees. Respondent's National Weather Service Training Center (NWSTC), Kansas City, Missouri, which is part of the consolidated unit, is charged with the responsibility of providing training programs for Respondent's employees. The Training Center is divided into two branches, only one of which, the Engineering Branch, is at issue in this case. There are approximately 16 instructors in the Engineering Branch. The nonsupervisory instructors are part of the bargaining unit.

Instructor Michael Silvestri has served in various representational capacities for the Union on behalf of the Training Center employees from the Union's certification to the present and has been the only Union official empowered to receive notice from Respondent's agents concerning matters affecting, and to bargain on behalf of, the Training Center employees. Respondent has been aware of Silvestri's authority to receive notice and to bargain on behalf of the Union.

Prior to October 1981, there was a longstanding NWSTC practice of conducting in-class evaluations of instructors. Supervisors, or program instructors as they were known after the reorganization of 1981, were free to use whatever methods they wished to accomplish the in-class evaluations. Some used "cuff" records, or personal notes, others used forms as a checklist for the evaluations.

Since approximately 1973, a form entitled, "Observation Report" (OR) had been available for supervisory use. The OR was an optional form which was originally issued by the Federal Aviation Administration. The OR is a one-page document horizontally printed on both sides. The top of the front page has a space for the name of the instructor and the lesson observed. The remainder of the front page is divided into three vertical blocks. The left block lists the following items: Identification and Clarification of Objectives, Development and Maintenance of Interest and Motivation, Evaluative Techniques, Lesson Development, Provision for Student Application and Delivery Techniques. The middle block contains a

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[1/] The unopposed motions of the General Counsel and the Respondent to correct the transcript are hereby granted. The transcript is corrected as set forth therein.

five-element evaluation system (outstanding, excellent, good, satisfactory and unsatisfactory), along with blank spaces for checking the rating for each item. The right block has blank spaces for comments. On the back, the top-third of the OR contains a continuation of the three-block pattern: Summarization Techniques, Utilization of Training Aids and Materials, and Total Instructional Effectiveness. The middle third is a blank space entitled Recommendations for Development. The bottom third sets forth the "adjective rating" and a comparative description of the five rating elements.

Also available for supervisory use during this period was a document entitled, "Sample Guidelines," which was also obtained from the Federal Aviation Administration. This document set forth standards for use with a lesson evaluation sheet. Most of the specific rating elements set forth in these guidelines were not identical to those set forth in the OR.

Although the record reflects that the OR and sample guidelines were available for use, unlike the Instructor Evaluation Sheet (IES), to be discussed later, there is only hearsay evidence in the record of any actual use of the OR form. It was reportedly not retained by the supervisors.

Since October 1981, instructors have been evaluated on their performance on an annual basis under a system known as the General Workforce Performance Appraisal System or GWPAS. Of the performance elements expected of instructors, one of the critical elements is instruction which consumes approximately 40% of an instructor's time.

During June 1981, James D. Nelson, a program instructor-supervisor, developed an Instruction Evaluation Sheet (IES) to evaluate instructors. He used the available OR form as a guide, but believed the OR to b incomplete and not in the exact form he wanted to use. In the process of developing the IES form, Nelson first made nonsubstantive changes in the sample guidelines. Then he made the IES conform exactly to the rating elements set forth in the guidelines.

The IES is a one-page document horizontally printed on both sides. The top of the front page has a space for the name of the instructor and the course being observed. The remainder of the front page is divided into three vertical blocks. The left block lists the following items: Initial Readiness, Statement of Objectives, Ability to Explain Subject, Development and Stress of Key Points, Use of Questioning Techniques, Use of Training and Class Participation and Summarization Techniques. The middle block contains a five-element evaluation system (outstanding, very good, average, fair, and poor), along with blank spaces for checking the rating for each item. The right block has blank spaces for comments. The back of the IES contains, in addition to the brief continuation of the three-block pattern from the front page (Voice, Diction, Delivery and Enthusiasm, Appearance, Mannerisms), a large blank space for summary comments, as well as the rating standards (numerical score ranges and description of each range), and a space for the supervisor's signature.

Neither the IES nor the sample guidelines used the same format as the GWPAS. The same concepts of classroom presentation and delivery techniques are measured, but the IES is more specific, particularly in terms of specific delivery techniques. The IES rating system uses categories of outstanding, very good, average, fair and poor which are achieved by attaining the appropriate numerical score within a range of scores identified on the back of the IES form. The GWPAS uses categories of outstanding, commendable, satisfactory, minimally satisfactory and unsatisfactory which are achieved by attaining a certain proportion of the Exceeded, Met and Not Met ratings for all of the performance elements listed in the GWPAS. The use of the IES can result in an evaluation which would be different than an evaluation reached by using the GWPAS without reference to the IES. The IES and the GWPAS are two different evaluation systems which concern the critical element of instruction.

Nelson distributed copies of the IES and its sample guidelines to at least three of the five other program instructors/supervisors at the Training Center, including the two other supervisors in the Engineering Branch. The IES was first used by them or him in October 1981. Nelson evaluated five different unit employee/instructors by using the IES, and at least two of these instructors were twice evaluated by Nelson using the IES. Within a few days after Nelson completed the IES concerning a particular instructor, he would give a copy to that instructor, discuss the ratings given to the instructor, and make suggestions for improvement. Such in-class evaluation occurred on an irregular basis.

Richard F. Myers, as director and Respondent's principal agent at the Training Center, was aware of the development of both the IES and sample guidelines and condoned their use. It is undisputed that Respondent never notified the Union of the institution of the IES and Sample Guidelines prior to its implementation in October 1981.

On September 1, 1983, Nelson evaluated Silvestri by using the IES. After Silvestri reviewed the IES, he told Nelson that he had never seen that form and that he was unaware of the procedures to be used in connection with the IES or the areas in which he was to be evaluated. Nelson agreed and tore up Silvestri's IES. This was the first time that Silvestri saw the IES.

By letter dated October 21, 1983, Respondent advised the Union's National President, Leo Harrison, of Respondent's intent to revise the IES and Sample Guidelines which, it stated, "is used to rate instructors in the classroom . . . ." (G.C. Ex. 7). Respondent concedes that this was the first time that it gave the Union any notice concerning any form of the IES or its use. Sometime after receiving a copy of the proposed revisions, Silvestri realized the connection between the proposed revision and the IES given to him by Nelson in September. Based on this realization, Silvestri sent a letter dated November 18, 1983, to Respondent objecting to the proposed revision because the Union had never been notified of the initial IES implementation.

The Union has concerns as to how the IES would be used in connection with an instructor's rating under GWFAS or otherwise, the frequency of use, application to the style of training in engineering, whether the instructor would be notified in advance, and what consideration would be given to such matters as an instructor's first time teaching a course, or having a group of difficult students, or of the rating instructor's familiarity with the course.

Discussion, Conclusions and Recommendations

The General Counsel contends that Respondent's implementation of the IES in October 1981 was a unilateral change in conditions of employment of unit employees without prior notice or an opportunity to bargain being afforded to the Union, thus violating sections 7116(a)(1) and (5) of the Statute. The General Counsel asserts that the impact and implementation of the IES, which had a reasonably foreseeable impact on unit employees, was negotiable.

Respondent defends on the basis, *inter alia*, that the use of the IES was not a departure from longstanding practice of allowing individual supervisors to accomplish in-class evaluation by use of forms, notes, or other methods; the changes made to the pre-existing form were not substantive changes giving rise to a bargaining obligation; and the IES had no impact, or *de minimus* impact, on bargaining unit employees.2/

The evidence establishes that the implementation of the IES was a change in conditions of employment. There is little persuasive evidence of actual use of the OR form or FAA sample guidelines on the engineering side. Moreover, the specific items evaluated were different than the OR previously available for use. Initial readiness, class participation, and personal elements, such as voice, diction, enthusiasm, appearance, and mannerisms, were not on the OR form. Aside from the different descriptive words used, the IES rating system has a numerical score range within which an instructor must fall in order to receive a particular rating. The OR rating system was merely descriptive, so receipt of any given score on the OR was strictly subjective. It is concluded that the creation of the IES was a major alteration of the OR, with additions of several job-related evaluation considerations and a new rating system. Accordingly, especially in light of the fact that the IES was specifically to be used in conjunction with the GWFAS which did not come into existence until October 1981, this change cannot be construed as a mere reaffirmation of existing policy.

2/ Respondent does not appear to contest the General Counsel's assertion that the complaint meets the requirements of section 7118(a)(4)(B) and was, therefore, timely filed. In any event, I so find.

as The IES had no impact, or reasonably foreseeable impact, on unit employees. I cannot accept Respondent's position that the forms of the [illegible], [illegible], and the evaluation forms all conveyed the same meaning, or that the in-house evaluation is an insignificant aspect of instructor evaluations. As noted, the Union had concerns as to just how the IES would be used, the frequency of use, application to the style of training in engineering, whether advance notice would be given, and what consideration would be given to such matters as an instructor's first time teaching a course, or having a group of difficult students, or of the rating instructor's familiarity with the course.

A performance appraisal system is clearly an appropriate matter for bargaining. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), enforced sub nom National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982). While the establishment of performance standards or the identification of critical elements is not bargainable, procedures and adverse impact on unit employees due to these matters are negotiable. Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA No. 63, 14 FLRA 390 (1984); Environmental Protection Agency, 16 FLRA No. 87 (1984). For example, where a union proposed that management be required to notify employees regarding which performance elements would be subject to appraisal, the Authority held that the proposal was negotiable. American Federation of Government Employees, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Native Health Service, 13 FLRA No. 112 (1984). Likewise, a proposal to give notice to employees concerning which performance elements are deemed critical is a negotiable matter. Alaska Native Health Service, supra. Other negotiable matters related to performance appraisal systems include informing the union should management elect to conduct a study of performance appraisals, requiring management to discuss a proposed evaluation or appraisal with an employee prior to sending it to higher level supervisor or reviewer, requiring that employees be evaluated solely on duties contained in their position descriptions, and insisting on uniform application of performance standards for identical duties in similar circumstances. American Federation of Government Employees, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA No. 80 (1983); National Federation of Federal Employees and Department of the Army, Fort Monmouth, New Jersey, 13 FLRA No. 75 (1983); American Federation of Government Employees Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 11 FLRA No. 103 (1983); National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983 (1983). Furthermore, a requirement that performance standards for critical elements be objective and directly related to an employee's position is negotiable. American Federation of Government Employees, Local 2192 and Veterans Administration Regional Office, St. Louis, Missouri, 9 FLRA 716 (1982). Thus, it is clear based on the above that the impact and implementation of a form which was used in evaluating a critical element of an employee's performance appraisal was an appropriate matter for bargaining.

It is concluded that Respondent's implementation in October 1981 of an instructor evaluation sheet to evaluate unit employees in connection with a performance appraisal critical element without first notifying the Union and affording it an opportunity to bargain over the impact and implementation of such change in conditions of employment violated sections 7116(a)(1) and (5) of the Statute, as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, the Authority hereby orders that the National Weather Service, Silver Spring, Maryland, shall:

1. Cease and desist from:

(a) Changing any instructor evaluation sheet at the National Weather Service Training Center, Kansas City, Missouri, or otherwise changing existing terms and conditions of employment with respect to evaluation forms used in conjunction with performance appraisal systems, without first notifying the National Weather Service Employees Organization (MEBA/AFL-CIO), the exclusive bargaining representative of its employees, and affording such representative the opportunity to bargain, upon request, to the extent consonant with law.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Rescind the Instructor Evaluation Sheet implemented in October 1981.

(b) Rescind and remove or expunge from its files all references to ratings issued to bargaining unit employees as a result of the implementation of the Instructor Evaluation Sheet at the National Weather Service Training Center, Kansas City, Missouri.

(c) Notify the National Weather Service Employees Organization (NWSEO/AFL-CIO) the exclusive bargaining representative of its employees, of any proposed change in existing terms and conditions of employment with respect to evaluation forms used in conjunction with performance appraisal systems, and, upon request, bargain in good faith to the full extent consonant with law.

(d) Post at its facilities at the National Weather Service Training Center, Kansas City, Missouri copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director, National Weather Service Training Center, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to 5 C.F.R. Section 2423.30 notify the Regional Director, Region VII, Federal Labor Relations Authority, Denver, Colorado, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 9, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the instructor evaluation sheets at the National Weather Service Training Center, Kansas City, Missouri, or otherwise change existing terms and conditions of employment with respect to a performance appraisal system, without first notifying the National Weather Service Employees Organization (MEBA/AFL-CIO), the exclusive bargaining representative of our employees, and affording such representative the opportunity to bargain, upon request, to the extent consonant with law.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the Instructor Evaluation Sheet implemented in October 1981.

WE WILL rescind and remove or expunge from our files all references to ratings issued to bargaining unit employees as a result of the implementation of the Instructor Evaluation Sheet in October 1981 at the National Weather Service Training Center, Kansas City, Missouri.

WE WILL notify the National Weather Service Employees Organization (MEBA/AFL-CIO), the exclusive representative of our employees, of any proposed change in existing terms and conditions of employment with respect to the evaluation forms used in conjunction with the performance appraisal system, and, upon request, bargain in good faith to the full extent consonant with law.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

[21 FLRA No. 63]

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver Colorado 80202 and whose telephone number is: (303) 837-5224, FTS 8-327-5224.

21 FLRA No. 64

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

Respondent

and Case No. 2-CA-40354

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2513, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision, and the General Counsel filed a brief opposing the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings,*/ conclusions and recommended Order.

---

*/ On pages 3 and 4 of his Decision, the Judge inadvertently noted the wrong year in describing the events leading up to the allegation in the unfair labor practice complaint. Thus, on pages 3 and 4 respectively, he referred to events occurring on September 2, 1983 and October 4, 1983, rather than 1984. These inadvertencies are hereby corrected.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, shall:

1. Cease and desist from:

(a) Failing and refusing, upon request, to bargain with the American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO, the exclusive collective bargaining representative of its employees, concerning the procedures to be observed in the interstation transfer of the employees of its former Brooklyn Wage-Hour Office and over appropriate arrangements for any employees adversely affected by such transfer.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO, concerning the procedures to be observed in the interstation transfer of the employees from its Brooklyn Wage-Hour Office to its Bronx and Manhattan Offices and concerning appropriate arrangements for employees adversely affected by such interstation transfer.

(b) Post at its Bronx and Manhattan, New York facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Wage and Hour Administrator, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse, upon request, to bargain with the American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO, the exclusive collective bargaining representative of our employees, concerning the procedures to be observed in the interstation transfer of the employees from our former Brooklyn Wage-Hour Office and over appropriate arrangements for any employees adversely affected by such transfer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO, concerning the procedures to be observed in the interstation transfer of the employees from the Brooklyn Wage-Hour Office to the Bronx and Manhattan Offices and concerning appropriate arrangements for employees adversely affected by such transfer.

____
(Agency or Activity)

Dated: ____________ By: ______________________
(Signature)

[21 FLRA No. 64]

E

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

[21 FLRA No. 64]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .
:
U.S. DEPARTMENT OF LABOR, EMPLOYMENT :
STANDARDS ADMINISTRATION, WAGE AND :
HOUR DIVISION :
:
Respondent :
:
and : Case No. 2-CA-40354
:
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 2513, AFL-CIO :
:
Charging Party :
:
. . . .

Annabelle T. Lockhart, Esquire
For the Respondent

Peter Richardson
For the Charging Party

Lee Mingledorff, Esquire
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

Pursuant to a charge filed on May 24, 1984, by American Federation of Government Employees, Local 2513, AFL-CIO (hereinafter called AFGE Local 2513) against U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (hereinafter called DOL and Respondent) the

General Counsel of the FLRA by the Director of Region II issued a Complaint and Notice of Hearing on August 31, 1984, alleging that Respondent violated Section 7116(a)(1) and (5) of the Statute by reassigning employees between offices without affording the National Council of Field Labor Locals of the American Federation of Government Employees, AFL-CIO (hereinafter called the Council) an opportunity to bargain over the impact and implementation of the reassignment. Respondent filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in New York, New York. Respondent, AFGE Local 2513 and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered. Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence I make the following:

Findings of Fact

The Employment Standards Administration and its Wage and Hour Division are constituent entities of the Department of Labor. At all times material herein the Council has been recognized as the exclusive collective bargaining representative for a unit of employees stationed throughout the nation in field duty stations of the Department of Labor, including employees in DOL's Employment Standards Administration, Wage and Hour Division. At all times material Kathleen Becker has been Vice-President of AFGE Local 2513 and a designated regional representative of the Council and an agent acting on its behalf.

Bargaining History and Collective Bargaining Agreement

On August 17, 1978, the DOL and the Council signed a collective bargaining agreement. This agreement, including the attached appendices and memoranda of understanding is still binding on the parties.[1]

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[1] Article 24 of the collective bargaining agreement entitled "Interstation Transfers," provides in relevant part:

> Section 5 - Notice to NCFLL.
>
> The NCFLL President or his/her designee will be notified of all proposed transfers of bargaining unit employees at least 2 weeks in advance.

On July 18, 1977 the Council submitted its initial proposals which included, *inter alia*, Section h of Article 31 which provided that where employees were to be involuntarily transferred, the Council would be notified and negotiations would be held with respect to the impact of the transfer on unit employees. The Council also proposed that supplemental agreements regarding interstation transfers could be negotiated. The Council maintained its position with regard to the language in Section h all through 1977. The assistance of the Federal Mediation and Conciliation Service was requested by the Council in late 1977. Management during this period had submitted two proposals, dated July 17, 1977 and October 19, 1977, which did not provide for such a bargaining obligation. On December 23, 1977, management submitted a third proposal which also did not require bargaining on the impact and implementation of involuntary reassignments. During this period the DOL had been adamant that it was not going to agree to bargain on impact and implementation of reassignments. On April 21, 1978 the Council submitted a second proposal on interstation transfer and reassignment. This proposal accepted management's proposals in a number of areas and in proposed Section 5 of Article 24 omitted reference to negotiations on impact and implementation, providing only that management would notify the Council of all proposed transfers "at least three (3) weeks in advance." This was the first time the Council had been willing to drop its efforts to get contractual recognition of bargaining rights in this area. The parties' final proposal in this area was dated May 4, 1978. It was a joint proposal and its only change from the Council's April 28, 1978 proposal is to be found in Section 5 wherein the notice period of transfers to be furnished the Union was reduced to two weeks. The May 4, 1978 Joint Proposal is the current wording of Article 24 of the parties' national agreement which deals with interstation transfers.2/

The Closing of the Brooklyn Wage-Hour Office
And Interstation Transfer of Employees

On September 2, 1984 Respondent's local Labor Relations Officer, Brenda Judson, notified the Council that Respondent intended to reassign all unit employees of the Brooklyn Area Office to the Bronx and Manhattan Area Offices. Becker, on behalf of the Council, requested negotiations on the implementation of the move and its impact on the affected unit

---

2/ DOL's chief negotiator testified that he felt that when the Council agreed to the final language this constituted a clear and unequivocal waiver of the Council's right, during the term of the agreement, to negotiate over the impact of interstation transfers. The Council negotiators testified that the Council had no intention of waiving its statutory rights.

employees. This request also contained a list of initial proposals. These initial proposals sought, among other things, to bargain regarding familiarizing employees with their new work sites; evacuation plans; the location and use of fire extinguishers; the methods (including seniority) by which employees would be assigned desk and work locations at their new work site; the utilization of partitions in the new space; parking arrangements for employees at the new site; telephones; territorial assignments of employees; office equipment; the ability to keep personal items; new business cards for employees; ventilation; window drapes; desk lamps; a non-smoking area; office availability to employees outside of normal duty hours; keys to the restroom and office; and administrative time for moving and relocating which would not be counted as time under the employee's productivity standards.

On September 20, 1983, Judson wrote to Jesse Rios, the President of the Council, stating that management would not relocate employees until bargaining over the impact and implementation of the relocations was completed. On September 29, 1983, Respondent, at the national level, repudiated the local official's offer and announced that DOL had no obligation to bargain over the impact and implementation of the relocation and that the relocation had no material effect on bargaining unit employees. On October 4, 1984, the Council again requested negotiations but the Council received no response from Respondent. No negotiations ever took place.

On January 18, 1984, the Council received notification of the reassignments of employees and on January 23, 1984, employees received their reassignment notifications. On February 6, 1984, the reassignments took place as scheduled. Two employees were transferred to the Bronx Wage and Hour Area Office and seven employees were transferred to the Manhattan Wage and Hour Area Office.

With regard to the impact of the relocation on employees, (1) travel time has been significantly increased both in terms of getting into the office from home and in traveling to investigate work sites in the boroughs of Queens, Brooklyn, and Staten Island; (2) there is increased cost due to parking and a lack of available parking spaces; (3) because there are now 17 compliance officers in the Manhattan Office there is greater noise and crowding than before; and (4) there are now proportionately fewer clerical employees providing support to compliance officers than before the relocation. The Brooklyn office employees had partitions to divide work spaces, increase privacy and reduce noise levels. Now employees have no partitions and fewer phones per employee than before. There were serious ventilation problems in the Manhattan Area Office which were made more serious by the introduction of additional employees in the same space. Prior to the move there had been no discussion as to how the move would occur or when employees would be able to pack. The move caused some employees to use more time in traveling in to and out from Manhattan to investigate work sites in Queens, Brooklyn and Staten Island. With respect to one employee extra time amounted to between 20 minutes and 45 minutes each way. Depending on the number of visits one would have to make to a particular site, this could add several hours to the time it took to investigate each case. Performance standards require employees to close a certain percentage of cases in 45 days and all cases by 180 days. In addition employees are held to a certain standard of effective time utilization which would also be effected by increased travel time. There was more on-street parking available in Brooklyn than in Manhattan, 12 DOL reserved parking spaces in Brooklyn verses none in Manhattan. Five of the seven employees transferred from the Brooklyn office used their privately owned vehicles in conducting their investigations and trying to find a parking space around the Manhattan Area Office could take from 5 minutes to two hours to locate, depending on the time of day. Management apparently had made no adjustments in performance standards based on the increased travel time or the difficulty in locating parking spaces. There were some asbestos hazards in the new location and, unlike the old work site where there were phones within reach of every desk, in Manhattan there were fewer phones per employee and many employees now had to leave their desk area to get to a phone. Manhattan also had a problem with pests. Certain office procedures which were different from the Brooklyn office had an impact on an employee's ability to be in the field for investigations. One of these was the requirement that each employee do technical assistance for an entire day. In Brooklyn no employee was assigned this task but employees who happened to be in the office would pick up this responsibility. After the transfer, the former Brooklyn Area Office employees had to perform technical assistance one day a week until they caught up with the time already served by the other Manhattan employees in that endeavor. Such employees perform technical assistance two times a month. One employee lost 24 field days due to this requirement between the transfer of February 6, 1984 and the date of the hearing.

Discussion and Conclusions

The interstation transfer by DOL of the employees of the Brooklyn Wage-Hour Office to the Bronx and Manhattan Wage-Hour Offices was a change in the working conditions that affected, or could reasonably be foreseen to affect, the transferred employees. Absent any privilege Respondent would be required to notify the Council of the change and to bargain concerning its impact and implementation. Cf. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA No. 60 (1985).

Respondent contends that it had no obligation to bargain concerning the implementation and impact of the interstation transfer because the Council allegedly waived its statutory right for such bargaining when the Council dropped its contractual proposal that Respondent bargain about the impact and implementation of interoffice transfers. Respondent's argument confuses a statutory right as opposed to a contractual right. The latter is a right set forth and secured in the collective bargaining agreement and it is enforced by utilizing the means for enforcing contractual rights, including grievance and arbitration procedures. Rights granted by the Statute must be enforced utilizing the methods provided by the Statute including unfair labor practice procedures. The procedures for the enforcement of contractual rights are often more speedy and effective than those for enforcing rights provided by the Statute.

In the instant case, when the Council dropped its contractual demand to bargain about the impact and implementation of interstation transfers the Council was merely abandoning its attempt to secure a contractual right which it could then enforce through the contract. Nothing in the record establishes or implies that the Council was in any way giving up its statutory rights. This distinction between statutory rights and contractual rights has long been recognized in the field of labor relations it has similarly been recognized that giving up the securing of a contractual right does not constitute the waiver of a statutory right. Cf. Timber Roller Bearing Company v. NLRB, 325 F 2d 746 (6th Cir 1963) at 751.

The waiver of a statutory right must be clear and unmistakable. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, supra. The record in the subject case shows no such clear and unmistakable waiver of the Council's statutory right to bargain about the impact and implementation of the interoffice transfer of employees. Agreeing that two weeks notice would be sufficient notice of such a transfer hardly constitutes a waiver of the right to bargain about the implementation and impact of such a transfer. Thus, I conclude the Council did not waive its right to bargain after the implementation and impact of the interoffice transfer of papers.

I conclude, further, in the absence of such a waiver, DOL violated section 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Council concerning the impact and implementation of the interoffice transfer of employees from the Brooklyn Wage-Hour Office to the Manhattan and Bronx offices.

Having found and concluded that DOL violated Sections 7116(a)(1) and (5) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby Orders, that the United States Department of Labor, Employment Standards Administration, Wage and Hour Division, Chicago, Illinois, shall:

1. Cease and desist from:

    (a) Failing and refusing, upon request, to bargain with American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO, the exclusive collective bargaining representative of its employees, concerning the impact and implementation of any interoffice transfer of employees.

(b) In any like or related manner interfere with, restrain, or coerce any employee in the exercise of right assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Upon request bargain with American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO concerning the impact of the inter office transfer of employees from the Brooklyn Wage-Hour Office to the Bronx and Manhattan Offices and concerning the impact and implementation of any future interoffice transfers of employees.

(b) Post at its Bronx and Manhattan facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receiving such forms, they shall be signed by an appropriate official of the Respondent and shall be posted and maintained by such official for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, in writing, within 30 days from the date of this Order, as to what steps are being taken to comply herewith.

SAMUEL A. CHAITOVITZ
Administrative Law Judges

Dated: September 12, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse, upon request to bargain with American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO the exclusive collective bargaining representative of our employees, concerning the impact and implementation of any interoffice transfer of employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request bargain with American Federation of Government Employees, National Council of Field Labor Locals, AFL-CIO concerning the impact of the interoffice transfer of employees from the Brooklyn Wage-Hour Office to the Bronx and Manhattan Offices and concerning the impact and implementation of future interoffice transfer of employees.

(Agency or Activity)

Dated: ________________ By: ________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

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Federal Labor Relations Authority

Washington, D.C. 20424

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NUMBER 360 **REPORT OF CASE DECISIONS** **May 6, 1986**

NEGOTIABILITY CASES

21 FLRA No. 65 (April 24, 1986)

Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Navy Public Works Center, Norfolk, Virginia. Case No. 0-NG-1176

21 FLRA No. 67 (April 25, 1986)

Radio Officers Union, D-3 NMEBA, AFL-CIO and Department of Commerce, National Oceanic and Atmospheric Administration. Case No. 0-NG-1248

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 68 (April 28, 1986)

Federal Railroad Administration and American Federation of Government Employees, Local 2814, AFL-CIO. Case No. 3-CA-50265

21 FLRA No. 69 (April 28, 1986)

Bureau of Government Financial Operations, Headquarters and National Treasury Employees Union and National Treasury Employees Union, Chapter 202. Case No. 3-CA-2646

21 FLRA No. 70 (April 28, 1986)

Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region and American Federation of Government Employees, AFL-CIO. Case No. 2-CA-40326

21 FLRA No. 71 (April 29, 1986)

Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio; and Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, and American Federation of Government Employees, AFL-CIO, Local 1592. Case No. 7-CA-40682

Y3.F31/21-3:

ARBITRATION CASE

21 FLRA No. 66 (April 24, 1986)

United Power Trades Council and United States Army Corps of Engineers, North Pacific Division (Axon, Arbitrator). Case No. 0-AR-960

Federal
Labor Relations
Authority

Tidewater Virginia Federal Employees Metal Trades Council and Dep't of the Navy, Navy Public Works Center, Norfolk, Va., Case No. 0-NG-1176 (Decided April 24, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2150 Management Rights	7106(a)(2)(B)
2152.40 Assign Work	7106(b)(1)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Hours of Work
    - Daylight Savings Time
      - Additional Hour for Affected Tours
  - Management Rights
    - Assign Work
      - Minor Changes in Starting and Quitting Times
  - Subjects of Bargaining
    - At the Election of the Agency
      - Numbers, Types and Grades of Employees
        - Minor Changes in Starting and Quitting Times
- 57 Comp. Gen. 429 (1978)

DIGEST NOTES

A proposal is negotiable which provides that employees working on a shift at the time of conversion to daylight savings time will have the option of using one hour of annual leave or working an additional hour as a method of maintaining their regular 8 hour shift. Minor changes in starting and quitting times of previously established shifts is a matter subject to the duty to bargain. The proposal does not interfere with management's right under § 7106(a)(2)(B) to assign work, i.e. management's right to determine what particular duties to assign; to determine when work assignments will occur; and to determine to whom or to what position duties will be assigned. Also the proposal does not interfere with management's elective right under § 7106(b)(1) to determine the numbers, types and grades of employees or positions assigned to a tour of duty.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

21 FLRA No. 86

United Power Trades Council and Army Corps of Engineers, North Pacific Division (Axon, Arbitrator), Case No. 0-AR-940 (Decided April 24, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION 1600 Grounds for Review Award Conflicts with Applicable Law	7122(a)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Set Aside
    - Award Contrary to the Sup. Appropriations Act of 1982
  - Compensation
    - Prevailing Wage Employees
      - Corps of Engineers Special Power Rate Schedules
    - Shift Differentials
      - Corps of Engineers Special Power Rate Schedules
    - Wage Surveys
      - Prevailing Wage Employees
  - Exceptions Asserted in Appeal
    - Award Contrary to the Sup. Appropriations Act of 1982 [Pub. L. No. 97-257, 96 Stat. 832]
  - Remedy
    - Backpay
- FPM Chapter 532
- FPM Supplement 532-1
- S. Rep No. 97-516, 97th Cong., 2nd Sess. 80 (1982)
- 5 C.F.R. Part 532
- 5 U.S.C. §§ 5341-5349 [Prevailing Rate Systems Act of 1972]
- 5 U.S.C. § 5343(a)(1), (2), (3) and (4)

DIGEST NOTES

The grievance in this case arose when the activity discontinued payment of night differential pay to employees paid from Corps of Engineers Special Power Rate Schedules. The arbitrator concluded that the activity violated the parties' agreement by discontinuing payment of shift differentials. As a remedy, the arbitrator awarded backpay.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

As one of its exceptions, the agency contended that the award was contrary to the Supplemental Appropriations Act of 1982 [Pub. L. No. 97-257, 96 Stat. 832]. That statute clearly and unequivocally requires that prevailing rate employees of the Corps of Engineers paid from the Corps of Engineers Special Power Rate Schedules shall be paid wages as determined by the Department of Defense Wage Fixing Authority [DOD WFA] to be consistent with wages of employees of the Departments of Interior and Energy who perform similar work in the corresponding area. Further, the DOD WFA, the agency exclusively authorized to establish the appropriate wage schedules and rates for Corps of Engineers prevailing rate employees, determined that Interior and Energy employees in comparable positions were not paid a shift differential. Therefore shift differentials cannot be paid affected Corps of Engineers employees. Consequently, the Authority set aside the award.

Federal Labor Relations Authority

21 FLRA No. 67

Radio Officers Union D-3 MEBA and Dep't of Commerce, National Oceanic and Atmospheric Administration, Case No. 0-NG-1248 (Decided April 25, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2700 Petition for Review
    2702 Timeliness

STATUTE

7105(a)(2)(E)
7117(c)(2)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Timeliness

DIGEST NOTES

The Union's petition for review was dismissed as untimely because the union failed to file its petition within the specified time limits, after service of the agency's allegation of nonnegotiability and in accordance with § 2424.3, § 2429.21 and § 2429.22 of the Authority's Rules and Regulations.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 67

Radio Officers Union D-3 MEBA and Dep't of Commerce, National Oceanic and Atmospheric Administration, Case No. 0-NG-1218 (Decided April 25, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2708 Petition for Review	7117(c)(2)
2702 Timeliness	

SUBJECT MATTER INDEX ENTRIES

Negotiability
Procedure
Timeliness

DIGEST NOTES

The Union's petition for review was dismissed as untimely because the union failed to file its petition within the specified time limits, after service of the agency's allegation of nonnegotiability and in accordance with § 2424.3, § 2429.21 and § 2429.22 of the Authority's Rules and Regulations.

**Federal
Labor Relations
Authority**

21 FLRA No. 68

Fed'l Railroad Admin. and AFGE, Local 2814, Case No. 3-CA-50265 (Decided April 28, 1986)

DIGEST HEADINGS	**STATUTE**
4000 UNFAIR LABOR PRACTICES	7101
4500 Refusal to Negotiate	7106
7500 OFFICIAL TIME	7106(a)(1) and (5)
	7131

SUBJECT MATTER INDEX ENTRIES

Official Time
  Management Needs Precluding Granting Official Time
Unfair Labor Practice
  Union Violations
    Refusal to Negotiate

DIGEST NOTES

An exclusive representative cannot claim that it is entitled to the allocation of official time to a particular employee without regard to management's needs and requirements regarding the performance of assigned work. Thus the agency did not violate section 7116(a) (1) and (5) by refusing to grant official time to one of the union's five designated representatives for negotiating a new contract. The agency indicated to the union that the employee-representative at issue possessed a particular expertise that was was essential to the accomplishment of the agency's work and the agency was operating under a Congressional mandate which included time constraints. On the other hand, the union neither alleged nor showed that the employee was essential to the functioning of the union's bargaining team so that his absence required the union to discontinue negotiations or that the right to name another representative in his place was requested or denied.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 68

Fed'l Railroad Admin. and AFGE,
Local 2814, Case No. 3-CA-50265
(Decided April 28, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICES	7101
4500 Refusal to Negotiate	7106
7500 OFFICIAL TIME	7106(a)(1) and (5)
	7131

SUBJECT MATTER INDEX ENTRIES

Official Time
  Management Needs Precluding Granting Official Time
Unfair Labor Practice
  Union Violations
  Refusal to Negotiate

DIGEST NOTES

An exclusive representative cannot claim that it is entitled to the allocation of official time to a particular employee without regard to management's needs and requirements regarding the performance of assigned work. Thus the agency did not violate section 7116(a) (1) and (5) by refusing to grant official time to one of the union's five designated representatives for negotiating a new contract. The agency indicated to the union that the employee-representative at issue possessed a particular expertise that was essential to the accomplishment of the agency's work and the agency was operating under a Congressional mandate which included time constraints. On the other hand, the union neither alleged nor showed that the employee was essential to the functioning of the union's bargaining team so that his absence required the union to discontinue negotiations or that the right to name another representative in his place was requested or denied.

Federal Labor Relations Authority

21 FLRA No. 69

Bureau of Gov't Financial Operations HQ and NTEU And NTEU, Chapter 202
Case No. 3-CA-2646 (Decided April 28, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICES	7114(a)(2)(A)
4800 Otherwise Refuse to Comply with the Statute	7116(a)(1) and (8)
	7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply with the Statute
      - § 7114(a)(2)(A)
  - Formal Discussions
    - Interviews in Preparation for a MSPB Hearing
  - Remedy
    - Afford Union an Opportunity to be at Formal Discussions

DIGEST NOTES

The District of Columbia Court of Appeals set aside a supplemental decision of the Authority that the Respondent was not obligated under section 7114(a)(2)(A) to afford an exclusive representative of its employees notice of and the opportunity to be present at an interview of a unit employee in preparation for a hearing before the Merit Systems Protection Board (MSPB) and therefore did not violate section 7116(a)(1) and (8). The Court held, contrary to the Authority, that the subject matter of the interview concerned a grievance as that term is used in section 7114(a)(2)(A), that the interview constituted a formal discussion within the meaning of that section, and that the Respondent's failure to notify the exclusive representative and provide it with an opportunity to be present at the interview therefore was contrary to the requirements of section 7114(a)(2)(A) and thus in violation of section 7116(a)(1) and (8). The Authority accepted the opinion of the Court as the law of the case and issued an appropriate remedial order.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Bureau of Gov't Financial Operations
HQ and NTEU and NTEU, Chapter 202
Case No. 3-CA-2646 (decided April
28, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICES	7114(a)(2)(A)
4800 Otherwise Refuse to Comply with the Statute	7116(a)(1) and (8) 7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
- Agency Violations
  - Otherwise Refuse to Comply with the Statute
    - § 7114(a)(2)(A)
- Formal Discussions
  - Interviews in Preparation for a MSPB Hearing
- Remedy
  - Afford Union an Opportunity to be at Formal Discussions

DIGEST NOTES

The District of Columbia Court of Appeals set aside a supplemental decision of the Authority that the Respondent was not obligated under section 7114(a)(2)(A) to afford an exclusive representative of its employees notice of and the opportunity to be present at an interview of a unit employee in preparation for a hearing before the Merit Systems Protection Board (MSPB) and therefore did not violate section 7116(a)(1) and (8). The Court held, contrary to the Authority, that the subject matter of the interview concerned a grievance as that term is used in section 7114(a)(2)(A); that the interview constituted a formal discussion within the meaning of that section, and that the Respondent's failure to notify the exclusive representative and provide it with an opportunity to be present at the interview therefore was contrary to the requirements of section 7114(a)(2)(A) and thus in violation of section 7116(a)(1) and (8). The Authority accepted the opinion of the Court as the law of the case and issued an appropriate remedial order.

Federal
Labor Relations
Authority

21 FLRA No. 70

HHS, SSA and SSA Field Operations, New York Region and AFGE, Case No. 2-CA-40326 (Decided April 28, 1986)

DIGEST HEADINGS	**STATUTE**
4000 UNFAIR LABOR PRACTICE: AGENCY	7114(b)(4)
4500 Refusal to Negotiate	7114(b)(4)(B)
4800 Otherwise Refuse to Comply With the Statute	7116(a)(1), (5) and (8) 7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Information, Union's Right
    - Grievance Proceeding, Information Required
    - Performance Improvement Plans
    - Presumptive Relevance Test Rejected
    - Reasonable Available and Necessary [§ 7114(a)(2)(B)]
    - Routine Use [§ 552(a)(b)(3) of the Privacy Act]
  - Refusal to Negotiate
    - Information

DIGEST NOTES

The union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data. The Authority rejected the contention that the union's request for information was "presumptively relevant" or that § 552(a)(b)(3) of the Privacy Act permits the disclosure of the requested information. The duty to supply information under § 7114(b)(4) turns upon the nature of the request and the circumstances in each particular case. The union had sought the names of all employees in the district who were under a performance improvement plan and related information. However, the union would only state that the information was necessary in connection with the processing of a possible grievance despite management's reasonable request for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes. Under these circumstances, the Authority found that the agency did not refuse to furnish data in violation of § 7114(b)(4), § 7116(a)(1), (5) and (8).

21 FLRA No. 70

HHS, SSA and SSA Field Operations, New York Region and AFGE, Case No. 2-CA-40376 (Decided April 25, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7114(b)(4)
4500 Refusal to Negotiate	7114(b)(4)(B)
4800 Otherwise Refuse to Comply With the Statute	7116(a)(1), (5) and (8) 7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Information, Union's Right
    - Grievance Proceeding, Information Required
    - Performance Improvement Plans
    - Presumptive Relevance Test Rejected
    - Reasonable Available and Necessary [§ 7114(a)(2)(B)]
    - Routine Use [§ 552(a)(b)(3) of the Privacy Act]
  - Refusal to Negotiate
    - Information

DIGEST NOTES

The union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data. The Authority rejected the contention that the union's request for information was "presumptively relevant" or that § 552(a)(b)(3) of the Privacy Act permits the disclosure of the requested information. The duty to supply information under § 7114(b)(4) turns upon the nature of the request and the circumstances in each particular case. The union had sought the names of all employees in the district who were under a performance improvement plan and related information. However, the union would only state that the information was necessary in connection with the processing of a possible grievance despite management's reasonable request for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes. Under these circumstances, the Authority found that the agency did not refuse to furnish data in violation of § 7114(b)(4), § 7116(a)(1), (5) and (8).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDICES

21 FLRA No. [illegible]

Dep't of the Air Force, HQ, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio; and Dep't of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and AFGE, Local 1592, Case No. 7-CA-40482 (Decided April 29, 1986)

DIGEST HEADINGS | **STATUTE**

4000 UNFAIR LABOR PRACTICE: AGENCY | 7114(b)(4)

4500 Refusal to Negotiate | 7116(a)(1), (5) and (8)

7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practices
  Discipline
    Suspension, 1 Day
  Information
    Necessary
      Comparison of Penalties
    Reasonably Available
      Request Too Broad
  Otherwise Refuse to Comply with the Statute
    § 7114(b)(4)
  Procedure
    Settlement Discussions
      Evidence Obtained May Not Be Used to Evaluate Allegations in the Complaint
  Refusal to Negotiate
    Information
  Time Clocks
    Discipline for Punching Another Employee's Time Card

DIGEST NOTES

A request was too broad that sought information relating to all agency disciplinary actions involving the misuse of time clocks in order to determine for grievance purposes whether a one-day suspension given an employee for punching his supervisor's time card was fair. The information sought was located in seven separate field activities; involved files maintained on unit employees by over 6000 supervisors; was not maintained by type of disciplinary action; would have required at least three months to produce and involved a minimum screening expense of $30,000. Moreover, the information sought included offenses other than the one involved in the grievance. Thus the Authority concluded that the information request sought data that was neither reasonably available nor necessary under § 7114(b)(4) for the processing of the grievance. Accordingly, the Authority affirmed the Judge's conclusion that the agency did not violate § 7116(a)(1), (5) and (8) for not providing the requested information.

Given the agency's regulation providing for "like penalties for like offenses in like circumstances," specific information relating to the discipline by a diverse group of managers of employees who punched time cards for other employees is necessary [§ 7114(b)(4)] for the union to fulfill its representational duties.

Evidence pertaining to settlement discussions may not be utilized to prove the truth or falsity of any allegation set out in the complaint, the Judge ruled in a decision adopted by the Authority.

21 FLRA No. 65

[21 FLRA No. 65]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL,
AFL-CIO

Union

and

Case No. 0-NG-1176

DEPARTMENT OF THE NAVY,
NAVY PUBLIC WORKS CENTER,
NORFOLK, VIRGINIA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of the following Union proposal:[1]

Article 13, Section 6 (Shift Work)

> Unit employees working on a shift at the time of conversion to daylight savings time will have the option of using one hour of annual leave or working an additional hour as a method of maintaining their regular 8 hour shift.

II. Positions of the Parties

The Agency alleges the proposal is nonnegotiable because (1) it interferes with management's right to assign work under section 7106(a)(2)(B) and (2) it interferes with management's elective right to determine the numbers, types and grades of employees assigned to a work project or tour of duty under section 7106(b)(1).

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[1] The petition as originally filed requested review as to 2 Union proposals. Subsequently, the Union withdrew its request as to one proposal. That proposal will not be considered further here.

The Union argues that the proposal is not contrary to law, rule or agency regulation. The Union contends, without controversion, that the proposal would affect a maximum of five employees working on their regular shift when standard time changes to daylight savings time each year. The Union's intent is to insure that those few employees would not lose an hour of pay due to this artificially created circumstance.

III. Analysis

A. Right to Assign Work

In the present case, contrary to the Agency's contention, the proposal would not interfere with management's right to assign work by giving employees the option of working an additional hour. That right set forth in section 7106(a)(2)(B) includes the right to determine (1) what particular duties will be assigned, (2) when work assignments will occur, and (3) to whom or to what position duties will be assigned. *National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt*, 3 FLRA 769, 775 (1980), *aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553 (D.C. Cir. 1982). Prior to the change from standard to daylight savings time the Agency had already assigned work to these employees to be done during their normal shift. There is no showing in the record to indicate that the proposal would interfere with that previous work assignment. It would not interfere with management's right to assign particular duties, management's determination of when work assignments will occur or who will be assigned certain work. Further, the Authority concludes that the proposal does not require the Agency to grant an employee annual leave where mission needs dictate otherwise. See *National Treasury Employees Union and Federal Deposit Insurance Corporation*, 14 FLRA 179 (1984). Therefore, contrary to the Agency's argument, the Authority finds that the proposal does not interfere with the Agency's right to assign work by granting employees the option of taking annual leave.

B. Elective Right to Determine Numbers, Types, and Grades

The Agency argues that the proposal has the effect of allowing employees to decide that twice the number of employees management has determined necessary would be assigned to a tour of duty. It alleges that this concerns the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," which is a matter negotiable only at the election of the Agency.

The Authority has consistently held that a proposal would be negotiable only at the election of an agency under this provision of section 7106(b)(1) if (1) the language of the proposal explicitly relates to the numbers, types, and grades of employees or positions assigned to a tour of duty so as to come within the literal language of that section, or (2) the agency demonstrates that the proposal is directly or integrally related to the numbers, types, and grades of employees or positions assigned to a tour of duty so as to be determinative of numbers, types, or grades. See, for example, American Federation of Government Employees, AFL-CIO, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441, 444-45 (1981). The proposal here does not on its face explicitly relate to the numbers, types, and grades of employees or positions assigned to a tour of duty nor has the Agency demonstrated that a yearly one hour shift adjustment for 5 employees has a direct or integral relationship to the assignment of employees to tours of duty. Specifically, there is no indication in the record that the yearly adjustment would establish a new shift or tour of duty or effect changes in the numbers, types, and grades of employees or positions assigned to shifts.

In the Authority's view, implementation of the proposal would amount to a minor, once-a-year adjustment in the quitting time of the affected employees assigned to this tour of duty. The Authority has held in a number of cases that minor changes in starting and quitting times of previously established shifts is a matter subject to the duty to bargain. See, for example, Department of Transportation, Federal Aviation Administration, Washington, D.C., and its Chicago Airways Facilities Sector and Professional Airways Systems Specialists, AFL-CIO, 16 FLRA 479, 481 (1984) and cases cited therein. We therefore determine that the Agency has failed to demonstrate that the proposal interferes with its elective right to determine the numbers, types, and grades of employees assigned to a work project or tour of duty under the Statute.

IV. Conclusion

The Authority finds, based on the foregoing analysis, that the Union's proposal is within the duty to bargain under the Statute.2/

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on this proposal.3/

Issued, Washington, D.C., April 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ We note that the Comptroller General has determined that an agency may by union agreement or agency policy permit employees to work an additional hour on the day that daylight savings time begins as a method of maintaining the regular 8-hour shift and normal pay. 57 Comp. Gen. 429 (1978). Our conclusion here is consistent with that decision. However, we agree with the Agency's view that the Comptroller General decision is not dispositive of the issue decided in this case concerning the negotiability of the proposal under the Statute.

3/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED POWER TRADES COUNCIL

Union

and

Case No. 0-AR-960

UNITED STATES ARMY CORPS OF
ENGINEERS, NORTH PACIFIC DIVISION

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Gary L. Axon filed on behalf of the Activity by the Department of the Army (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance arose when the Activity discontinued payment of night differential pay for certain power plant operational personnel who worked night shift hours. The Activity based its action on the 1983 Pacific Northwest Regional Power Rate Schedule issued by the Department of Defense Wage Fixing Authority.

The wages of the employees involved are governed by the Prevailing Rate Systems Act of 1972, which is codified at 5 U.S.C. §§ 5341-5349 and which is commonly referred to as the prevailing rate statute.[1] Section 5341 provides that the general policy of the prevailing rate statute is that the rates of pay of prevailing rate employees are to be fixed and adjusted from time to time, as nearly as is consistent with the public interest, in accordance with the prevailing rates paid for comparable work in the local area by private sector employers. Under section 5343, which establishes the basic mechanism to carry out this policy, the Office of Personnel Management (OPM) is responsible for defining geographical wage areas and for designating a lead agency for each area. 5 U.S.C. § 5343(a)(1) and (2). Lead agencies are responsible for conducting wage surveys, analyzing wage survey data, and developing and establishing appropriate wage schedules and rates for prevailing rate employees. 5 U.S.C. § 5343(a)(3). The head of each agency having prevailing rate employees in a wage area is required to apply to those employees the wage schedules and rates established by the lead agency. 5 U.S.C. § 5343(a)(4). OPM has implemented the prevailing rate statute in 5 CFR part 532, Federal Personnel Manual (FPM) chapter 532 and FPM Supplement 532-1. Section 5343(f) of the prevailing rate statute and FPM Supp. 532-1 provide for the payment of a night differential for prevailing rate employees.

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[1] Watervliet Arsenal, Department of the Army and National Association of Government Employees, Local R2-98, 10 FLRA 670 (1982).

With regard to the prevailing rate employees involved in this case, OPM designated the Department of Defense Wage Fixing Authority (DOD WFA) as the lead agency to conduct wage surveys among private electric utilities in the area in which the Activity operated hydroelectric power producing plants and to develop and establish the appropriate wage schedules. DOD WFA's Pacific Northwest Power Rate Schedule established the rates of pay for the Activity's prevailing rate employees. In addition, the employees were authorized night shift differential pay as provided for in the prevailing rate statute and FPM Supp. 532-1. Moreover, the parties' collective bargaining agreement provided that night differential would be paid in accordance with FPM Supp. 532-1.

In 1982, the Supplemental Appropriations Act of 1982 was signed into law (Pub. L. No. 97-257, 96 Stat. 832). That Act provides, in part:

> Without regard to any other provision of law limiting the amounts payable to prevailing wage rate employees, United States Army Corps of Engineers employees paid from Corps of Engineers Special Power Rate Schedules shall be paid, beginning the effective date of each annual wage survey in the region after the date of enactment of this Act, wages as determined by the Department of Defense Wage Fixing Authority to be consistent with

> wages of the Department of Energy and the Department of the Interior employees performing similar work in the corresponding area. . . .

The legislative history of the provision indicates that Congress was concerned that Corps of Engineers power plant employees were being paid less than employees of the Departments of Interior and Energy in the same geographic area who were doing comparable jobs, and that Congress intended to correct that inequity. Thus, the Senate Committee Report on the Act provides:

> The Committee has been informed that certain Corps of Engineers power plant operational personnel are paid less than personnel of the agencies doing comparable jobs in nearby locations. The Committee believes that all Federal employees should receive comparable compensation for performing comparable work and has concurred with the House provision in the bill that would remove the inequity.

S. Rep. No. 97-516, 97th Cong., 2nd Sess. 80 (1982).

In 1983, DOD WFA issued the first Pacific Northwest Regional Power Rate Schedule pursuant to the Supplemental Appropriations Act, following wage surveys at Interior and Energy facilities in the region. Those surveys revealed that while Interior and Energy employees in comparable positions were compensated at higher rates than Corps of Engineers employees in some respects, such as overtime pay, they were not paid shift differential. Accordingly, DOD WFA's 1983 Rate Schedule and subsequent amendments provided for pay rates for Corps of Engineer employees consistent with the rates for Interior and Energy employees and specifically excluded shift differential pay. The Activity implemented the Rate Schedule and discontinued payment of shift differential to its prevailing rate employees. The Union then filed the grievance in this case alleging that the Activity had thereby violated the parties' agreement.

The Arbitrator determined that the parties' agreement expressly provided for payment of shift differential and that nothing in the Supplemental Appropriations Act required covered employees to forego the benefits of the agreement.

Accordingly, as his award, the Arbitrator concluded that the Activity had violated the parties' agreement by discontinuing payment of shift differential. As a remedy, the Arbitrator awarded the affected employees backpay from the date the shift differential was discontinued and directed the Activity to reinstitute shift differential pay until the execution of a new agreement.

III. EXCEPTION

As one of its exceptions, the Agency contends the Arbitrator's award is contrary to the Supplemental Appropriations Act of 1982.

IV. ANALYSIS AND CONCLUSION

The Supplemental Appropriations Act of 1982 clearly and unequivocally requires that prevailing rate employees of the Corps of Engineers paid from the Corps of Engineers Special Power Rate Schedules shall be paid wages as determined by the DOD WFA to be consistent with wages of employees of the Departments of the Interior and Energy who perform similar work in the corresponding area. Further, the DOD WFA, the agency exclusively authorized to establish the appropriate wage schedules and rates for Corps of Engineers prevailing rate employees, determined that Interior and Energy employees in comparable positions were not paid a shift differential. Therefore, in view of the clear language of the Supplemental Appropriations Act and the intent of Congress as expressed in the related legislative history, shift differential could no longer be paid to the affected Corps of Engineers employees after DOD WFA made its determination. The Authority finds that because the Supplemental Appropriations Act effectively prohibited payment of a shift differential to the Activity's prevailing rate employees after DOD WFA's determination, the Arbitrator was precluded from directing otherwise. Consequently, the Authority concludes that the Arbitrator's award is deficient as contrary to the Supplemental Appropriations Act of 1982.

V. **DECISION**

Accordingly, for the above reasons, the Arbitrator's award is set aside.[2/]

Issued, Washington, D.C., April 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In view of this decision, the Authority has determined that it is not necessary to address the Agency's other exception to the award.

21 FLRA No. 67

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

RADIO OFFICERS UNION
D-3 NMEBA, AFL-CIO

Union

and

Case No. 0-NG-1248

DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under section 2429.23(d) of the Authority's rules of procedure, the time limit established in section 7117(c)(2) of the Statute may not extended or waived by the Authority.

As part of its petition for review, the Union submitted a copy of the Agency's allegation of nonnegotiability dated January 22, 1986, which allegation apparently was served on the Union by mail on the same date. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on February 11, 1986.

However, the petition for review was mistakenly addressed to the Authority's Washington Regional Office and sent by certified mail on February 6, 1986. The regional office has no record of receipt of such appeal, and the Union advises that it does not have proof of receipt. Although another copy of the petition for review was later sent to the Authority at its national office in Washington, D.C., it was not filed until March 19, 1986, and thus was untimely.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 25, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL RAILROAD ADMINISTRATION

Respondent

and

Case No. 3-CA-50265

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2814, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and by the General Counsel.

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to recognize and bargain in good faith with a representative designated by the Charging Party (the Union) for collective bargaining purposes. Specifically, the complaint alleges that on or about April 1, 1985,*/ supervisor Brenda Hooks told Union President Fiori Perdichizzi that employee Joel Litzky could not serve as a member of, and would not be available to serve on, the Union negotiating team.

II. The Facts

On or about January 14, the parties agreed to ground rules for the negotiation of a new collective bargaining agreement which provided, in part, for negotiations to begin

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*/ All dates refer to 1985.

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on April 16, to be conducted in two-week sessions, with two weeks between each session, until completed. The Union's team members were to be granted official time to participate in the negotiations. The Union then designated its negotiating team, which included Litzky. Litzky was part of the Respondent's Conrail Division, whose function was to give support to the Secretary of Transportation in accomplishing, by Congressional mandate, including deadlines, the transfer of Conrail to the private sector. On April 1, Hooks orally advised Perdichizzi that Litzky would not be given official time to serve as a member of the Union negotiating team because of workload considerations. Litzky then informed Perdichizzi that his current workload should not prevent him from participating in negotiations as, in his opinion, he was up to date on all overdue or urgent correspondence. On April 9, Hooks informed Perdichizzi by memorandum that, due to workload constraints, Litzky would not be given official time to serve on the Union negotiating team. By memorandum dated April 12, Perdichizzi notified the Respondent that, due to its actions, the Union would not proceed with negotiations as scheduled.

III. Positions of the Parties

The Respondent states that, after being informed that Litzky had been selected by the Union, it thoroughly reviewed both his current and anticipated workload; estimated that Litzky's participation as a member of the bargaining team would require that at least one half of his duty time be devoted to the negotiating sessions; noted that Litzky already held the position of grievance chairperson, which position itself would require some duty time; and concluded that Litzky's function as the sole person who, among other duties, had been answering Congressional inquiries, was critical to the Conrail Division's mandate. The Respondent argues that its actions did not constitute either an interference with the rights of the Union or Litzky, or a failure to negotiate in good faith, but rather were a proper exercise of management's right to determine that its workload in view of all these considerations would not permit it to release Litzky from his assigned duties to allow him to participate in negotiations at that time.

The General Counsel argues that management interfered with the Union's right to designate its own representative(s) for collective bargaining purposes, noting that the ground rules agreed to by the parties said nothing more than that the parties would designate their respective representatives, and argues that Litzky, having been designated by the Union, must therefore be accepted by management as a member of the Union's team. The General Counsel also argues that Litzky's duties at the time were not so demanding or critical as to justify management's argument that he could not be spared to serve on the Union's team.

IV. Analysis

The actions of the Respondent complained of here arose out of a conflict between the right of employee Litzky to official time, under section 7131 of the Statute, to serve as a designated member of the Union's bargaining team and the right of management, under section 7106 of the Statute, to manage consistent with an effective and efficient Government. Section 7101 of the Statute provides both for the right of employees to participate in the collective bargaining process through labor organizations of their own choosing and for the safeguarding of the public interest in maintaining an effective and efficient Government. Thus, the Authority has held that management cannot deny official time for representational functions, including negotiations, to a representative of the exclusive representative unless it can show that the use of official time will interfere with the accomplishment of the agency's work. On the other hand, the Authority has also explained that an exclusive representative cannot claim that it is entitled to the allocation of official time to a particular employee without regard to management's needs and requirements regarding the performance of assigned work. *See Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia*, 15 FLRA 867 (1984); *American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 19 FLRA No. 23 (1985); *petition for review filed, sub nom. American Federation of Government Employees, Council of Locals No. 214 v. FLRA*, No. 85-1500 (D.C. Cir. Aug. 12, 1985); *Department of the Air Force, Scott Air Force Base, Illinois*, 20 FLRA No. 89 (1985), *petition for review filed, sub nom. National Association of Government Employees, Local R7-23 v. FLRA*, No. 86-1011 (D.C. Cir. Jan. 7, 1986).

In light of these principles, it is the Authority's view that the Respondent's denial of official time to employee Litzky was not unlawful, as it has demonstrated that the use of official time by him at the time requested, would have interfered with the accomplishment of the agency's work. In this regard, it is noted that the Respondent was operating under a Congressional mandate which included time constraints. Litzky was performing a function which in management's judgment was essential, and which required his particular expertise. This was explained to the Union in management's April 9 memorandum. Conversely, Litzky was but one of five designated members of the Union's negotiating team, and it is neither alleged nor shown that Litzky was essential to the functioning of the Union's bargaining team so that his absence required the Union to discontinue negotiations or that the right to name another representative in his place was requested or denied. In short, it appears that the argument of the General Counsel is that the right to choose employees as members of a union bargaining team is absolute. As noted above, however, the Authority has previously held to the contrary.

V. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties, and concludes that the Respondent did not violate section 7116(a)(1) or (5) of the Statute, as alleged, and therefore we shall dismiss the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-50265 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C. April 28, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 69]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF GOVERNMENT FINANCIAL
OPERATIONS, HEADQUARTERS

Respondent

and

Case No. 3-CA-2646
(15 FLRA 423)

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 202

Charging Party

SUPPLEMENTAL DECISION AND ORDER

On August 1, 1984, the Authority issued its Supplemental Decision and Order in the above-entitled proceeding[1] in which it found that the Respondent was not obligated under section 7114(a)(2)(A) of the Federal Service Labor-Management

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[1] The Authority issued its original decision on this matter on September 15, 1983, in which it found that the Respondent, Bureau of Government Financial Operations, Headquarters, had not violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute and ordered that the complaint be dismissed, Bureau of Government Financial Operations, Headquarters, 13 FLRA 27 (1983). Subsequent thereto, the Union petitioned for review of the Authority's decision in the U.S. Court of Appeals for the District of Columbia Circuit (No. 83-2180). Thereafter, the Authority filed and the court granted a motion to remand in order to allow the Authority an opportunity to address with more particularity in a supplemental decision the application of Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982), to the instant case.

Relations Statute2/ (the Statute) to afford an exclusive representative of its employees notice of and the opportunity to be present at an interview of a unit employee in preparation for a hearing before the Merit Systems Protection Board (MSPB) and therefore had not violated section 7116(a)(1) and (8) of the Statute.3/ Bureau of Government Financial Operations, Headquarters, 15 FLRA 423 (1984). Thereafter, on October 11, 1985, the U.S. Court of Appeals for the District of Columbia Circuit set aside the Authority's Decision and held, contrary to the Authority, that the subject matter of the interview concerned a grievance as that term is used in section 7114(a)(2)(A) of the Statute, that the interview constituted a formal discussion within the meaning of section 7114(a)(2)(A), and that the Respondent's failure to notify the exclusive representative and provide it with an opportunity to be

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2/ Section 7114(a)(2)(A) provides:

§7114. Representation rights and duties

. . . .

> (a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment[.]

3/ Section 7116(a)(1) and (8) provides:

§7116. Unfair labor practices

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(Continued)

[illegible] at the interview therefore was contrary to the requirements of section 7114(a)(2)(A) and thus in violation of section 7116(a)(1) and (8) of the Statute. *National Treasury Employees Union v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985).

The Authority accepts the court's opinion as the law of the case and, consistent with that opinion, shall issue the following remedial order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Bureau of Government Financial Operations, Headquarters, shall:

1. Cease and desist from:

(a) Conducting formal discussions with employees in the bargaining unit exclusively represented by the National Treasury Employees Union, concerning grievances or any personnel policy or practices or other general conditions of employment, without affording the NTEU prior notice of, and the opportunity to be represented at, such formal discussions.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(Continued)

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter[.]

(a) Notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions with members of the bargaining unit exclusively represented by the NTEU concerning grievances or any personnel policy or practices or other general conditions of employment.

(b) Post at its facility where employees in the bargaining unit are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 28, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with employees in the bargaining unit exclusively represented by the National Treasury Employees Union, concerning grievances or any personnel policy or practices or other general conditions of employment, without affording the NTEU prior notice of, and the opportunity to be represented at, such formal discussions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions with members of the bargaining unit exclusively represented by the NTEU concerning grievances or any personnel policy or practices or other general conditions of employment.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, N.W., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION AND SOCIAL SECURITY
ADMINISTRATION FIELD OPERATIONS
NEW YORK REGION

Respondent

and

Case No. 2-CA-40326

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The issue concerns whether the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to furnish the Charging Party (the Union) with information it had requested pursuant to section 7114(b)(4) of the Statute.

II. Background and Judge's Conclusion

The basic facts in this case are not in dispute, and were stipulated to the Judge at the hearing. Based upon various "complaints" allegedly reported to it by employees of the Respondent's Downtown New York District Office, the Union requested that the Respondent furnish to the Union certain information pursuant to section 7114(b)(4) of the Statute. Basically the Union asked that it be furnished the names of all employees in the District Office who had been during the past 12 months, or were currently, under a performance improvement plan; the operative dates of the plans; and the race, sex, color, national origin, religion and age of all those identified. The Union stated only that the information requested was "necessary in connection with the processing of a possible grievance." By an exchange of letters, it became clear that the Union would accept only unsanitized information, and that the Respondent refused to furnish the requested information unless the Union supplied enough of an explanation that would allow management to make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes.

The Judge found that the Respondent was entitled to know why the information requested was needed by the Union, that the only reason given was insufficient, and that, in the face of the Union's refusal to clarify the request the Respondent was not obligated under the Statute to furnish the information.

The Judge further addressed the arguments raised by the parties in connection with the Privacy Act, particularly the Respondent's assertion that the "presumptive relevance theory" asserted by the General Counsel was inapplicable to the information requests because of Privacy Act considerations and the General Counsel's contention that the requirements of the Privacy Act had been met. In Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region, 21 FLRA No. 35 (1986), the Authority basically adopted its Administrative Law Judge's findings, conclusions and recommended dismissal of the complaint. In that case, involving these same parties, the Judge noted that even assuming the information requested was presumptively relevant, since the Union was seeking unsanitized data of a personal nature, the Respondent's obligation to adhere to the Privacy Act had to be balanced against the Union's need for the information. Considering the Respondent's obligations under the Privacy Act and the Statute, he found no merit to the General Counsel's "presumptive relevance theory" in the circumstances of the case, where the necessity of the data to the Union was never conveyed to the Respondent and such necessity was not apparent from the surrounding circumstances. The Judge here cited to and adopted the analysis and reasoning of the Judge in 21 FLRA No. 35, and in the circumstances of this case recommended that the complaint be dismissed.

III. Positions of the Parties

The General Counsel basically argues that the information sought by the Union was necessary to enable it to determine whether a grievance or EEO complaint should be filed under the parties' agreement or to take other appropriate action; that the Union's explanation that the information was "necessary in connection with the processing of a possible grievance" was sufficiently precise, i.e., the requirement of establishing relevancy and necessity was met because the information was "presumptively relevant"; and that the Judge erred by failing to find the violations as alleged. Further, the General Counsel asserts that the "routine use" exception in the Privacy Act permits the disclosure of the requested information. More specifically, the General Counsel asserts that section 552(a)(b)(3) of the Privacy Act permits the disclosure of the requested information which is contained in a system of records maintained by the Office of Personnel Management (OPM) identified as OPM/GOVT-2, "Employee Performance File System Records." The Respondent, whose arguments before the Judge were basically adopted, did not file an opposition brief with the Authority.

IV. Analysis

In agreement with the Judge, the Authority finds that the General Counsel has not met the burden of proving that the Respondent failed to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it failed to furnish the requested information to the Union. In reaching this conclusion, the Authority rejects the General Counsel's contention that the information sought was presumptively relevant. Rather, as the Authority has previously held, section 7114(b)(4)(B) of the Statute requires that the information requested be "reasonably available and necessary," Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, 19 FLRA No. 47 (1985), and that a union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data, but the duty to supply data under section 7114(b)(4) of the Statute turns upon the nature of the request and the circumstances in each particular case. Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624 (1985), petition for review filed *sub nom. American Federation of Government Employees, Local 1345 v. FLRA*, No. 85-1378 (D.C. Cir. June 21, 1985). In the instant case, the record reveals that the Union failed and refused to explain why it was seeking the information despite management's reasonable requests for clarification so that it could make an informed judgment as to whether or to what extent the information sought was necessary for collective bargaining purposes. Thus, under such circumstances, the Authority finds that the Respondent did not unlawfully refuse to furnish the data sought by the Union. See *Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region*, 21 FLRA No. 35 (1986); *Internal Revenue Service, Buffalo District, Buffalo, New York*, 7 FLRA 654 (1982).*/

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order except as noted in the footnote. We therefore conclude that the Respondent did not fail to comply with section 7114(b)(4) in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the information sought by the Union. Accordingly, the complaint shall be dismissed.

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*/ In view of the finding that the information sought by the Union was not shown to be necessary within the meaning of section 7114(b)(4)(B) of the Statute, the Authority finds it unnecessary to pass upon the Judge's findings pertaining to his consideration of the Privacy Act or the contention that the "routine use" exception in the Privacy Act permits the disclosure of the requested information.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-40326 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 28, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION and SOCIAL SECURITY ADMINISTRATION FIELD OPERATIONS, NEW YORK REGION

Respondent

and

Case No.: 2-CA-40326

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

. . . .

Thomas H. Gabriel, Esq.
For the Respondent

Cecilia McCarthy, Esq.
For the Charging Party

Joel Hornstein, Esq.
E. A. Jones, Esq.
For the General Counsel

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191, (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, et seq.

The charge in this matter was filed by the American Federation of Government Employees, AFL-CIO (herein called the Charging Party or the Union) against the Department of Health and Human Services, Social

Security Administration, and Social Security Administration Field Operations, New York Region (herein collectively called the Respondent), on May 1, 1984. On June 29, 1984, the General Counsel of the FLRA by the Regional Director for Region II issued a Complaint and Notice of Hearing alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 7116(a)(1), (5) and (8) of the Statute, by failing and refusing to furnish the Union certain necessary and relevant information relating to the issuance of Performance Improvement Plans (PIPs) at Respondent's Downtown New York District Office, which information was necessary and relevant in order to determine whether a grievance should be filed under the parties' collective bargaining agreement.

On July 17, 1984, Respondent filed an answer denying the substantive allegations of the complaint.

A hearing was held before the undersigned in New York, New York and the Union, Respondent and General Counsel of the FLRA were represented. All parties had the opportunity to examine witnesses, submit documents and other evidence. All parties entered into an extensive stipulation of facts. Post-hearing briefs have been filed and duly considered.

Based upon the entire record herein I make the following:

Findings of Fact

At all times material herein, the Department of Health and Human Services, Social Security Administration (herein called DHHS SSA), has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute. Additionally, SSA Field Operations, New York Region, has been, and is now, a constituent entity within DHHS SSA and an agent acting on its behalf. The SSA Downtown New York District Office has been, and is now, a constituent entity within DHHS SSA and an agent acting on its behalf.

At all times material herein, the Charging Party has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute. Additionally, the Union has been, and is now, the certified exclusive collective bargaining representative for a consolidated, nationwide unit of certain employees of Respondent, including all employees employed in the District and Branch Offices of DHHS SSA in the States of New York and New Jersey, with exclusions not relevant herein. Pursuant to appropriate delegations of authority, the American Federation of Government Employees, Local 3369, AFL-CIO (AFGE Local 3369), has been recognized by Respondent as the agent of the Union for the purposes of collective bargaining at the SSA Downtown New York District Office. The parties are operating under a national collective bargaining agreement (herein called the Agreement) effective June 11, 1982.

During late February and March of 1984, several unit employees from Respondent's Downtown New York District Office contacted AFGE Local 3369 President John Riordan. Riordan subsequently discussed complaints made by these employees with AFGE Local 3369's on-site representative at Respondent's Downtown New York District Office. Based on the complaints of the employees and the discussion with the on-site representative, the Union believed that potential discrimination complaints and/or grievances existed regarding Equal Employment Opportunity (herein called EEO) matters or the issuance of Performance Improvement Plans (herein called PIPs) at Respondent's Downtown New York District Office. A PIP may have serious consequences for an employee, including possible denial of a within-grade-increase, an adverse action or a reassignment. A PIP is a written plan prepared for an employee who in his or her supervisor's judgment is failing to meet one or more critical elements of his or her generic job tasks (performance standards) and/or may be denied his or her next within-grade-increase (herein called a WIGI). A PIP may result in a possible denial of a WIGI. It may also lead to an adverse action or a reassignment. For probationary employees, a PIP may lead directly to termination. PIPs last for a specific period of time, usually 60 or more days.

Article 24 of the Agreement concerns grievance procedures. Under Section 9 of Article 24, an employee, or the Union on behalf of an employee or employees, can file a grievance regarding EEO matters or PIP issues. Section 10 of Article 24 permits the Charging Party to file a Union-Management grievance concerning EEO matters or PIP issues. Additionally, Article 18, Section 5 of the Agreement provides for the filing of an EEO complaint under Respondent's "agency EEO complaint procedure." Finally, Article 24, Section 8 of the Agreement provides for discussion with an EEO counselor prior to the filing of an EEO complaint.

Based on the information from the employees of the Downtown District Office and the Union's belief that potential grievances or complaints existed, Riordan, by letter dated March 30, 1984, requested certain information from the District Manager of Respondent's Downtown New York District Office, Jefferson Woodcox. Pursuant to Section 7114(b) of the Statute, Riordan requested:

> 1. Names and positions of all employees in the Downtown district office currently under a performance improvement plan (PIP) in accordance with Article 21, Section 7, C of the National Agreement.
>
> 2. Dates that PIPs were initiated for each employee.
>
> 3. Names and positions of all employees in the Downtown district office that were placed on a PIP in the last twelve months but not currently on a PIP.
>
> 4. Dates that PIPs were initiated and concluded for each employee.

> 5. Please provide the race, sex, color, national orgin (sic), religion (if known) and indicate if employee is age forty or above for all employees given PIPs in (1) and (3) above.

Additionally, the letter stated that the information requested was "necessary in connection with the processing of a possible grievance." This was the sole reason made known to the Respondent for the data requested.

The information requested in the March 30, 1984 letter in numbered paragraphs (1) through (4) and in paragraph (5) as to race, sex and age was normally maintained by Respondent in the regular course of business and did not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining. Additionally, the information sought was not available to the Union from any other source.

Charging Party requested the names and positions of employees currently on PIPs and the dates the PIPs were initiated because it would enable the Union to determine whether management had issued a disproportionate number of PIPs and because such information would be relevant in determining whether to file a grievance or an EEO complaint. The Union also sought the dates that PIPs were initiated for the purpose of correlating the PIPs and other possible contemporaneous actions by, against or involving the unit employees. The Union sought the identification of employees on PIPs in the prior twelve months and the dates of the PIPs because only a few employees might have been on PIPs at the time of the March 30, 1984 request, but additional employees might have been on and completed PIPs prior to that date. The information was relevant for determining whether a disproportionate number of employees were on PIPs and whether such PIPs were related to other actions involving the employees. These facts would help determine whether a grievance or complaint would be filed. Finally, the information regarding the race, sex, color, national origin, religion and age of the employees issued PIPs in the prior twelve months was requested to enable the Union to determine whether to file a grievance or an EEO complaint. The information requested was required and requested in unsanitized form in order to permit the Union to investigate and pursue fully any potential grievances or EEO complaints under the negotiated grievance procedure or the agency EEO procedure.

By letter dated April 10, 1984, District Manager Woodcox refused to furnish the information requested by Riordan in the March 30, 1984 letter. Woodcox stated that Riordan's request appeared to address the same issue as an information request made by another official of AFGE Local 3369. Woodcox also indicated if that were not the case, he wanted to know the issue and whether it related to an EEO complaint. Woodcox explained that this information would assist him in deciding whether or not to release, in an unsanitized format, some or all of the data the Union had requested.

By letter dated April 16, 1984, Riordan replied to Woodcox's letter of April 10, 1984. Riordan indicated his information request did not address the same issues as the request Woodcox had received from another Union official. He repeated that the sole purpose for the information was a "possible grievance." He also explained that information in a sanitized format would not allow the Union to determine whether it should file a grievance. Riordan acknowledged that a small part of his request may have been duplicative of the request of the other Union official, but he asked Woodcox to furnish to him all the information that he had requested that was not duplicative after furnishing the duplicative information to the other Union official.

By letter dated April 24, 1984, Woodcox again refused to furnish the information requested by the Union in the March 30 and April 16, 1984 letters. Woodcox stated in the letter that duplication of information was no longer a problem. Additionally, he informed Riordan that in order to provide data in an unsanitized form, he needed to know "the precise nature of the potential grievance" so that he could determine whether the requested information in unsanitized form was necessary and relevant. Woodcox further stated that unless he was informed of the precise nature of the potential grievance, he could only provide Riordan with a sanitized list of employees currently under a PIP. Finally, concerning the Union's request for data on race, national origin and religion, Woodcox stated that he could not visually ascertain these characteristics and would not consider asking such questions of the employees involved.

Since April 24, 1984, Respondent has failed and refused to furnish to the Charging Party the information requested by it in numbered paragraphs (1) through (4) and paragraph (5) as to race, sex and age of the March 30, 1984 letter. Other than the correspondence referred to above, no other communications between the parties regarding Charging Party's information request have occurred. At no time has Respondent contended that the information, requested in paragraph (1) through (4) and paragraph (5) as to race, sex and age of the March 30, 1984 information request, is not reasonably available.*/ Respondent never advised the Charging Party as to the availability of the information requested in the March 30, 1984 letter relating to the color, national origin and religion of the employees on PIPs in the prior twelve months.

Discussion and Conclusions of Law

General Counsel of the FLRA contends that the information requested by Charging Party regarding the PIPs was necessary and relevant to enable Charging Party to determine whether to file a grievance or EEO complaint under the agreement and therefore Respondent's failure to furnish the data violated Sections 7116(a)(1), (5) and (8) of the Statute.

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*/ In fact, information was maintained as to race, sex and age.

Section 7114(b)(4) of the Statute sets forth the duty of Respondent to furnish data, upon request, to the Charging Party, the exclusive collective representative or its authorized agent, AFGE Local 2369. The obligation to provide data encompasses information that: (A) is normally maintained by the agency in the regular course of business; (B) is reasonably available; (C) is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; (D) does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining; and (E) is not prohibited from disclosure by law. The record is clear in this case that the Union requested the names and positions of all employees currently on PIPs and the dates such PIPs were initiated; the names and positions of all employees on PIPs in the prior twelve months and the dates of such PIPs; and the race, sex, color, national origin, religion and age of the above employees. Further, the record clearly demonstrates that all of the information, with the exception of the data regarding color, national origin and religion, was normally maintained by Respondent in the regular course of business. Equally clear from the record is the fact that the information, with the same exceptions mentioned above, does not constitute guidance, advice, counsel or training provided to management officials or supervisors relating to collective bargaining. Finally, it appears from the record that the requested information, with the same exceptions noted above, was reasonably available to Respondent. Respondent has not claimed otherwise and it is reasonable to assume that the information, relating as it does to the identity and work performance of unit employees, would be reasonably available to the supervisors of those employees, including District Manager Woodcox.

Respondent essentially contends that the Union was obligated to advise Respondent at the time of the request of the relevancy and necessity of obtaining the information in an unsanitized form and the Union's failure to do so, when so requested, privileged Respondent's refusal to furnish the data. General Counsel of the FLRA argues the information sought was of such a nature as to be presumptively relevant and necessary and therefore, the Union was not required to provide Respondent with any specific showing of relevancy and necessity. Respondent argues that the presumptive relevance theory is inapplicable to the requests herein, especially in view of the requirements of the Privacy Act of 1974, 5 U.S.C. § 552 a. In Department of Health and Human Services, Social Security Administration, and Social Security Administration Field Operations, New York Region, OALJ 85-56 (1985), Administrative Law Judge Salvatore J. Arrigo analyzed in detail the state of the law with respect to the Section 7114(b)(4) rights of labor organizations to information, Respondents' rights to know why the information is needed and the area of presumptive relevancy. Judge Arrigo discussed, in detail, both the cases under the Statute and in the private sector. I adopt his analyses, reasoning and conclusions in this regard, especially when he states at page 23 of his decision:

> "Rather I conclude that under the Statute when unsanitized personal information is sought wherein Privacy Act considerations are legitimately raised, sufficient facts demonstrating a union's need must be available to an agency as the employer can balance the union's need for the information against the employer's duties and obligations under the Privacy Act and the Statute."

In light of the foregoing conclusion, in the subject case Respondent had a legitimate Privacy Act concern as to whether to provide the Union with the unsanitized PIPs and the requested information concerning race, sex, age, etc. of the employees involved. Respondent was therefore entitled to know why the Union needed the requested information so Respondent could balance the Privacy Act considerations with those of the Statute. The Union's mere statement that the information was "necessary in connection with the processing of a possible grievance" was not sufficiently precise to have permitted Respondent to balance its various duties and obligations under the Privacy Act and the Statute. Thus Respondent had no obligation to produce the requested information until advised of the precise reason the unsanitized information was needed.

Accordingly I conclude that Respondent did not violate the Statute when it refused to furnish the Union with the requested data and I recommend the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 2-CA-40326 be and hereby is dismissed.

Samuel A Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 28, 1985
Washington, DC

21 FLRA No. 71 [21 FLRA No. 71]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO; AND DEPARTMENT OF THE
AIR FORCE, OGDEN AIR LOGISTICS
CENTER, HILL AIR FORCE BASE, UTAH

Respondents

and Case No. 7-CA-40682

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because the General Counsel filed exceptions to the Decision of the Administrative Law Judge which dismissed the complaint. The Respondent filed an opposition. The case arose as a result of the Respondents' refusal to supply the Charging Party with certain documents relating to employee misuse of time clocks, which the Union had requested in connection with the processing of a grievance. The request for information was made under the provisions of section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute). The refusal is alleged to have violated section 7116(a)(1), (5) and (8) of the Statute. The issue is whether, in the facts of this case, the information requested was normally maintained, reasonably available, and necessary to enable the exclusive representative to fulfill its representational obligations.

II. Facts

The American Federation of Government Employees, AFL-CIO, Local 1592 (Union) is an affiliate member of AFGE Council 214, the exclusive representative of a nationwide bargaining unit of nonsupervisory and nonprofessional employees of the Air Force Logistics Command which encompasses employees located at Hill Air Force Base.

The grievance which gave rise to the information request in this case arose as the result of a one-day suspension given to a unit employee for punching in his supervisor's time card on several occasions while the supervisor was parking a car used by them in a car pool. On June 5, 1984, the Union requested from Respondent Hill Air Force Base "[a] copy of any and all records, from bargaining unit members and managers, throughout AFLC, in regards to misuse of time clocks and the disciplinary action proposed as a result of such." It was noted that the records sought would be used for the purpose of "Grievance processing or other representational activity."

Three or four days after receipt of the June 5 request, the Respondent called the Union seeking to clarify the nature of the information sought. As found by the Judge, the Union repeated its request for the records of all AFLC disciplinary actions and decisions relating to the misuse of time clocks in order to process the grievance in question, making it clear that the Union was seeking records of all AFLC disciplinary actions relating to the misuse of time clocks. The Judge found that the Union did not otherwise limit its request. Although the Union testified that it needed the disciplinary records to ascertain whether or not the penalty imposed on the unit employee conformed to the parties' negotiated agreement and relevant portions of Air Force Regulation 40-750, entitled "Discipline and Adverse Actions," its request was phrased in broad language "[t]o obtain all the records, not just the ones that management wanted to send up," and the Union conceded that "misuse of time clocks" could refer to a number of possible violations other than the one involved in the grievance at issue.

The information sought by the Union is located throughout the Air Force Logistics Command which consists of seven separate field activities. Each of the field activities has a Central Civilian Personnel Office which maintains records of proposed and final disciplinary actions for a three-year period. The Judge noted in detail the facts concerning records requested and the amount of time and staff work which would be necessary to produce the information. In addition, the facts, as found by the Judge, show that files maintained on unit employees by over 6,000 supervisors contain certain kinds of discipline for time clock misuse, and found that the

Union's request contemplated the production of these files. Respondent Hill Air Force Base denied the information request, stating that it did not maintain the information sought and that the request did not "meet the criteria of 5 USC 7114(b)(4)."

III. Administrative Law Judge's Decision

The Judge concluded that the General Counsel did not sustain the burden of proving that the data sought was reasonably available and necessary within the meaning of section 7114(b)(4)(B) of the Statute for the purpose of processing a grievance. Therefore, he recommended dismissal of the complaint. In reaching this result, he found that the Union's request for information included all disciplinary records from all elements of the Air Force Logistics Command relating in any way to the misuse of time clocks, a request so broad that it encompassed circumstances and violations far different from the specific one involved in the grievance in this case. In addition, the Judge found that as the Air Force regulations for penalties do not require "mathematical rigidity," in his opinion a comparison of penalties would not be relevant and necessary to processing the grievance, despite the guiding principle of "like penalties for like offenses in like circumstances." He also determined that the information was not reasonably available because it would require a search of the "hundreds of disciplinary files" in seven different locations and the individual files maintained by more than 6,000 first level supervisors.

IV. Exceptions to the Judge's Decision

The General Counsel excepted to a number of the Judge's findings of fact which led to disagreement with his findings and conclusions.

V. Analysis

The Authority finds, in agreement with the Judge's conclusion, that the information request by the Union was too broad because it sought data which was neither reasonably available nor necessary for the processing of the grievance involved in this case. While management requested clarification of the information sought, the Union nevertheless did not limit its request for all disciplinary records relating to the misuse of time clocks. This request could have included information contained in personnel files maintained by over 6,000 first level supervisors, as well as hundreds of disciplinary files from the various civilian personnel offices. Moreover, because the request was so general, it sought data about proposed and imposed disciplinary actions for offenses other than the one involved in the grievance. Thus, the Authority agrees with the Judge that the request was so broad that much of the data sought was unnecessary to the processing of the grievance,*/ and additionally was not reasonably available. It should be emphasized, however, that a narrowly framed request for information about proposed and actual disciplinary actions in like circumstances might have been deemed to be necessary, and that a request for necessary data separately maintained in the Personnel Offices of the various facilities where unit employees are located might have been deemed reasonably available. *See Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region*, 19 FLRA No. 96 (1985), *petition for review filed sub nom. North Germany Area Council, Overseas Education Association v. FLRA*, No. 85-1595 (D.C. Cir. Sept. 20, 1985).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings made by the Judge at the hearing, finds that no prejudicial error was committed, and thus affirms the rulings. The Authority has considered the Judge's Decision and the entire record, including the parties' contentions, and, except as noted, adopts the Judge's findings, conclusions and recommended Order. Therefore, we shall dismiss the complaint.

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*/ The Authority does not agree with the Judge's finding that "the comparison of penalties imposed by a diverse group of AFLC management officials in different environments would not be relevant and necessary to the processing of the . . . grievance." Rather, given the general mandate of "like penalties for like offenses in like circumstances," the Authority would find such data necessary for the Union to fulfill its representational duties if the information related to discipline of unit employees for similar offenses.

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-40682 be, and it hereby is, dismissed.

Issued, Washington, D.C., April 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 71]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO; AND DEPARTMENT OF THE AIR FORCE, OGDEN AIR LOGISTICS CENTER, HILL AIR FORCE BASE, UTAH

Respondents

and — Case No. 7-CA-40682

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1592

Charging Party

. . . .

Clare A. Jones, Esquire
For the Respondents

Joseph Swerdzewski, Esquire
Michael Farley, Esquire
For the General Counsel

William Harper, Esquire
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint alleged that on or about June 12, 1984, and thereafter, the Department of the Air Force, Headquarters, Air Force Logistics Command, (AFLC), Wright-Patterson Air Force Base, Ohio; and Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah (Respondents), have refused to supply the American Federation of Government Employees, AFL-CIO, Local 1592 (Charging Party or Union), with certain documents relating to employee misuse of time clocks. It was further alleged that the request was appropriately made under the provisions of Section 7114(b)(4) of the Statute, and that such refusal constituted violations of Sections 7116(a)(1), (5), and (8) of the Statute.

Counsel representing the Respondents contends that the General Counsel failed to establish a violation of Section 7114(b)(4), and argues that the record does not reflect by a preponderance of the evidence that the information sought was necessary for the performance of Union representational responsibilities; or that it was reasonably available. Lastly, the Respondents contend that any obligation to provide the Union with the information was satisfied by the furnishing of certain documents after the filing of the charge.[1]

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[1] Following the filing of the charge on July 26, 1984, representatives of the Union and Respondents engaged in settlement discussions to resolve issues generated by the charge. As a result of these settlement discussions, certain Hill Air Force Base disciplinary records were supplied to the Union. Evidence relating to these settlement discussions was introduced by counsel representing the General Counsel in an effort to establish that the production of all similar AFLC records would not be burdensome. (Tr. 72-74). This evidence was not otherwise questioned by opposing counsel. Copies of documents supplied to the Union after the filing of the charge and copies of related correspondence were made a part of the record as G.C. Exh. Nos. 11, 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 11(g), 11(h), 11(i), 11(j), 11(k), 11(l), and 12.

Testimony and documents relating to settlement discussions occurring after the filing of the charge herein is deemed to be admissible only insofar as it relates to the remedy sought by the General Counsel, inasmuch as the Respondent argued that obligations imposed by Section 7114(b)(4) were fully met by production of relevant Hill Air Force Base disciplinary records after the filing of the charge. However, such evidence is not otherwise admissible, and should not have been received without appropriate limitation. It is well settled that evidence pertaining to settlement discussions may not be utilized to prove the truth or falsity of any allegations set out in the complaint. U.S. Department of the Air Force, Norton Air Force Base, A/SLMR No. 261 (1973), 3 A/SLMR 175; Directorate of Facility Engineers, Fort Richardson, Alaska, A/SLMR No. 946 (1977), 7 A/SLMR 1046; General Services Administration, National Archives and Records Service, A/SLMR No. 1113 (1978), 8 A/SLMR

(Footnote continued)

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including exhibits, and other relevant evidence adduced at the hearing, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.[2]

Findings of Fact

Information Request Relating to Employee Misuse of Time Clocks

The American Federation of Government Employees, Council 214, is the exclusive representative of a nation-wide bargaining unit of nonsupervisory and nonprofessional employees of the AFLC. Certain employees in these categories at the Ogden Air Logistics Center, Hill Air Force Base, Utah are included in the unit. At all times material herein, the Union was an affiliate member of Council 214, and an agent of the Council and AFGE. (G.C. Exh. Nos. 1(c), 1(d), and 13; Tr. 21).

The grievance which gave rise to the information request arose as a result of a disciplinary action brought against Harry Dubach, a Hill Air Force Base employee and bargaining unit member. Dubach received a "Notice of Proposed Suspension" dated April 11, 1984 for punching in his supervisor's time card on several occasions while the supervisor was engaged in parking a car used in a carpool. (G.C. Exh. No. 2). The Notice proposed that Dubach be suspended for one day.[3] Dubach sought Union representation in connection with the matter, and an informal grievance was pursued in an effort to reduce the proposed one-day

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[1] (Footnote continued)

979; *National Labor Relations Board and its General Counsel and National Labor Relations Board, Region 29*, A/SLMR No. 1143, 8 A/SLMR 1197, *aff'd*, 1 FLRA No. 28 (1979), 1 FLRA 220. The fact that the parties involved offered such evidence or otherwise acquiesced concerning its admission would not operate to modify the rules outlined in authorities cited. Accordingly, such evidence and argument relating thereto have been given no consideration for the purpose of determining the truth or falsity of the allegations of the complaint.

[2] Counsel representing the General Counsel moved to correct errors in the hearing transcript. Under authority reflected in 5 C.F.R. § 2423.19(r), the proposed corrections are approved.

[3] The supervisor was also subjected to disciplinary action for involvement in the practice.

suspension. (Tr. 22-23). However, Dubach's Foreman decided to carry out the proposed penalty. A May 23, 1984, "Decision to Suspend" letter issued, and Dubach served the suspension on May 25, 1984. (G.C. Exh. No. 3, Tr. 23).

Under the provisions of Article 5 of the Master Labor Agreement governing the labor relations of the Union and management officials at Hill Air Force Base, the term "disciplinary action" is defined as "oral admonishment, written reprimands, suspensions, and removals." (G.C. Exh. No. 13, at page 16, Section 5.01(a)). The agreement reflects that discipline is the responsibility of the Employer; and that disciplinary actions, "shall be based on just cause and [shall be] in accordance with applicable regulations." (G.C. Exh. No. 13, at page, 16, Section 5.01(b)).

Air Force Regulation 40-750, dated July 23, 1982, defines "disciplinary action" in substantially the same terms as the Master Labor Agreement. (G.C. Exh. No. 5, Section A, Paragraph (2)(g)). First-level supervisors have been delegated authority to take disciplinary action. (G.C. Exh. No. 5, Section A, Paragraph (6); Tr. 30, 59). Section F, Paragraph (34)(a) of Air Force Regulation 40-750 provides:

> a. Governing Criteria. In determining the appropriate penalty, management observes the principle of "like penalties for like offenses in like circumstances." This means that penalties will be applied as consistently as possible considering the particular circumstances of the cause of disciplinary action. It does not mean that penalties will be applied with ". . . mathematical rigidity or perfect consistency regardless of variations in circumstance or changes in prevailing regulations, standards, or mores," (Douglas v. Veterans Administration, et al., MSPB Decision No. AT075299006, 10 April 1981). The penalty selected should not be disproportionate to the offense, should contribute to the solution of the problem and to the attainment of an effective management environment, and should take into consideration all relevant penalty selection factors.

Section F, Paragraph 34(b) of Air Force Regulation 40-750 lists some factors that may be relevant in penalty selection, and a "Guide to Disciplinary Actions" is provided as an attachment to Air Force Regulation 40-750. The Guide lists typical penalties for various offenses. The one-day suspension imposed on Dubach was consistent with the "Guide to Disciplinary Actions." (Tr. 61-62).

After issuance of the "Decision to Suspend," the Union's representational role was undertaken by Brent Weyland, a Union Steward. Through Weyland, Dubach pursued his effort to effect a reduction of the penalty; and with this objective in view the Union, by letter dated June 5, 1984, submitted an information request to R. Riley Skeen, Chief of Labor Relations, Ogden Air Logistics Center, Hill Air Force Base. (G.C. Exh. No.4). It requested the following:

> A copy of any and all records, from bargaining unit members and managers, throughout AFLC, in regards to misuse of time clocks and the disciplinary action proposed as a result of such.

It was noted that the records would be used for the purpose of "Grievance processing or other representational activity."

Initially management had difficulty in understanding the June 5th letter. The unlimited request for "any and all records throughout AFLC," regarding the "misuse of time clocks," included a very broad and far-ranging category of documents. (Tr. 98).[4]

Clarification of Information Request by Hill Air Force Base Staff Judge Advocate General's Office

Under the terms of a settlement agreement reached in April of 1984 by the Charging Party and the Ogden Air Logistics Center in another unrelated case; the Respondents were obligated to either grant the information request, deny the request with supporting reasons, or request clarification to determine the nature of information requested. (G.C. Exh. No. 14 at paragraph 3, Tr. 165). Accordingly, three or four days after receipt of the June 5th request, and before denial of the request and the filing of the charge, S. Reed Murdock, Chief of General Law, Hill Air Force Base Staff Judge Advocate, phoned Wayland for clarification, and to inquire concerning the nature of the information sought.[5] (Tr. 32,

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[4] Wayland's testimony established that the reference to records "from bargaining unit members" was a mistake and that the latter should have referred to records "on bargaining unit members." (Tr. 55). This error was not specifically corrected by the Union. However, as a result of clarification hereinafter described it became clear to Hill Air Force Base officials that the request contemplated AFLC records only, and not records obtained "from bargaining unit members."

[5] It is clear that the Murdock call was initiated in an attempt to ascertain more detail concerning documents sought by the Union. Counsel representing the General Counsel acknowledged that the Murdock call was an attempt to clarify an ambiguous request, and that after the call the Respondents were aware of the nature of the records being sought. (Tr. 74-75, 109-110). Testimony concerning the call was supplied by Wayland. Murdock was unable to recall the conversation. (Tr. 163-164).

69-70, 90-91). Weyland explained that the information was needed in connection with the processing of the Dubach grievance. (Tr. 86). Weyland made it clear to Murdock that he was seeking records of all AFLC disciplinary actions and decisions relating to the misuse of time clocks. (Tr. 25, 32-33, 55, 70, 77, 90). 6/ Weyland did not otherwise limit the request, and did not advise Murdock that the Union did not wish to obtain relevant "971 files" dealing with disciplinary actions taken in connection with the misuse of time clocks. (Tr. 57, 70, 84, 89). 7/ Murdock stated that he had "a better picture" of what Weyland was requesting and the conversation ended. (Tr. 77).

Weyland testified that he requested the disciplinary records to ascertain whether or not the penalty imposed upon Dubach conformed to general criteria outlined in Section 5.01(a) of the Master Labor Agreement, and relevant portions of Air Force Regulation 40-750. (Tr. 31). He wanted to compare the penalty imposed on Dubach with penalties in other similar cases in the AFLC to ascertain whether or not Dubach's penalty was unduly severe. (Tr. 31, 49). His request was phrased in broad language "[t]o obtain all the records, not just the ones that management wanted to send up." (Tr. 57). He acknowledged that disciplinary records relating to the misuse of time clocks involved a general category of violations and that a "myriad" number of "time card type violations" might be involved. (Tr. 55-56). He also admitted that the phrase "misuse of time clocks" involved a number of possible violations other than the offense specifically involved in the Dubach disciplinary action.

Information Request Denied and Formal Grievance Filed

By letter dated June 12, 1984, Kay Self, Acting Chief, Hill Air Force Base, Employee Relations Section, Civilian Personnel Branch, denied the

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6/ By its terms the request was also designed to include relevant disciplinary records pertaining to managers.

7/ Weyland admitted that the request could have been interpreted as including "Air Force Forms 971's [sic]" (Tr. 71-72), and as noted the apparent scope of the request would have included such forms. These documents were described as Air Force records maintained for each employee by supervisors for a specific period to document significant information. Weyland acknowledged that these records would have been helpful to him in connection with the processing of the Dubach grievance. (Tr. 93-94). Weyland indicated that he was endeavoring to show that an oral admonishment would have been a more appropriate penalty, and oral admonishments, a form of disciplinary action, would have been reflected in 971 files. (Tr. 86-87, 92-93, 151, 153).

information request. (G.C. Exh. No. 6). The denial noted that Self's office did not maintain the information sought, and that the request did not "meet the criteria of 5 USC 7114(b)(4)." 8/

On June 14, 1984, Weyland filed a formal second-step grievance on Dubach's behalf. (G.C. Exh. No. 7, Tr. 35). He requested that the one-day suspension be overturned because of unfairness, and suggested that a written reprimand be issued as a penalty. The one-day suspension was thereafter affirmed at the second and third stages of the grievance procedure. (G.C. Exh. Nos. 8, 9, and 10).

Facts Concerning Records Requested

Information sought by the Union is located throughout the Air Force Logistics Command, consisting of seven separate field activities. (Tr. 99, 125) 9/ Each of the Air Force Logistics Centers are roughly comparable to Hill Air Force Base. (Tr. 129). It was estimated that it would take more than three months to respond to a request for records relating to just one type of disciplinary action. (Tr. 135). It would be necessary to divide the request down into component parts in order to reach the systems of records involved, and then the AFLC Headquarters would have to mandate necessary compliance. Field activities would have to receive instructions concerning the gathering of the information, and the processing of the information for eventual return to the Ogden Air Force Logistics Center. The procedure would necessarily involve instructing personnel office staff and supervisors; preparation of instructions; dissemination of instructions and guidance to Air Force Logistics Command field activities; searching of files and records; sanitizing records where warranted; processing and transmitting information to the Air Force Logistics Command Headquarters; collation of information; preparation for delivery to Hill Air Force Base; and the actual transmission of the information to the Union. (Tr. 134-135).

Records sought are maintained in part in Central Civilian Personnel Offices servicing Air Force Logistics Command installations. (Tr. 25, 41). These offices maintain records of proposed disciplinary actions, and decisions on such proposals for a three-year period. (Tr. 105, 125, 151-153). Other relevant documents embraced within the wide scope of the request are also maintained in these files stored in Central Civilian Personnel Offices. (Tr. 155-157).

8/ Self was not directly involved in handling the request. She merely signed the denial as a responsible official. (Tr. 96-97, 101).

9/ Included were Hill Air Force Base containing the Ogden Air Logistics Center, four other Air Force Logistics Centers, the 2750th Air Base Wing that hosts the Air Force Logistics Command Headquarters; and the Aerospace Ground Metrology Center.

Central Civilian Personnel Office case files are retained for a three-year period. (Tr. 126). They are maintained by year in alphabetical order by name. Files are not established by subject or offense involved. (Tr. 127, 152-154). The system would not permit direct retrieval of time clock violations. Alphabetical systems of case files relating to each calendar year would have to be screened to locate the disciplinary records sought. (Tr. 152-154). The screening would have to be meticulous to avoid overlooking time clock violations in cases involving multiple charges. (Tr. 153). Each Central Civilian Personnel Office would have to screen several hundred case files in order to respond to the request. (Tr. 125-126).

By its terms the request also contemplated the production of 971 Files reflecting disciplinary action relating to the misuse of time clocks. Oral admonishments for such offenses would be reflected in 971 Files. (Tr. 100, 124, 132, 151). Since 971 Files are maintained for a prescribed period by first-level supervisors, the request would necessarily involve the screening of these files to locate relevant documents. (Tr. 124, 152-153). The screening of AFLC 971 Files maintained by approximately 6,000 supervisors in several different installations would involve an estimated cost of more than $30,000. (Tr. 124-125, 129-132). The process would involve 2,000 supervisors at Hill Air Force Base alone. (Tr. 100).

Discussion and Conclusions

Section 7114(b)(4) of the Statute provides in pertinent part:

> "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -
>
> . . .
>
> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-
>
> "(A) which is normally maintained by the agency in the regular course of business;
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> "(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . ."

Authority decisions have made it clear that management must furnish a Union with data needed by a union to carry out representational obligations relating to the processing of a grievance, provided the information sought meets criteria prescribed in Section 7114(b)(4). Failure to furnish such information constitutes an unfair labor practice. However, an analysis of the facts presented in this case discloses that the complaint must be dismissed because the information sought does not fall within the purview of Section 7114(b)(4). Here the record failed to reveal a showing that the information sought was "necessary" for the purpose of processing a grievance. Such a showing is essential. *Internal Revenue Service, Buffalo District, Buffalo, New York*, 7 FLRA No. 102 (1982), 7 FLRA 654; *United States Customs Service, Region IV, Miami, Florida*, 3 FLRA No. 127 (1980), 3 FLRA 876; and *Department of the Navy, Naval Underwater Systems Center, Newport Naval Base*, 3 FLRA No. 64 (1980), 3 FLRA 413. The record also revealed that the information sought was not "reasonably available."

The broad scope of the request is reflected in the Union's insistence upon the production of disciplinary records from all elements of the AFLC. An attempt by management to clarify the Union's request was only partially successful. At most the clarification resulted in limiting the request to AFLC records.[10/] As modified the request still operated to include all disciplinary records relating to the misuse of time clocks even though this record category also related to types of disciplinary action unlike the specific charge involved in the Dubach grievance. The Union's avowed purpose in obtaining the records was to determine whether the penalty imposed on Dubach was unusually severe. The Dubach matter involved an employee punching a time card on behalf of his supervisor. The record clearly established that the phrase "misuse of time clocks," used in the request, could have included a large number of offenses unlike the offense of punching a time clock on behalf of another employee. Such information would not be "necessary" in connection with the Union's processing of the Dubach grievance.

Air Force Regulation 40-750, specifically mandated that managers follow the general principle of "like penalties for like offenses in like circumstances." Information concerning violations other than one associated with the Dubach grievance would not have assisted the Union because there would be no logical basis upon which to base a comparison of penalties.

Assuming that the request were in fact limited to violations involving the punching of a time card on behalf of another employee, it still would not be possible to conclude that it would be "necessary" to furnish all AFLC records of such infractions. Air Force Regulation 40-750 specifically provides that the principle guiding management in fashioning

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[10/] See Footnotes 4 and 5, *supra*.

penalties, "does not mean that penalties will be applied with mathematical rigidity or perfect consistency regardless of variations in circumstances or changes in prevailing regulations, standards, or mores.'" In light of the foregoing, the comparison of penalties imposed by a widely diverse group of AFLC management officials in different environments would not be relevant and necessary to the processing of the Dubsch grievance.11/

As noted, the Union's request for any and all AFLC disciplinary records dealing with the misuse of time clocks was overly broad, and included a very large variety of documents ordinarily maintained in such files. Hundreds of disciplinary files maintained in AFLC Central Civilian Personnel Offices in seven different locations, and 971 files maintained by over 6,000 AFLC supervisors, were identified as possible sources of documents sought. All of these files would have to be meticulously screened in order to comply with the request. Inasmuch as files are not maintained by type of disciplinary action, the task of screening these files would be unusually burdensome.12/ The screening of AFLC 971 files alone would involve an expenditure in excess of $30,000. It would take over three months to process the entire request. Compliance would impose an extremely heavy administrative burden on AFLC Headquarters personnel. The broad scope of the request, together with attendant factors related to production of documents sought leads to the conclusion that in the special circumstances presented the documents were not "reasonably available." This case is unlike the factual pattern presented in Social Security Administration, 15 FLRA No. 180 (1984), 15 FLRA 969, where a similar defense was rejected because of a failure to show that compliance with a request would be unduly burdensome. Here, the record reflects the unusual difficulty that management would encounter in complying with the request.

This element of the request would have had to be apparent to the Union. Moreover, even if the apparent burdensomeness was not sufficient to put the Union on notice, the Respondent's denial clearly indicated to the Union that documents sought did "not meet the criteria of 5 U.S.C. 7114(b)(4)." Among other things, Section 7114(b)(4) imposes the requirement that data requested be "reasonably available." Thus, the Union was apprised of deficiencies in the request within a short period of time, but took no action to limit the request in appropriate ways.

11/ In the context of this case it is unnecessary to determine the precise limitations which the Union should have, or could have, placed upon documents requested in order to assure compliance with Section 7114(b)(4).

12/ It should also be noted that the Union's request was not in any way limited as to time frame.

In summary the information request herein goes far beyond what would be needed by the Union to process the Bubach grievance. The request is much broader in scope than what would reasonably be needed to fulfill the Union's representational obligations. Management's attempt to obtain clarification of the request was met with a demand for most, if not all of the documents originally requested. The Union was thereafter generally apprised of Respondents' reasons for denying the request. About a week after receipt of the information request, management apprised the Union that the documents sought did not meet criteria set out in Section 7114(b)(4). The Union made no further effort to modify the request, or to establish a showing of relevance and necessity, nor was inquiry made by the Union concerning the matter in order to perfect the request made.

The nature of the request was finally made clear; however, the overly broad scope of the demand placed management in the position of having to engage in speculation and conjecture concerning exactly which documents to furnish to the Union.[13] The task of complying with the Union's request under the circumstances would have necessarily involved management's revision of the request so as to include only documents which were reasonably available and necessary for the purpose of enabling the Union to perform representational activity.

Although it would have been advisable for the parties to negotiate their differences at this point, it is not possible to impute blame to Respondents for the failure to pursue further efforts to reach agreement; nor is it possible to find wrongdoing on the part of Respondents for not volunteering to furnish information of some sort to the Union prior to the filing of the charge. It is true that a more reasoned approach by either party might have made a significant difference, and might have led to a resolution of the matter prior to the filing of a charge. However, this determination does not affect the disposition herein.

Under the circumstances outlined it is concluded that the General Counsel has not sustained the burden of showing that the data sought was "reasonably available and necessary" within the meaning of Section 7114(b)(4)(B); and further that the evidence does not establish violations of Sections 7116(a)(1), (5) and (8) as alleged in the complaint.

It is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2422.29.

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[13] See Director of Administration, Headquarters, U.S. Air Force, 6 FLRA No. 24 (1981), 6 FLRA 110, wherein the Authority affirmed the dismissal of a complaint based on Section 7114(b)(4), for refusing to furnish information in response to an overly broad data request calling for much more than what would have been needed by a union to administer or police a collective bargaining agreement.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 7-CA-40682, be, and it hereby is, dismissed.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: April 16, 1985
Washington, D.C.

READEX FICHE best copy available

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 361 — REPORT OF CASE DECISIONS — May 7, 1986

JUN 3 1986

NEGOTIABILITY CASES

21 FLRA No. 73 (April 30, 1986)

American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Air Force Logistics Command, Wright-Pa[illegible] Base, Ohio, Case No. 0-NG-786

21 FLRA No. 74 (April 30, 1986)

Patent Office Professional Association and Patent and Trademark Office, Department of [illegible] Case No. 0-NG-806

21 FLRA No. 76 (April30, 1986)

National Weather Service Employees Organization, MEBA, AFL-CIO and Department of Commerce, National Weather Service, National Oceanic and Atmospheric Administration Case No. 0-NG-627

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 72 (April 30, 1986)

Social Security Administration (Baltimore, Maryland) and Office of Hearings and Appeals, Region II (New York, New York) and Office of Hearings and Appeals (Syracuse and Buffalo, New York) and American Federation of Government Employees, Local 1760, Case Nos. 1-CA-20322 and 1-CA-20341

21 FLRA No. 77 (April 30, 1986)

Defense Mapping Agency, Aerospace Center, St. Louis, Missouri and National Federation of Federal Employees, Local 1827, Case No. 7-CA-30165

ARBITRATION CASE

21 FLRA No. 75 (April 30, 1986)

Veterans Administration Medical Center, Roseburg, Oregon and American Federation of Government Employees, Local 1042 (Neill, Arbitrator), Case No. 0-AR-1133

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21 FLRA No. 71

Federal Labor Relations Authority

SSA (Baltimore, Md.) and Office of Hearings and Appeals, Region II (New York, N.Y.) and Office of Hearings and Appeals (Syracuse and Buffalo, N.Y.) and AFGE, Local 1760, Case Nos. 1-CA-20322 and 1-CA-20341 (Decided April 30, 1986)

DIGEST HEADINGS

4000 UNFAIR LABOR PRACTICES
    4500 Refusal to Negotiate

STATUTE

7106
7116(a)(1) and (5)
7118

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Office Moves
  Remedy
    Bargaining Order
    Status Quo Ante Remedy Rejected

DIGEST NOTES

The Authority adopted the Judge's decision in a consolidated case that both activities violated sections 7116(a)(1) and (5) by relocating their offices without negotiating over the union's proposals concerning the procedures and appropriate arrangements for unit employees adversely affected. The entire Syracuse and Buffalo offices were moved a distance of some five and four city blocks, respectively, from their former locations, and the moves brought about differences in such things as building structures and office space. The duration of the moves was permanent and the moves involved the displacement and relocation of the entire office staffs in two of the Activities offices. Thus, based upon the totality of the facts and circumstances presented in the instant case, the Authority concluded that the relocations of the two offices had more than a *de minimis* impact on conditions of employment and imposed a duty to bargain on the activities concerning procedures and appropriate arrangements for adversely affected employees.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

21 FLRA No. 73

AFGE, Council 214 and Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. O-NG-786
(Decided April 30, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2700 Petition for Review
    2705 Moot
7500 OFFICIAL TIME

STATUTE

7105(a)(2)(E)
7131(a) and (d)

SUBJECT MATTER INDEX ENTRIES

PSIP
  Mediation/Arbitration
    Ground Rules
Negotiability
  Official Time
    Travel and Per Diem
      Moot
    Union Negotiators in Excess of the Number of Management
      Negotiators
  Procedure
    Moot
      Binding Agreement Precludes Processing Proposal

DIGEST NOTES

A proposal seeking official time for more union negotiators than the number designated by management is negotiable under § 7131(d). The Authority also noted that types of activities for which union representatives may receive official time under § 7131(d) include time to prepare for negotiations, impasse resolution and counter proposals. Also under § 7131(a), employees representing unions in negotiation of a collective bargaining agreement are entitled to official time for such purposes as attendance at impasse proceedings.

A part of a proposal is moot that concerns whether travel and per diem is within the parties' duty to bargain under the Statute where there is a valid, binding agreement disposing of this aspect of the proposal. Responding to a PSIP recommendation, the parties

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

had previously submitted their ground rules dispute to mediation/arbitration. The mediator/arbitrator directed, among other things, that the parties choose between alternative dispositions of their travel and per diem dispute. The parties agreed to the alternative in which negotiations would be held at the union's preferred location with each side bearing the travel expense for its own team.

Federal
Labor Relations
Authority

21 FLRA No. 74

Patent Office Professional Association and Patent and Trademark Office, Dep't of Commerce, Case No. 0-NG-806 (Decided April 30, 1986)

DIGEST HEADINGS | **STATUTE**

2000 NEGOTIABILITY — 7105(a)(2)(E)
2011 Conditions of Employment — 7131 and 7131(a)
2600 Conditions for Review
2601 Proposal Alleged to be Inconsistent with Federal Law
2700 Petition for Review
7500 OFFICIAL TIME

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions of Employment
    - De Minimis Impact, Duty to Bargain
- Hours of Work
  - Representational Activities Outside Normal Duty Hours
- Mediation
  - Agency Representative, Designation of
- Procedure
  - Allegation of Nonnegotiability
    - Constructive Declaration
  - Forum
    - Where FSIP Exercises Jurisdiction Over an Impasse
- Official Time
  - Compensatory Time
  - Overtime Payments

DIGEST NOTES

A union may file a petition for review of a negotiability issue even though an agency has requested FSIP to resolve an impasse. Negotiability issues which arise during the collective bargaining process must be resolved through appeal to the Authority.

The failure of an agency to respond to a union's written request for an allegation of nonnegotiability constitutes a constructive declaration of nonnegotiability which gives rise to the right of appeal to the Authority.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Overtime payments and compensatory time are not authorized as official time under § 7131(a) to union representatives for time preparing for and participating in negotiations outside the employee's normal working hours. Entitlement to overtime pay is governed by 5 U.S.C. § 5542, and 5 U.S.C. § 5543 addresses eligibility for compensatory time off in lieu of the monetary compensation to which the employee would be entitled under § 5542. Representational activities performed by a union official outside his or her workday do not constitute the performance of "hours of work" within the meaning of 5 U.S.C. § 5542. Accordingly, proposals providing for such payments are nonnegotiable. (proposals 1 and 2)

A proposal is nonnegotiable that would require, with certain exceptions, negotiations over impact and implementation of management proposed changes in working conditions to be combined with negotiations over the basic agreement. The proposal does not distinguish between those management initiated changes which have no more than a de minimis impact on bargaining unit employees for which management does not have a duty to bargain, and those changes which have more than a de minimis impact. Thus the proposal would effectively impose on the agency a duty to bargain which is broader than that prescribed by the Statute. (proposal 3)

A proposal is nonnegotiable that requires the agency's head management official to attend all mediations sessions. It is within the discretion of both agency management and labor organizations holding exclusive recognition to designate their respective representatives when fulfilling their responsibilities under the Statute. The designation of those individuals who will attend mediation sessions on behalf of the agency is not a matter directly related to the conditions of employment of unit employees. While the agency may elect to bargain concerning this proposal, it did not. (proposal 4)

Federal Labor Relations Authority

21 FLRA No. 75

VA Medical Center, Roseburg, Oregon and AFGE, Local 1042 (Neill, Arbitrator), Case No. 0-AR-1133 (Decided April 30, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION 1550 Procedure 1552 Time Limits for Filing Exceptions	7122(a) and (b)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with § § 2425.1, 2429.21 and 2429.22 of the Authority's Rules and Regulations, applicable to the computation of time limits.

Overtime payments and compensatory time are not authorized as official time under § 7131(a) to union representatives for preparing for and participating in negotiations outside the employees' normal working hours. Entitlement [illegible] government [illegible] eligibility [illegible] in lieu of the monetary compensation [illegible] would be entitled [illegible] § 5542. Representational activities performed by a union official outside his or her workday do not constitute the performance of "hours of work" within the meaning of 5 U.S.C. § 5542. Accordingly, proposals providing for such payments are nonnegotiable. (proposals 1 and 2)

A proposal is nonnegotiable that would require, with certain exceptions, negotiations over impact and implementation of management proposed changes in working conditions to be combined with negotiations over the basic agreement. The proposal does not distinguish between those management initiated changes having no more than a de minimis impact on bargaining unit employees for which management does not have a duty to bargain, and those changes which have more than a de minimis impact. Thus the proposal would effectively impose on the agency a duty to bargain which is broader than that prescribed by the Statute. (proposal 3)

A proposal is nonnegotiable that requires the agency's head management official to attend all mediation sessions. It is within the discretion of both agency management and labor organizations holding exclusive recognition to designate their respective representatives when fulfilling their responsibilities under the Statute. The designation of those individuals who will attend mediation sessions on behalf of the agency is not a matter directly related to the conditions of employment of unit employees. While the agency may elect to bargain concerning this proposal, it did not. (proposal 4)

Federal Labor Relations Authority

21 FLRA No. 76

National Weather Service Employees Organization, MEBA and Dep't of Commerce, National Weather Service, National Oceanic and Atmospheric Administration, Case No. 0-NG-627 (Decided April 30, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2150 Management Rights	7106(a)(1)
2151.05 Assign Work	
2600 Conditions for Review	
2601 Proposal Inconsistent with Federal Law	
2602 Proposal Inconsistent with Government-wide Regulation	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Compensation
    Student Housing Allowance
  Conditions for Review
    Proposal Alleged to be Inconsistent with Federal Law
      41 U.S.C. § 252(a)
    Proposal Alleged to be Inconsistent with
      Government-wide Regulation
      41 C.F.R. § 1-3.490(b)
  Management Rights
    Budget
      Student Housing Allowance
5 U.S.C. § 5911(3)
GAO Certificate of Settlement, Claim No. 2-2624287 (3/30/78)

DIGEST NOTES

A proposal is negotiable that permits employees who are students at the National Weather Service Training Center to arrange for their own housing instead of being required to stay in agency-arranged housing. The proposal would pay those employees, in addition to per diem given to all students for food and other expenses, the same amount of money as the agency pays per employee for the housing it arranges. The agency did not support its allegation that the proposal interfered with management's right under § 7106(a)(1) to determine its budget by demonstrating that the proposal would result in a significant and unavoidable increase in costs which is not offset by compensating benefits. Nor does the proposal interfere with the agency's ability to contract for services under 41 U.S.C. § 252(a). Also, the agency's contention that the proposal is inconsistent with a policy determination (i.e. to provide housing by contract) made pursuant to 5 U.S.C. § 5911(e), does not provide a basis for finding the proposal nonnegotiable. Under 5 U.S.C. § 5911(3) the matter is strictly within the agency's discretion and concerns a condition of employment affecting unit employees. Finally, there is no inconsistency between the proposal and 41 C.F.R. § 1-3.409(b) which sets forth the description and application of "requirements" contracts.

Federal Labor Relations Authority

21 FLRA No. 77

Defense Mapping Agency, Aerospace Center, St. Louis, Mo. and NFFE, Local 1827, Case No. 7-CA-30165 (Decided April 30, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7114(b)(4)
4500 Refusal to Negotiate	7116(a)(1), (5) and (8)
4800 Otherwise Refuse to Comply with the Statute	

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7114(b)(4)
    Refusal to Negotiate
      Information
        Procedures for Filling Supervisory and Other Non-unit Positions
        Presumptively Relevance Rejected

DIGEST NOTES

The Authority adopted the Judge's Decision that the Respondent did not violate sections 7116(a)(1), (5) and (8) when it refused to provide the union with requested information. The union had requested information under § 7114(b) concerning the procedures for the filling of supervisory or other non-bargaining positions for the purpose of determining whether to file grievances concerning the nonselection of a bargaining unit employee for a supervisory position.

The Judge concluded that under § 7114(b)(4), a refusal to supply information within the scope of that section constitutes a violation of the Statute irrespective of whether the refusal might also constitute a breach of the parties' agreement.

The Respondent's contention that since the information sought does not constitute a condition of employment and concerns a matter which is nongrievable under the parties' negotiated agreement, the union was not entitled to such information, was also rejected by the Judge. The fact that matters pertaining to non-bargaining unit positions do not relate to conditions of employment of unit employees and are outside the duty to bargain under the Statute does not preclude disclosure of information relating to non-bargaining unit positions to an exclusive representative if such information is otherwise shown to be necessary and relevant to the performance of the statutory rights and duties of the exclusive representative.

However, the Judge concluded that as the union did not specify the grievant's charges or indicate the issues involved in the potential grievance, it failed to demonstrate the relevance and necessity for the information to the Respondent at the time the request was made. Therefore, it was not established that the agency failed to comply with the Statute when it refused to furnish the requested information.

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21 FLRA No. 72

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
(BALTIMORE, MARYLAND) AND OFFICE
OF HEARINGS AND APPEALS, REGION II
(NEW YORK, NEW YORK) AND OFFICE
OF HEARINGS AND APPEALS (SYRACUSE AND
BUFFALO, NEW YORK)

Respondents

and

Case Nos. 1-CA-20322
1-CA-20341

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760

Charging Party

DECISION AND ORDER

I. Statement of Case

This unfair labor practice case is before the Authority because of exceptions filed by the Respondents to the attached Decision of the Administrative Law Judge. The General Counsel filed a response in opposition and cross exceptions. The issue concerns whether the Respondents violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain concerning the procedures to be observed in implementing the relocations of their Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

II. Background

These consolidated cases involve the displacement and relocation of the entire office staffs in Respondents' Region II Hearings and Appeals Offices in Syracuse and Buffalo, New York, a distance of some five and four city blocks, respectively. The Union requested impact and implementation bargaining and submitted a number of proposals. Agreement was reached on several of the proposals but the Respondents refused to bargain on others, claiming that those proposals involved working conditions which were either unchanged or improved as a result of the move.

III. Judge's Decision

The Judge concluded that the Respondents improperly refused to bargain over the impact and implementation of the office relocations and thereby violated section 7116(a)(1) and (5) of the Statute. In reaching such conclusion, the Judge found that the foreseeable impact of the relocation of the Syracuse and Buffalo offices was "substantial." Once the impact test was met, the Judge concluded that the Respondents were obligated to bargain over the Union's proposals submitted in connection with and relating to the office relocations which all concerned working conditions, even if a particular proposal addressed a situation where no change or an improvement in preexisting working conditions resulted from the relocation of the offices.

IV. Positions of the Parties

The Respondents except to the Judge's Decision, asserting essentially that the relocations had no substantial adverse impact on unit employees as a whole. They further take issue with the Judge's finding that they must bargain over specific proposals, contending that each proposal must address substantial adverse impact. Finally, they assert that those proposals involving issues under negotiation at the national level could not be negotiated at the regional or local level. The General Counsel's opposition to the Respondents' exceptions fully agrees with the Judge's findings, conclusions and rationale.

V. Analysis

With respect to the Respondents' initial contention pertaining to the impact of the relocations on unit employees, after the Judge issued his Decision in this case, the Authority held that "where an agency in exercising a management right under section 7106 of the Statute, changes conditions of employment of unit employees . . . , the statutory duty to negotiate comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable." [Footnote omitted.] U.S. Government Printing Office, 13 FLRA 203, 204-05 (1983). The Authority thereafter held that "no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimis." Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA 922 (1984). Further, the Authority looks to the totality of the facts and circumstances presented in each case in determining whether the impact or reasonably foreseeable impact of the exercise of a management right on bargaining unit employees is more than *de minimis*. Thus, in *Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois*, 19 FLRA No. 101 (1985), the Authority looked to such factors as the nature of the change (*e.g.*, the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (*i.e.*, duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past. The Authority also emphasized that the factors considered in the circumstances of that case were not intended to constitute an all-inclusive list or to be applied in a mechanistic fashion. Moreover, where there is no indication that the nature and degree of impact is at issue in the case, the Authority will not necessarily require in every case a determination as to whether the exercise of the management right results in a change in a condition of employment having an impact or a reasonably foreseeable impact on bargaining unit employees which is more than *de minimis*. However, in cases where it must be determined whether the nature and degree of impact is more than *de minimis*, factors such as those listed above will be considered.

In applying the above factors to this case, the Authority finds, based upon the totality of the facts and circumstances presented, that the relocation of the Syracuse and Buffalo offices did have an impact or a reasonably foreseeable impact on the conditions of employment of unit employees and that such impact or reasonably foreseeable impact was more than *de minimis*. Therefore, the Respondents were obligated to notify the Union and bargain upon request over the procedures they would observe in exercising its section 7106 rights and concerning appropriate arrangements for adversely affected employees. In reaching this result, the Authority notes that the nature of the change involved the movement of the entire Syracuse and Buffalo offices a distance of some five and four city blocks, respectively, from their former locations, and that the moves brought about differences in such things as building structures and office space. Further, the duration of the moves was permanent. Although the employees are part of a consolidated unit, the Authority notes in the particular circumstances of this case that the moves involved the displacement and relocation of the entire office staffs in two of the Respondents' Region II Hearings and Appeals Offices. Accordingly, based on the totality of the facts and circumstances presented, the Authority finds that the relocation of the two offices imposed a duty upon the Respondent to bargain with the Union concerning procedures and appropriate arrangements for adversely affected employees.

Finally, for the reasons stated by the Judge, the Authority finds no merit to the Respondents' other two contentions that they were relieved of the duty to bargain because each Union proposal must meet the test of substantial adverse impact and because those proposals involving issues under negotiation at the national level could not be negotiated at the regional or local levels. See Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, 19 FLRA No. 47 (1985), which involved basically the same parties and similar issues and arguments.

VI. Remedy

Having found that the Respondents' conduct violated section 7116(a)(1) and (5) of the Statute, the remaining issue concerns the appropriate remedial order. The Authority notes as to remedy that no retroactive relief was sought by the General Counsel. The Judge, in noting the same circumstances, chose to address the need for a status quo ante remedy, and in keeping with our decision in Federal Correctional Institution, 8 FLRA 604 (1982), determined that such a remedy was not warranted. The Authority is in agreement with that analysis by the Judge and determines that a prospective remedy is warranted and will fully effectuate the purposes and policies of the Statute in the circumstances of this case.

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order. We therefore find, in agreement with the Judge, that the Respondents violated section 7116(a)(1) and (5) of the Statute by implementing the Syracuse and Buffalo office relocations without negotiating over the Union's negotiable proposals concerning procedures and appropriate arrangements for unit employees adversely affected by such relocations.*/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Social Security Administration (Baltimore, Maryland) and Office of Hearings and Appeals, Region II (New York, New York) and Office of Hearings and Appeals (Syracuse and Buffalo, New York), shall:

1. Cease and desist from:

(a) Relocating or moving their offices and employees, without first notifying the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of its employees, and affording it the opportunity to negotiate concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

(b) Refusing to negotiate in good faith with the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of their employees, concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

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*/ As noted by the Judge at page 16 of her Decision, the Respondents never alleged that such proposals were nonnegotiable.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Notify the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of their employees, of any intention to relocate or move any of their offices and employees and, upon request, negotiate with such representative concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

(b) Post at its Hearings and Appeals offices in Buffalo and Syracuse, New York, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C., April 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT relocate or move our offices and employees, without first notifying the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of our employees, and affording it the opportunity to negotiate concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

WE WILL NOT refuse to negotiate in good faith with the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of our employees, concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, Local 1760, the agent of the exclusive bargaining representative of our employees, of any intention to relocate or move any of our offices and employees and, upon request, negotiate with such representative concerning the procedures to be observed in implementing the relocations of the Hearings and Appeals offices in Buffalo and Syracuse, New York, and concerning appropriate arrangements for employees adversely affected by such relocations.

(Agency)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

[21 FLRA No. 72]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

SOCIAL SECURITY ADMINISTRATION
(BALTIMORE, MARYLAND) AND
OFFICE OF HEARINGS AND APPEALS,
REGION II
(NEW YORK, NEW YORK) AND
OFFICE OF HEARINGS AND APPEALS
(SYRACUSE AND BUFFALO, NEW YORK),

Respondents

and

Case Nos.: 1-CA-20322
1-CA-20341

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760,

Charging Party

. . . .

Stephen Sunshine,
Counsel for Respondents

Herbert Collender,
President of Local 1760
American Federation of
Government Employees

Marilyn Z. Roth,
Counsel for the General Counsel
Federal Labor Relations Authority

Before: Isabelle R. Cappello
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (Supp. V, 1981), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the "Statute," and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Charges of an unfair labor practice under the Statute were filed in Case No. 1-CA-20341 on August 10, 1982 and amended on November 29, 1982 by the Charging Party (hereinafter also referred to as the "Union"). The General Counsel of the Federal Labor Relations Authority ("Authority") investigated and, on November 30, 1982, served the complaint initiating Case No. 1-CA-20341.

In Case No. 1-CA-20322, charges of unfair labor practices under the Statute were filed on July 14, 1982, and amended on November 29, 1982. The General Counsel investigated and, on November 30, 1982, served this complaint initiating Case No. 1-CA-20322.

As amended at the hearing,[1] each complaint in this proceeding alleges that the Respondent has engaged, and is engaging in unfair labor practices in violation of 5 U.S.C. 7116(a)(1) and (5).[2] Each complaint names the alleged violative act as being the relocation of a hearing office without affording the Union an opportunity to negotiate concerning the impact and implementation of the decision to relocate. At the hearing, the two cases were consolidated.

The hearing was held on April 21, 1983, in New York City. The parties appeared, adduced evidence and examined witnesses. Pursuant to an order dated May 9, 1983, the briefing time was extended until June 23. Respondent filed its brief on June 21.

The General Counsel, on June 22, filed a memorandum, enclosing a copy of a decision rendered on May 23 by Administrative Law Judge William Naimark in Case Nos. 12-CA-20179 and 20355, entitled Social Security

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[1] The amendment consisted of striking from the complaint in Case No. 1-CA-20322, allegations concerning a failure to provide information.

[2] 5 U.S.C. 7116(a) provides, in pertinent part, as follows:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . or
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . .

Administration, Office of Hearings and Appeals, Region II, New York, New York, Respondent and American Federation of Government Employees, Local 1760, Charging Party. That proceeding also involved, *inter alia*, alleged violations of 5 U.S.C. 7116(a)(1) and (5) caused by an alleged unilateral relocation of an office -- from Mineola to Hempstead, New York. In the memorandum filed in this proceeding, the General Counsel asserts that there are "no material differences between the facts and legal arguments raised in the proceeding before Judge Naimark from those present in the instant case" and that the same legal conclusions should be reached herein. Filed along with the memorandum and the decision was the brief submitted on behalf of the General Counsel in Case Nos. 12-CA-20179 and 20355.

Judge Naimark concluded that it was "the change in location that underlies a possible obligation to bargain" in such a situation; and he rejected Respondent's position that what controlled was "the extent of a change in a particular condition." See his slip opinion, pages 10-11 in OALJ-83-89. He concluded that if a decision to relocate involves foreseeable impact and the specific union proposals relate to working conditions encompassed by the move, an employer is required to bargain regarding the impact and implementation of the relocation.

Judge Naimark noted that the foreseeable impact of a planned relocation must be a substantial one and not "a mere possibility of some impact" (slip op. 12). In the case before him, the move was "from one town to another, with attendant differences in building structures and size, location, area, neighborhood facilities, transit routes and security - to name a few considerations. . ." (slip op. 12). These factors led to Judge Naimark's conclusion "that it is a reasonable likelihood such relocation will produce a substantial and adverse impact upon Respondent's workers" (slip op. 12). Accordingly, he concluded that Respondent must bargain with the Union over any proposal which related to working conditions, even though the particular proposal might represent an improvement over that particular working condition at the old location, or even no change. As examples, there was a water cooler at both locations; and there were no day care centers or lounge areas at either location. Nevertheless, Judge Naimark concluded that Respondent must bargain over Union's proposals on water coolers, lounge areas, and a space for a day care center.

Based upon the record made in this case, including my observation of the demeanor of the witnesses, and the brief and memorandum filed, I enter the following findings of fact, conclusions of law and recommended order.

Findings of Fact[3]

1. It is admitted that Respondent is an "agency" and the Union is a "labor organization", within the meaning of the Statute.

2. It is further admitted that the American Federation of Government Employees ("AFGE") is the exclusive bargaining representative of a consolidated nationwide unit of Respondent's employees, including ones employed at Respondent's hearing offices located at Buffalo and Syracuse, New York.

3a. In Case No. 1-CA-20322, it is further admitted that, at all times material herein, Respondent has recognized Local 1760 of AFGE as a representative of AFGE "for the purposes of collective bargaining at the Hearings Offices of the Office of Hearings and Appeals, New York Region on matters involving changes in working conditions at the local level." The New York Region is also referred to as "Region II."

3b. In Case No. 1-CA-20341, it is further admitted that, at all times material herein, Local 1760 of AFGE "has been, and is now recognized by Respondent Office of Hearings and Appeals, Region II, New York, New York, and Respondent Office of Hearings and Appeals, Buffalo, New York, acting thereby as agents of Respondent Social Security Administration, Baltimore, Maryland . . . as the agent of American Federation of Government Employees for the purpose of collective bargaining, at the Regional and local (Hearing Office) level, concerning the impact and implementation of changes in conditions of employment affecting employees employed by Respondent at its Hearing Office located at Buffalo, New York."

4a. It is stipulated that Respondent has an obligation to bargain with the Union over the impact and implementation of the relocation of the Syracuse and Buffalo hearing offices of the Office of Hearings and Appeals

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[3] The following abbreviations will be used. "TR" refers to the transcript in this proceeding. Corrections to it have been made pursuant to 5 CFR 2423.19(r). See Appendix A hereto. Other abbreviations to be used are as follows. "GC" refers to the exhibits of the General Counsel. "R" refers to the exhibits of Respondent. Multipage exhibits will be referenced by the exhibit number followed by the page or paragraph number. "GCM" refers to the memorandum submitted by the General Counsel. "RBr" refers to the brief submitted by Respondent.

Respondents will be referred to jointly as "Respondent," unless otherwise specifically noted.

("OHA"), of the Social Security Administration ("SSA"), in accordance with 5 U.S.C. 7106(b)(2) and (3).[4]

4b. It is undisputed that the Union submitted proposals on the relocations and agreement was reached as to some items. As to the rejected ones, management's basic response was that "there was no adverse impact" and, as to a "few", that they were "on the table at the national level" (TR 118).

5a. Effective June 11, 1982, AFGE and SSA are bound by a national agreement applicable to the nationwide bargaining unit. The agreement remains in effect for three (3) years from its effective date, and automatically renews itself from year to year thereafter. At the time of the relocations here at issue (May 3, 1982 for the Buffalo office and February 20, 1982 for the Syracuse office) only memorandums of understandings existed between AFGE and SSA; and they concerned grievances, negotiations, and official time.

5b. Articles in the national agreement cover such items as health and safety; parking; child care, including a study on a model child care center at one facility; excused absences; and supplemental agreements. The national contract provides for supplemental negotiations over seven items, including health and safety, facilities, parking, and flextime. See R 1.9, Section 3 of Article 5. As of the time of the hearing in these cases, there had been no negotiations for supplemental agreements. See TR 70.

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[4] 5 U.S.C. 7106 provides, in pertinent part, as follows:

> § 7106. Management rights. . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating- . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

This is commonly called "impact and implementation" bargaining.

6a. James Armet, Vice-President for Administration, Local 1760, is responsible for negotiating with Respondent on matters dealing with a change in physical location for any OHA office in New York and New Jersey.

6b. Elliot Glassman served as Region II's technical advisor on management's team negotiating the relocations here at issue. He serves as "labor relations coordinator" (TR 57). Specialists "at the central office of OHA" advised him of what was "on the table at the national negotiations" (TR 60).

Case No. 20322, the Syracuse relocation

7. Around 40 bargaining unit employees work in the Syracuse office of OHA.

8. By letter dated October 27, 1981, the Deputy Regional Management Officer of OHA notified Mr. Armet that the Syracuse office of OHA would be relocated. The letter stated that the move was to be made on or about December 1 from the Federal Building at 100 South Clinton Street to the seventh floor of a building at 351 South Warren Street.

9. On October 30, 1981, Mr. Armet wrote a letter to Respondent in which he demanded bargaining on the "plans to relocate" and the "potential adverse impact of that decision on members of the bargaining unit" (GC 3).

10. On November 12, 1981, Respondent replied to the October 30 demand to bargain. The letter stated that the move was to a building "a distance of approximately 5 city blocks" and that "[s]ince both new and old locations [were] in the same neighborhood with access to the same transportation and both locations conform to GSA [General Services Administration] requirements and regulations, the potential adverse impact of this move is de minimis" (GC 4). The letter explained that GSA was forcing the move upon Respondent. It also contained an offer to meet with Mr. Armet to "discuss any potential adverse impact that [he] identif[ied]" (GC 4).

11. Approximately 12 meetings were held between the parties on the impact and implementation of the Syracuse relocation, the first being on December 15, 1981 and the last on June 16, 1982. The move took place on February 20, 1982.

12. On December 17, 1981, the Union delivered its bargaining proposals to management. At the time the proposals were submitted, the negotiations on a national agreement were being mediated by an arbitrator appointed by the Federal Service Impasses Panel ("FSIP"). Larry Kramer, the Chief of labor relations for the central office of OHA, located in Arlington, Virginia, gave directions to the management team negotiating over the relocation of the Syracuse office. Mr. Kramer informed Mr. Glassman that "they did not want, under the guise of impact implementation bargaining,

any of their subordinate region offices to reach an agreement which the union negotiating team then would use as a precedence in its negotiations — either the national unit or any supplemental units have to negotiate on these things — it's being on the table, you do not have to negotiate on it" (TR 64). The central office mentioned "certain areas" as being "on the negotiating table at the national level" (TR 64).

13. As to some union proposals, agreement was reached — smoking; provision for a safe and healthy work environment and prompt action to correct any unsafe or unhealthy ones; provision for an emergency lighting system; provision for a security guard, subject to the availability of funds; and the application of the agreement to the Syracuse OHA office until specific provisions of a national agreement superceded them. See R 4.

14. As to seven proposals, agreement was not reached.

14a. Flextime. Mr. Armet explained that he had received an anonymous tip from an employee in the Syracuse OHA office that led to the Union's proposal on this item. The tipster told Mr. Armet that employees were "most upset about the relocation and that they were being relocated from a Federal building in the center of Syracuse, approximately six to eight blocks away in an area that was an urban renewal area . . . that was undergoing construction, renovation . . . that it wasn't a safe area, safe as the central location that they were in presently, and there were people hanging around in the street corners and things like that" (TR 19-20). The flextime proposal was to allow employees to be dropped off at a mutually convenient time for spouses and employees. This tip was not mentioned at the bargaining table.

Management responded that it would not consider the flextime proposal; that it exceeded the scope of impact bargaining; that there was no substantial adverse impact; and that it was on the table at negotiations on the national agreement which were taking place in Baltimore.

There is no article on flextime in the national agreement. Mention of flextime appears only in the provision for supplemental agreements. See finding 5b, supra. At Baltimore, there was no discussion on the topic in the context of impact and implementation bargaining upon the relocation of offices.

14b. Day care center. The proposal on this topic was met with a management response that there was no adverse impact. Also, at the last negotiating session, on June 16, 1982, there was "general agreement" that there were provisions covering day care in the national agreement (TR 62).

Article 20 of the national agreement provides for a "feasibility study for a model child care center" at a mutually determined site or for the Woodlawn complex (R 1.33).

14c. Parking. The proposal on this topic was met with the management response that there was none "available previously, there's none now and there was no adverse impact" (TR 62). Also, management stated that "the matter was under discussion at the national level" (TR 23).

Article 13 of the national agreement deals with "Parking," and there is also provision for supplemental agreements. See R 1.24 and finding 5b, supra.

14d. Noise abatement. This topic was met with a management response that there was "no adverse impact" because there would be "less noise than there was previously" (TR 63)[5] and that the matter was being negotiated at the national level.

Article 9 of the national agreement deals with "Health and Safety," but in general terms (R 1.15-16). The provision for supplemental agreements allows for further negotiations on "Health and Safety" (R 1.9 and see finding 5b, supra).

14e. Lunchrooms. Management may have alleged that this proposal was contrary to a national law, rule, or regulation.

14f. Window coverings. This topic was met by a management response that there were "drapes previously and there's drapes now and there's no adverse impact" (TR 63). Management refused to sign off on a proposal to provide drapes, which the Union felt it needed so that failure to provide them would be grievable and to insure the protection of employees' rights.

14g. Water coolers. This topic was met by a management response that "the supply of water was even better than it was previously, so there was no adverse impact" (TR 61).

15. While Mr. Glassman testified that management was prepared to negotiate with the Union over proposals that had less adverse impact (see TR 62-63), in fact management relied upon allegations of an absence of adverse impact to justify refusal to bargain, as set forth in finding 14, supra.

16. Management consulted with the office manager of the OHA hearing office in Syracuse throughout the negotiations on the relocation; and she testified at the hearing on the impact of the relocation.

16a. She established that the space allotted to OHA in the commercial building on Warren Street is not exactly the same as that which had been provided at the Federal building located at Clinton Street. At the Federal building the accomodations were "almost plush," and the reluctance to relocate was over concern about giving up "some of the plushness" (TR 48).

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[5] There are two page 63s in the transcript. This citation is to the first one.

16b. She established that the Warren Street location is approximately four blocks from the Federal building, and one block off the main drag of downtown Syracuse. It is closer to the shopping area and is served by the same transportation facilities. To her knowledge, the Warren Street building is not in an urban renewal area and the neighborhoods appear to be trafficked by the same people. She testified that there is presently no construction going on "in" the Warren Street location, nor was there at the time of the move (TR 49). Another witness testified that, on a visit to the Warren Street OHA office in November 1982, the streets surrounding the Warren Street building in which the OHA office is located were being torn up, and the noise from the drilling and construction equipment could be heard inside the building and was "disturbing and disconcerting" (TR 71). Both witnesses appeared to give truthful testimony and their testimony can be reconciled. One testified to construction *in* the building and the other to construction *outside*, but nearby the building.

16c. The office manager affirmed that there had been no day care center, flextime, or official parking at the Federal building.

16d. As to drapes, she established that there were open-weave ones at the Federal building and wool-lined ones at the Warren Street location.

16e. As to the noise from office machines, she established that they had been located "on the floor with the employees," at the Federal building, and are now "housed in a separate room", with a resulting "decrease in that noise" (TR 46).

16f. As to water coolers, she established that there had been one on each floor, in the area of the elevators, at the Federal building, and that they were shared with the general public. At the Warren Street facility, there is one drinking fountain within the space allocated to Respondent, which has the entire fourth floor.

16g. As to parking, private parking lots are located closer to the Warren Street location than they were to the Federal building.

17. The union president, on a visit to the Warren Street location in November 1982, was approached by a panhandler, which he felt to be "unique in Syracuse" (TR 70-71). Employees told him that the OHA office on Warren Street was "not as nice" as their former quarters in the Federal building.

18. The reason for the relocation was that OHA wished to expand its office. There was insufficient space in the Federal building to accomodate the expansion, according to GSA, the Federal agency holding control

over space for governmental agencies. GSA planned the relocation to Warren Street and promised the space occupied by OHA in the Federal building to other agencies. The office facilities arm of OHA's Region II, and its management operations specialist, tried to stop the move and then to delay it, but could not control GSA, which threatened to evict the OHA Syracuse office from the Federal building, if it did not move on GSA's schedule. These futile attempts by Region II were communicated to Mr. Glassman.

19. On February 8, 1982, Respondent directed a letter to Herbert Collender, President of Local 1760, to notify him that the move would take place on February 20, 192.

20. On February 12, 1982, Mr. Armet replied to the February 8 letter. He reminded Respondent that the move was "presently subject to impact bargaining" (GC 6). Respondent did not reply, in writing.

21. The Union learned that the Syracuse move had taken place while at a negotiation session on February 22, 1982.

Case No. 20341, the Buffalo relocation

22. About 21 bargaining-unit employees worked in the Buffalo office of OHA, when it was located in the U.S. Courthouse. Within two weeks of the office relocation here at issue, the number rose to around 28.

23. By letter dated February 8, 1982, Mr. Glassman, the labor relations coordinator for Region II of OHA, notified the president of Local 1760 that the Buffalo OHA office, then located at the U.S. Courthouse at 68 Court Street, would be moved to a building at 268 Main St., three to six blocks away.

24. On February 17, 1982, Mr. Armet requested impact and implementation bargaining over the proposed relocation.

25. On March 18, 1982, Mr. Armet submitted the union proposals to Mr. Glassman. They were motivated by a telephone call from the union steward at Buffalo. She complained that another relocation of the OHA office was to take place, to a "less desirable . . . seedy" location where the area was being reconstructed and to a building that was under renovation (TR 81). Mention was made of "derelicts on the street" (TR 81). These concerns were expressed to management during negotiations. Management checked them out and did not find them "believable" (TR 119-120).

26. The parties met in eight negotiation sessions, the first being on March 22, 1982 and the last on July 21. The relocation took place on May 3.

27. At the hearing, testimony was adduced on the items in the Union's proposals upon which agreement was not reached.

27a. Flextime. On March 23, 1982 and at subsequent negotiation sessions, management took the position that there had been no flextime at the U.S. Courthouse location and so no adverse impact from the relocation. Also, management responded that flextime was on the table at the national negotiations. (See finding 14a, supra, for what was negotiated in the national agreement.)

27b. Day care center. On July 12, 1982, management's response was that there had been none at the U.S. Courthouse and so no adverse impact. Also, management "wouldn't discuss it" (TR 86) because it was for "a benefit that was covered in the national agreement" (TR 126). (See finding 14b, supra, for what was in the national agreement.)

27c. Parking. On July 12, 1982, management's response was that there was none at either location and so no adverse impact, and also that it was "on the table at a higher level of negotiations" (TR 86). (See finding 14c, supra, as to what was negotiated in the national agreement.)

27d. Health and safety. On at least four occasions, the union's proposal met with the response that it was "beyond the scope of adverse impact and such conditions were being negotiated at the national level" (TR 83). (See finding 14d, supra, as to what was negotiated in the national agreement as to health and safety.) Included in the Union's health and safety proposals were ones relating to emergency lighting, smoke detectors, fire alarms, at least two water coolers, restrooms, a lounge area, sufficient lighting, and transportation to a health unit. See GC 12.3-5.

27e. Emergency lighting. Mr. Armet testified that management's response to this topic was that there was none at either facility, and thus no adverse impact. Mr. Glassman agreed that the response was no adverse impact, but that it was based on emergency lighting being in both locations. See TR 122. Mr. Glassman appeared more confident, on this point, than Mr. Armet. Accordingly, I credit the testimony of Mr. Glassman on this point.

27f. Smoke detectors. Again, Mr. Armet testified that management's response was that there was none in either building, and so no adverse impact. Mr. Glassman agreed that there were none and explained that this was because the Buffalo GSA code required sprinkler systems. Mr. Glassman further explained that there was "either a sprinkler system installed or there would be one installed at the Main Street location" and, therefore, that there would be no adverse impact and no need to bargain on smoke detectors (TR 122).

27g. Fire alarms. Management's response was that similar systems existed in both buildings, and so there would be no adverse impact.

27h. Restrooms. As to this topic, management's response, on June 21, 1982, was that the restrooms at the Main Street building are "more private" and "much cleaner" (TR 93 and 125). Thus, management felt that the impact was "beneficial," and there was "no duty" to bargain (TR 125).

27i. Lounge area. On June 21, 1982, management responded that there was none in either facility, and therefore no adverse impact.

27j. Water coolers. In July, 1982,6/ management responded that the same or better conditions existed at the Main Street location, and therefore there was no adverse impact, and "they would not negotiate the issue" (TR 85).

27k. Transportation to the health unit. On July 12, 1982, management's response was that there was no adverse impact.

27l. Lighting to avoid eye fatigue. On July 12, 1982, the response was that "the lighting would be equal or better," and so there would be no adverse impact (TR 125) and they "would not bargain on it" (TR 85).

27m. Break and lunch room. On July 12, 1982, management responded that there was none at either facility, and therefore there was no adverse impact and "no duty to bargain" (TR 126). Management did explain that it "could not authorize lunch rooms — GSA — officially," but would attempt to solve the problem by "just having spare space" (TR 126). Management has been able to provide such spare space for the Buffalo OHA office.

27n. First aid kits. Management's response was that the kit they used in the Courthouse was "portable" and the OHA office had the same one at the Main Street facility (TR 128). Thus, there was "no adverse impact" (TR 128). It was admitted that OHA Buffalo was getting more employees in the Main Street building. According to Mr. Glassman, the Union did not state that it wanted to bargain over more kits because one was insufficient. See TR 128-129. The proposal was that: "Management will provide each working unit with a GSA approved first aid kit", (GC 11,7).

27o. Administrative leave on paydays to cash checks. Management's response was that the old and new locations were in the same general area, with the same banks available. Therefore, there was "no adverse impact" (TR 129).

27p. Window coverings. Management's response was that there were drapes in the OHA office at both locations, and so there was no adverse impact, and thus "no need to bargain" (TR 127).

6/ A witness believed the date was July 26, but did not seem sure. See TR 85. It was probably before that, as the last bargaining session was established to be on July 21. See finding 26, supra.

27q. Noisy office equipment. Management's response was that the new office would be "much quieter," since the machines would not be concentrated and were "off the floor and away from the office area" (TR 127), thus, no adversed impact.

28. Management consulted with the office manager of OHA office in Buffalo throughout the negotiations on the relocation. The office manager testified at the hearing on the impact of the relocation.

28a. He established that the distance between the former and present offices is three and a half blocks and that the bargaining-unit employees regard the U.S. Courthouse as "more prestigious" (TR 105).

28b. The office at Main Street was extensively remodeled to OHA's specifications before the move. It met GSA's minimum specifications. Approximately 60 days prior to the move, Mr. Allen inspected the construction "to make sure that they were complying to our specifications for [the] office needs" (TR 109). More space was provided for each employee.

28c. A GSA inspection of the Main Street location involved areas of emergency lighting, fire alarms, and smoke detectors; and changes were made pursuant thereto, some at prodding of the office manager.

28d. The Main Street location is "much closer to the central transportation bus station which comes from all areas of western New York" (TR 90). It is not in an urban renewal area.

28e. Parking is "much better and reasonable" at the Main Street location (TR 99).

28f. Bargaining-unit employees had no windows at the U.S. Courthouse. Now they have windows covered by "beautiful flowered drapes" (TR 133).

28g. Noisy office machines are located further away from the work area of employees, at the Main Street office; and a decrease in the noise level has resulted.

28h. Within a three to four block area of the Main Street building, there are eight banks. One is about 50 feet from the building. These banks are located between the present and former buildings housing the OHA office. Only one branch bank that would have been used by OHA employees, when located in U.S. Courthouse, is not between it and the Main Street building; and the main office of that bank is located in the blocks between the two buildings.

28i. There was only one water cooler in the U.S. Courthouse. It was located directly in front of the elevators and about a 114-foot walk from the OHA office. At the Main Street building, a water cooler is located centrally, within the OHA office area.

28j. The first aid kit is not used frequently and is replenished before supplies are used up.

28k. At neither location have there been locked restrooms for the exclusive use of OHA employees, as in the Union's proposal, but at Main Street, they are shared with fewer people and are maintained in a "much cleaner" condition (TR 93).

28l. At neither location has there been an employee lounge or a health unit. The health unit used by employees at both locations is in a Federal building, which is three and a half blocks further away from the Main Street location, but is reached more comfortably (less windy) due to the shelter provided by buildings along the route. On the route between the health unit and the Main Street facility, one passes "business type people, shoppers" (TR 109). The walk to the health unit from the Main Street facility is "no different" than what was passed going from the U.S. Courthouse (TR 108).

28m. There is more "light power" at the Main Street location, and the light is "much better" because it is florescent (TR 96). Employees at the Main Street location have not complained over the existing level of lighting "[i]n the working areas" (TR 96).

28n. The lunch and break facilities at the U.S. Courthouse were in a room about 12 by 14 feet which also served as a mail and supply room and one in which to counsel SSA claimants. There were no vending or coffee machines, hot plates, or refrigerators for the exclusive use of bargaining-unit employees, as proposed by the Union for the Main Street location. At Main Street, a room which is 10 by 10 feet is used exclusively for break and lunch periods of the bargaining-unit employees.

28o. There are no day care centers sponsored by the Federal government in Buffalo.

29. The Buffalo OHA office relocation was occasioned by an OHA request for more space to accomodate a projected staff increase. Other agencies in the U.S. Courthouse also needed to expand. GSA decided to relocate OHA, and was being pressed by the other agencies to expedite the move. The office facilities arm of OHA's Region II, and its management operations specialist, tried to stop the move and then delay it. GSA forced the move and specified the moving date.

30. By letter dated April 16, 1982 Mr. Glassman notified the union president that the Buffalo OHA office would be moved on May 3-4.

31. At meetings of the parties, on April 26 and 30, 1982, the Union requested a delay in the implementation of the move. Management replied, each time, that GSA wanted the office "out" and a delay was not possible (TR 80).

Discussion and Conclusions

Respondent, at page 16 of its brief, correctly summarizes certain well established principles of law which it deems to be controlling in this proceeding. The first one is that:

> Impact and implementation bargaining ("I & I" or "impact" bargaining) is narrower in scope than other forms of midterm bargaining or term negotiations. While other forms of midterm or term bargaining may be concerned with substantive issues, impact bargaining is limited to (a) procedures management will follow in implementing its decision, and (b) appropriate arrangements for employees adversely affected by the decision. 5 U.S.C. 7106(b)(2) and (3). Intrinsically, the obligation to bargain over I & I can only arise as the result of management inititative (sic). Moreover, the management action must have or portend substantial impact on the conditions of employment of bargaining unit employees. Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region and Council of District Office Locals, American Federation of Government Employees, San Francisco Region, 5 FLRA No. 45 (1980).

The second one is that:

> It is also a generally accepted principle of Federal sector labor relations that absent agreement otherwise, the obligation to negotiate exists at the level of recognition, and not at the local level. Social Security Administration and American Program Service Center, Kansas City Missouri and American Federation of Government Employees, AFL-CIO Local 1336, 10 FLRA No. 4 (1982), Department of Health and Human Services, Social Security Administration and Local 1346, American Federation of Government Employees, AFL-CIO, 6 FLRA No. 33 (1981). [Emphasis added.]

While these statements of legal principles are correct, their application, as urged by Respondent, is not.

A. As to the impact of the relocations, the preponderance of the evidence indicates that the foreseeable impact was substantial. While the moves were not far in distance, they required the relinquishment of "plush" offices (at Syracuse) and a "prestigious" location (at Buffalo). While a few conditions may have been better at the new locations, even management recognized that they did not compensate for what was being given up and, unsuccessfully, tried to stop the moves altogether.

B. Faced with the inevitability of a substantial change in working conditions (having to give up the comfort and pleasure of working in plush and prestigious quarters), the Union put together a set of proposals, some of which may have resulted in particular working conditions remaining the same, or being even better. Respondent refused to bargain over such items.

In agreement with Judge Heimark, I conclude that Respondents improperly refused to bargain on the ground that particular proposals represented no change or an improvement in particular working conditions. Using the union proposal on window coverings for the Syracuse office as an example, it was established that there were drapes at both the old and new locations, but management refused to enter into a written agreement that there would be drapes at the new location. See finding 14(f) supra. The Union correctly asserted that it needed a written agreement to insure the matter and properly protect the bargaining-unit employees. To have agreements in writing is a statutory right. See 5 U.S.C. 7114(b)(5). Unions would probably not long retain their exclusive representative status if they relied on verbal statements from management.

Using the union proposal on lounge areas as another example, the Union was within its rights in making such a proposal, even though there had been none at the old location. Overall, the relocation had a foreseeable substantial adverse impact. This item might alleviate that impact somewhat.

C. All of the Union's proposals concerned working conditions. (Indeed, Respondent does not argue to the contrary and admits that it made no allegations of non-negotiability. See RBr 20.) See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477, et al., and Library of Congress, 7 FLRA No. 89, 7 FLRA 578 (1982), involving a relocation of employees to a new building and in which the Authority declared that inter alia, the following proposals by the bargaining agent, as a result of the relocation, related to matters affecting working conditions: file cabinet space; office size; partitions to insure no noise; conformance to fire codes and regulations to the extent the agency had discretion; and prohibiting work in areas violating safety codes. See also American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77, 2 FLRA 604 (1980), involving day care facilities; and National Treasury Employees Union and NTEU Chapter 80 and Department of the Treasury, Internal Revenue Service, Central Region, 8 FLRA No. 38, 8 FLRA 197 (1982), involving installation of drapes, and noise abatement items.

D. The fact that some items proposed by the Union were on the table at national negotiations does not matter, in these cases, because of Respondent's admission that Local 1760 was the appropriate bargaining agent for regional and local changes in working conditions of unit employees in New York offices, which would include these here at Syracuse and Buffalo. See findings 3(a) and (b), supra. Agreements reached at the national level would, of course, supercede any conflicting ones arrived at regional or local levels. This would seem to be the case as to Local 1760's proposals on a day care center. See findings 5b, 14b, and 27b, supra.

Remedy

Counsel for the General Counsel did not ask for "a status quo ante remedy" (TR 74, 9). She did ask for an affirmative order to bargain in good faith on the previously submitted proposals and to require "any agreements reached between the parties to be made retroactive to the date of the move" (TR 9 and see also TR 75). She stated that she would submit a brief and was requested to submit a proposed order for relief delineating "exactly what [she] meant by retroactivity" as it related to the proposals. She agreed. However, neither a brief nor a proposed order has been submitted on behalf of the General Counsel. Instead, reliance is placed solely on Judge Naimark's decision and the brief filed on behalf of the General Counsel in Case Nos. 12-CA-20179 and 20355. Judge Naimark granted only prospective relief in those cases, without discussing the statement on page 15 of the brief seeking relief retroactive to the date of the relocations. The brief made no argument in support of such relief.

It would be fair to assume, from the failure to submit a proposed order and argument in support of it, that the General Counsel is not too concerned about an order for retroactive relief. In any event, I do not consider such relief appropriate here, under standards enunciated by the Authority in such cases as Federal Correctional Institution, 8 FLRA No. 111, 8 FLRA 604, (1982). While Respondent did relocate the OHA offices during the course of bargaining, it tried to stop and delay the move, but to no avail. GSA was prepared to evict the OHA offices. Respondent gave timely notices of its actions to the Union and timely responded to the bargaining proposals of the Union. The responses, while rejected here, were not totally lacking in merit. I find no bad faith in Respondent's refusal to give the Union a written allegation of non-negotiability of any proposal, in view of Respondent's stance that it was not taking such a position. See RBr 20-22. While the evidence demonstrated that employees in the bargaining unit have suffered substantial adverse effects from their moves away from plush and prestigious offices, there is no evidence that they are so dire as to call for any but prospective relief, under all the circumstances of this case. Just how disruptive retroactive relief would be, or how much it would impair the efficiency and effectiveness of Respondents' operations is unclear from the record. Counsel for the General Counsel suggested only one specific type of retroactive relief — correcting the records of any employees who were marked as late on paydays, in view of the proposal to grant an extra one-half hour of administrative leave on paydays so that employees might cash their checks. Since a number of banks appear to be in close proximity to the new location, the impact upon unit employees of the failure to bargain this proposal is not sufficient to warrant the ordering of such relief. Under all the circumstances here involved, retroactive relief is best left to bargaining between the parties.

Ultimate Findings and Recommended Order

Respondent has engaged and is engaging in the unfair labor practices alleged in the complaints, in violation of 5 U.S.C. 7116(a)(1) and (5).

Accordingly, and pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, shall:

1. Cease and desist from:

(a) Relocating or moving its offices and employees, without first notifying the American Federation of Government Employees, Local 1760, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the procedures to be observed in such relocation or move and the arrangements for employees adversely affected by such action.

(b) Refusing to negotiate in good faith with the American Federation of Government Employees, Local 1760 to the extent consonant with law and regulations, as to the procedures to be observed in any further implementation of its relocation of OHA offices in Buffalo and Syracuse, New York, and the arrangements for employees adversely affected by the relocation, including, but not limited to proposals already made.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the American Federation of Government Employees, Local 1760 of any intention to relocate or move any of its offices and employees, and afford it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the procedures to be observed in such relocation or move and arrangements for employees adversely affected by such action.

(b) Upon request, negotiate in good faith with the American Federation of Government Employees, Local 1760 to the extent consonant with law and regulations, as to the procedures to be observed in any further implementation of its relocation of OHA offices in Buffalo and Syracuse, New York, and the arrangements for employees adversely affected by the relocations, including, but not limited to proposals already made.

(c) Post at its OHA offices in Buffalo and Syracuse, New York, copies of the attached notice, marked "Appendix B", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of Region II and they shall be posted for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other materials.

(d) Notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: July 28, 1983
Washington, D.C.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We Hereby Notify Our Employees That:

WE WILL NOT relocate or move our offices and employees, without first notifying the American Federation of Government Employees, Local 1760, the exclusive representative of our employees, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the procedures to be observed in such relocation or move and the arrangements for employees adversely affected by such action.

WE WILL NOT refuse to negotiate with the American Federation of Government Employees, Local 1760, the exclusive representative of our employees to the extent consonant with law and regulations, as to the procedures to be observed in any further implementation of the relocation of OHA offices in Buffalo and Syracuse, New York, and the arrangements for employees adversely affected by the relocations, including, but not limited to proposals already made.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, Local 1760, the exclusive representative of our employees, of any intention to relocate or move our offices and employees, and afford it the opportunity to negotiate, to the extent consonant with law and regulations concerning the procedures to be observed in such relocation or move and arrangements for employees adversely affected by such action.

WE WILL, upon request, negotiate in good faith with the American Federation of Government Employees, Local 1760, the exclusive representative of our employees, to the extent consonant with law and regulations, as to the procedures to be observed in any further implementation of the relocations of OHA offices in Buffalo and Syracuse, New York, and the arrangements for employees adversely affected by the relocation, including, but not limited to proposals already made.

(Agency or Activity)

Dated: ________________ **By:** ________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 214

Union

and

Case No. 0-NG-786

DEPARTMENT OF THE AIR FORCE,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case is before the Authority because of an appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of the following Union proposal. This dispute arose while the parties were bargaining over ground rules in preparation for contract negotiations.

UNION PROPOSAL

Proposal 2(a). The employer agrees to provide official time, and to pay per diem and constructive travel costs in accordance with the Joint Travel Regulations and Civil Service Reform Act for up to ten (10) union negotiating team members, as follows:

(1) For five (5) calendar days at dates designated by the Union at Wright-Patterson Air Force Base to prepare proposals, counter-proposals, etc., prior to the start of across-the-table negotiations.

> (2) For an initial across-the-table bargaining session of up to four (4) weeks. If bargaining is not completed within that time, the negotiating period will be extended by mutual consent, or a second bargaining period will be established.
>
> (3) For any additional sessions by the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel. [The underscored portion is in dispute.]

II. Position of the Parties

The parties' arguments focus on the issues of whether additional official time can be negotiated over and above that to which union negotiators are entitled under the Statute and whether travel and per diem expenses are within the duty to bargain. Under section 7131(a) of the Statute, the number of employees entitled to official time while participating on the Union negotiating team would be limited to the same number as the management team. The Union proposal here seeks negotiated official time, as well as travel and per diem, for up to ten Union negotiating team members because the Agency had expressed its intent to limit its management negotiating team to three or less members.

The Union asserts that official time for Union team members, over and above that to which there is an entitlement under section 7131(a), is negotiable under section 7131(d). The Union specifically says it does not intend its proposal to affect the size of the management negotiating team. The Union argues that the negotiation of travel and per diem expenses is a condition of employment and that the proposal is not inconsistent with the Travel Expense Act as interpreted by the Comptroller General.

The Agency contends that the parties have entered into a ground rules agreement through the Mediation/Arbitration process. It argues that this agreement has effectively resolved the parties' dispute over the subjects of official time and travel and per diem. Because there is no longer an outstanding dispute over these issues, it contends that the petition is moot and moves that it be dismissed. As to the merits of the proposal, the Agency argues that negotiation of official time for Union negotiators over and above that provided in section 7131(a) of the Statute conflicts with section 7131 of the Statute. It also asserts that the proposal effectively seeks to determine the numerical size of the Agency negotiating team and is nonnegotiable for that reason as well. With respect to travel and per diem, the Agency asserts that it is not a condition of employment within the meaning of the Statute because payment of travel expenses is specifically provided for by law. It also asserts that Congress did not intend to require agencies to pay travel and per diem expenses of employees representing a union in collective bargaining and that whatever discretion agencies may possess under the Travel Expense Act to do so cannot appropriately be exercised through negotiation.

III. Analysis

A. Question of Mootness

As noted earlier this proposal was presented during ground rules negotiations between the parties. Having reached an impasse in those negotiations, and based on a recommendation by the Federal Service Impasses Panel (FSIP), the parties submitted their ground rules dispute to Mediation/Arbitration. The Mediator/Arbitrator held that the issue of official time for additional union negotiators was nonnegotiable and that the Union negotiators were strictly limited to the amount of official time provided pursuant to section 7131(a) of the Statute. The Mediator/Arbitrator therefore held that under the Statute the parties could not negotiate over official time for Union negotiating team members who exceeded the number of Agency team members. The Mediator/Arbitrator directed the parties to choose between alternative dispositions of their travel and per diem dispute. The alternatives were:

> (1) Negotiations would be held at Wright-Patterson Air Force Base, Ohio -- the Agency's preferred location -- with the Agency paying certain specified travel costs for up to seven Union negotiating team members;
>
> (2) negotiations would be held at Tinker Air Force Base, Oklahoma -- the Union's preferred location -- with each side bearing the travel expenses for its own team.

The record indicates that the parties agreed to the second alternative and that contract negotiations were held at Tinker Air Force Base. Since the parties reached agreement as to the site of negotiations and since that agreement was coupled with an agreement on payment of travel expenses, the Authority finds that there is no longer an outstanding issue as to whether travel and per diem is within the parties' duty to bargain under the Statute. A valid, binding agreement disposing of this aspect of the proposal has been reached by the parties. Therefore, this portion of the petition is moot. See *Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard*, 7 FLRA 701 (1982).

The Authority wishes to point out that it has recently found a proposal which would require payment by an agency of the travel expenses of union representatives using official time to be within the duty to bargain. *National Treasury Employees Union and Department of the Treasury, U. S. Customs Service*, 21 FLRA No. 2 (1986). That case, in the Authority's view, addresses arguments similar to those which the parties in this case raise as to the merits of the question of the negotiability of travel and per diem. However, in view of the parties' agreement as to the site of negotiations and the payment of travel expenses, no order to bargain is appropriate or warranted here.

With respect to that portion of the petition concerning the negotiation of additional official time for Union negotiators, the Mediator/Arbitrator's award was based on her determination that official time for additional Union negotiators was nonnegotiable. The merits of the Union's proposal were never considered nor was any agreement reached with respect to this issue. Therefore, the Authority does not consider this aspect of the petition moot.

B. Official Time Issue

The Union has specifically stated that the proposal is not intended to prescribe the number of members on the Agency's negotiating team. This interpretation comports with the plain language of the proposal. The Agency's contention that the proposal effectively dictates the size of its team is rejected.

The Authority has previously held that, under section 7131(d) of the Statute, a proposal seeking more union negotiators than the number designated by management and official time for those additional negotiators is within the duty to bargain. *American Federation of Government Employees, AFL-CIO and U. S. Environmental Protection Agency*, 15 FLRA 461 (1984) (Union Proposal 2). The Authority finds that the official time provisions of this Union Proposal are within the duty to bargain for the reasons set forth in that case.

The parties' arguments do not specifically address the aspect of the proposal involving the types of activities for which official time will be authorized. However, we note that under section 7131(a) employees representing unions in negotiation of a collective bargaining agreement are entitled to official time for such purposes as attendance at impasse proceedings. Additionally, the Authority has previously found that under section 7131(d) official time for union representatives to prepare for negotiations, impasse resolution and counterproposals is a negotiable matter. Federal Uniformed Firefighters, Local F-159 and U.S. Army Armament Research & Development Command, Dover, New Jersey, 3 FLRA 317 (1980).

IV. Conclusion

The Authority finds that, because the parties have reached an agreement on the travel and per diem issue, the Union's petition as to this issue is moot. However, as far as the issue of official time for additional Union negotiators is concerned, the petition has not been rendered moot. The Authority finds that this aspect of the Union Proposal is within the duty to bargain under section 7131(d) of the Statute.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning that portion of the proposal which relates to authorizing official time for Union negotiating team members.*/ IT IS FURTHER ORDERED that that portion of the petition which relates to per diem and travel costs be, and it hereby is, dismissed.

Issued, Washington, D.C. April 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding this portion of the proposal within the duty to bargain the Authority makes no judgment as to its merits.

[21 FLRA No. 74]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

and

Case No. 0-NG-806

PATENT AND TRADEMARK OFFICE,
DEPARTMENT OF COMMERCE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of four Union proposals.[1] The proposals arose in negotiations between the parties over ground rules to be followed in bargaining over a new basic agreement.

II. Procedural Issues

Preliminarily, the Agency asserts that the petition for review is not properly before the Authority. It contends that it has requested that the Federal Service Impasses Panel (the Panel) resolve an impasse between itself and the Union regarding Proposals 1 and 2 without regard to their negotiability. As for the remaining proposals addressed in the petition, it contends that, because the Union has refused to affirm that those proposals would be before the Panel if no negotiability dispute existed, the Union has failed to establish that the proposals are "real" as opposed to "hypothetical." Thus, the Agency contends that the petition for review as to these proposals does not meet the requirements of Part 2424 of the Authority's Rules and Regulations. The Authority rejects this contention.

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[1] The Union's appeal originally involved a fifth proposal. The Union has subsequently withdrawn that proposal from its appeal and it will not be considered in this case.

In the Authority's view, nothing in the Statute or the Authority's Rules and Regulations precludes a union from filing a petition for review of a negotiability issue even though an agency has requested the Panel to resolve an impasse without regard to the negotiability of the proposal involved. In fact, the Authority has held that negotiability issues which arise during the collective bargaining process (of which the Panel operates as one aspect) must be resolved through appeal to the Authority. Thus, while the Panel may be able to resolve an impasse while avoiding obligation to bargain problems, negotiability issues may be resolved only by the Authority. Interpretation and Guidance, 11 FLRA 626 (1983). Additionally, the Authority finds that nothing in the Statute or its Rules and Regulations provides that a union must either submit a proposal to the Panel or declare its intent to do so as a prerequisite to instituting a negotiability appeal with respect to that proposal.

The Agency additionally contends with respect to various of the proposals that it has not declared them nonnegotiable. The Authority notes that the Union specifically requested, in writing, a declaration by the Agency of its position on the negotiability of those proposals and that the Agency effectively failed to respond to the request. Such failure constitutes a constructive declaration of nonnegotiability which gives rise to a right of appeal to the Authority. American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service, 13 FLRA 697 (1984). Therefore, the Authority finds that the petition is appropriately before it.

III. Union Proposals 1 and 2

Union Proposal 1

Section 3. Time

> In accordance with past practice in the PTO, all POPA bargaining team members, if otherwise in a duty status, shall be

> authorized a reasonable amount of official time to perform all necessary and relevant activities related to these negotiations. For those members of POPA's bargaining team who are engaged in activities related to these negotiations outside of their regular work hours, they shall be on compensated overtime or compensatory time status, at the election of the employee.

Union Proposal 2

Section 4. Schedule

. . . . . .

> c. If negotiations extend beyond 300 hours the schedule will be modified to add paid overtime or compensatory time sessions on Saturdays. Both POPA and the PTO recognize that such paid overtime and compensatory time may be authorized by reason of the fact that all time spent by the POPA negotiating team in actual negotiations constitutes official duty time. Any compensatory time earned can be used only after a new basic agreement is signed. POPA team members may accrue and use such compensatory time without limitation.

A. Positions of the Parties

These two proposals seek to authorize payment of overtime or compensatory time for participation in preparation for, and actual, negotiations when participation occurs outside an employee's normal working hours. The Agency asserts that it must have specific statutory authority to grant pay and that nothing in section 7131 of the Statute authorizes overtime compensation for Union representatives' participation in representational activity when they would not otherwise be in duty status. The Union contends that the entitlement to official time under section 7131(a) of the Statute extends to overtime hours as long as the Agency approves the overtime in advance. Additionally, the Union argues that under the legal provisions governing overtime, 5 U.S.C. § 5542, the Agency has discretion to pay the overtime sought by these proposals.

B. Analysis and Conclusions

As is relevant here,[2] payment of overtime compensation and granting of compensatory time off are governed by the provisions of 5 U.S.C. §§ 5542 and 5543.[3] Entitlement to overtime pay is governed by § 5542, and § 5543 addresses eligibility for compensatory time off in lieu of the monetary compensation to which the employee would be entitled under § 5542. Representational activities performed by a union official outside his or her workday do not constitute the performance of "hours of work" within the meaning of 5 U.S.C. § 5542. *See Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO*, 19 FLRA No. 4 (1985) and *NTEU v. Gregg*, No. 83-546 (D.D.C. Sept. 20, 1983).[4/] Nor do the provisions of section 7131 of the Statute authorize overtime compensation for time spent in representational activities when the employee involved was not otherwise in a duty status.[5/] *See NTEU v. Gregg*. Thus, because Union Proposals 1 and 2 go beyond the conditions under which overtime compensation is specifically authorized under statute, they conflict with Federal statute and are not within the duty to bargain. *See National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 6 FLRA 508 (1981) (Union Proposal 1).

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[2] The record indicates that the grade levels of the members of the Union's representatives are such that they are exempt from coverage under the Fair Labor Standards Act. See Federal Personnel Manual Letter 551-1. Thus, overtime entitlements under that statute are not germane to this dispute.

[3] 5 U.S.C. § 5542 provides, in relevant part:

> § 5542. Overtime rates; computation
>
> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . .

5 U.S.C. § 5543 provides, in relevant part:

> § 5543. Compensatory time off
>
> (a) The head of an agency may--
>
> (1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and
>
> (2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

IV. *Union Proposal 3*

> *Section 2. Attendance, Priorities and Other Negotiations*
>
> . . . .
>
> f. Except for changes in working conditions mandated by statute or government-wide regulation, negotiations regarding impact

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[4/] In *NTEU v. Gregg* the court found, among other things, that two employees of an agency who spent time beyond their normal workweek serving on a union negotiating team were not entitled to overtime compensation under section 7131 of the Statute, 5 U.S.C. § 5542, or the Fair Labor Standards Act. Insofar as the latter two provisions were concerned, the court noted that such representational activities did not fall within the definition of "work" within the meaning of those statutes. In *Social Security Administration* the Authority noted that the legal basis for granting compensatory time off arises under 5 U.S.C. § 5543 as a result of overtime work performed by an employee. Citing *NTEU v. Gregg* in support, the Authority found that a union official's performance outside his workday of representational functions did not constitute hours of work within the meaning of 5 U.S.C. § 5542 for which either overtime pay or compensatory time off could be legally granted.

[5/] It is unnecessary to reach, and the Authority does not pass upon, the question of entitlement to overtime compensation where representational activities occur when the employee involved would otherwise be on duty in an overtime status.

> and implementation of future management changes in working conditions will be combined with these negotiations on a new basic agreement. Management recognizes its obligation to defer implementation of such proposed changes until a new basic agreement is signed, except where immediate implementation is required by an overriding exigency. For example, management recognizes that no overriding exigency exists with respect to automation and that automation of the PTO constitutes a significant impact on working conditions that would preclude implementation until negotiations on a new basic agreement are concluded.

A. Positions of the Parties

This proposal would require that, with certain stated exceptions, negotiations over the impact and implementation of management proposed changes in working conditions would be combined with negotiations over the basic agreement. It would further require that, absent an overriding exigency, any proposed change be deferred until the new basic agreement had been signed.

The Agency's arguments as to this proposal are limited to the procedural ones discussed above in section II. It has presented no arguments on the merits of this proposal. The Union contends that the proposal constitutes a negotiable procedure for orderly conduct of negotiations over changes in conditions of employment.

B. Analysis and Conclusions

During the pendency of this case the Authority issued several decisions which addressed an agency's duty to bargain when, in exercising a management right under section 7106 of the Statute, it changes conditions of employment of unit employees. The Authority has held that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimis. Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA 922 (1984); Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 (1985). Insofar as negotiation over the impact and implementation of management changes in working conditions is concerned, Union Proposal 3 does not distinguish between those management initiated changes which have no more than a *de minimis* impact on bargaining unit employees and those which have more than a *de minimis* impact. Thus the proposal would effectively impose upon the Agency a duty to bargain which is broader than that prescribed by the Statute. Given this, it extends beyond the duty to bargain imposed upon the Agency by the Statute. An agency could elect to bargain over the impact and implementation of changes of a *de minimis* nature as long as proposals do not conflict with law or Government-wide rule or regulation. *See Federal Deposit Insurance Corporation, Headquarters*, 18 FLRA No. 92 (1985). However, since the record in this case does not show that the Agency has elected to bargain over Union Proposal 3, the Authority finds that it is not within the Agency's duty to bargain.

V. Union Proposal 4

> Section 8. Attendance at Mediation
>
> The Commissioner and the President of POPA will personally attend all mediation sessions held under the auspices of the FMCS.

A. Positions of the Parties

The Agency contends that the Union has no right to insist on a provision which prescribes who will represent management in negotiations. The Union asserts that this proposal would not actually restrict the Agency's ability to choose its own representatives. In support it contends that, as the principal with whom they are trying to reach agreement, the Commissioner is "inherently" the "ultimate representative." The proposal would allow it to communicate directly with that principal and eliminate potential inaccuracies resulting from use of intermediaries. It maintains that this proposal provides a procedure for facilitating its statutory right to present its views to the head of the Agency.

B. Analysis and Conclusions

This proposal requires that the Commissioner attend mediation sessions in his capacity as "ultimate" management representative as opposed to relying solely on his/her designated representatives. The Authority has held that it is within the discretion of both agency management and labor organizations holding exclusive recognition to designate their respective representatives when fulfilling their responsibilities under the Statute. American Federation of Government Employees, AFL-CIO, 4 FLRA 272 (1980). Moreover, insofar as Union Proposal 4 requires that the Commissioner of the Agency personally attend mediation sessions, it concerns matters which go beyond those directly affecting unit employees. The designation of those individuals who will attend mediation sessions on behalf of the Agency is not a matter directly related to the conditions of employment of unit employees, contrary to the Union's argument. See National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA 88 (1980). While the Agency may elect to bargain concerning such matters, the record does not establish that it has chosen to do so. See Federal Deposit Insurance Corporation, Headquarters, 18 FLRA No. 92 (1985). Therefore, this proposal is not within the Agency's duty to bargain.

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 75]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, ROSEBURG, OREGON

Activity

and Case No. 0-AR-1133

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1042

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Eugene R. (Joff) Neill filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated March 18, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended, 1/ and section 2425.1 of the Authority's Rules and Regulations, as amended, 2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on April 21, 1986. However, the exceptions were not filed with the Authority at its national office until April 22, 1986. In this regard, the record established that the Union mailed the exceptions, by certified mail from Roseburg, Oregon, addressed to the Authority's San Francisco Regional Office, on April 14, 1986. The San Francisco Regional Office received them on April 17, 1986, and exercised due diligence in forwarding the exceptions on April 18, 1986. However, they were not received by the Authority's national office until April 22, 1986. [3] Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 30, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

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[3] It is well established that exceptions to an Arbitrator's award cannot be filed at a Regional Office but must be filed with the Authority's national office. See, The Panama Canal Commission and Maritime Metal Trades Council, AFL-CIO, 21 FLRA No. 38, n. 5 (1986).

21 FLRA No. 79

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION,
MEBA, AFL-CIO

Union

and Case No. O-NG-627

DEPARTMENT OF COMMERCE,
NATIONAL WEATHER SERVICE,
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union Proposal:

> Students at the (National Weather Service Training) Center shall be given the option of staying at housing of their choice in the Kansas City area. In addition, each student who elects to stay at housing other than the Downtown Travelodge shall be given the $11.85 which would have been paid to the Downtown Travelodge (by the Agency) for their housing, to use in paying for whatever housing the student selects. This $11.85 would be in addition to the $23.00 per diem given to each student for food and miscellaneous expenses.

II. Positions of the Parties

The Agency essentially contends that the proposal is nonnegotiable for the following reasons. First, it conflicts with management's right to determine its budget under section 7106(a)(1) of the Statute, because the increase in cost associated with the proposal is significant and is not offset by compensating benefits. Second, the Agency asserts that the proposal is inconsistent with its right under 41 U.S.C. § 252(a) to contract for services. Third, the Agency states that the proposal is inconsistent with a policy determination it made pursuant to its authority under 5 U.S.C. § 5911(e) that employees may be required to use Government furnished quarters when they are students at the training center if the Agency head determines it is necessary. Finally, the Agency maintains that it has a "requirements" contract with a private contractor which is consistent with 41 C.F.R. § 1-3.409(b). According to the Agency, a "requirements" contract requires an employer to have all its needs supplied exclusively by the contractor. In the Agency's view, its contract legally prevents it from purchasing its housing needs from anyone but the private contractor, thereby making it impossible for the Agency to agree to the terms of the proposal without risking a lawsuit.

The Union contends that the proposal is not intended to cost the Agency any more than it has already determined to spend. The Union also contends that the proposal would not violate law or regulation. It argues that the contract the Agency has negotiated for housing its employees/students may be altered or terminated at its sole discretion, and that the contract does not force the Agency to compel its employees/students to lodge with the private contractor.

III. Analysis

The Union's proposal would allow employees who are students at the National Weather Service Training Center to arrange for their own housing instead of being required to stay in Agency-arranged housing. The proposal further provides that the Agency would pay to employees who arrange their own housing the same amount of money as the Agency pays per employee for the housing it has arranged. The housing allowance would be added to the regular per diem given to all students for food and other expenses.

A. Right to Determine Budget Under Section 7106(a)(1)

In support of its position that the proposal would infringe upon management's right to determine its budget, the Agency cites American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), *enforced sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982). In that decision the Authority determined the conditions under which an otherwise negotiable proposal could be found to violate an agency's right to determine its budget under section 7106(a)(1) of the Statute. The Authority stated, in relevant part, that such a determination will be made only where an agency makes a substantial demonstration that a proposal would require a significant and unavoidable increase in costs which is not offset by compensating benefits. The Authority finds in this case that the Agency has failed to demonstrate that the proposal would require any increase in costs whatsoever.

B. Proposal's Consistency With 41 U.S.C. § 252(a), 5 U.S.C. § 5911(e) and 41 C.F.R. § 1-3.409(b)

The Agency's contentions concerning the proposal's alleged inconsistency with law, and with the Agency's policy determinations made under the authority of law, are all without merit. 41 U.S.C. § 252(a) provides that "Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations of the Administrator." The proposal would not have prevented the Agency from contracting, as it did, with a private contractor, nor would it require the Agency to contract for any housing when the Agency had not already determined to do so. The proposal would only provide employees/students with the option of arranging their own housing and being reimbursed up to the cost of Agency-furnished housing.

5 U.S.C. § 5911(e) states that "[t]he head of an agency may not require an employee ... to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise." The fact that the head of the Agency in this case made a previous policy determination consistent with the terms of 5 U.S.C. § 5911(e), does not settle the issue of whether the Agency is barred from negotiating over the proposal. For the proposal to be outside the duty to bargain, it must be inconsistent with law (or Government-wide regulations or agency regulations for which there is a compelling need). The Agency does not contend, nor does it appear, that the proposal is inconsistent with 5 U.S.C. § 5911(e), or that 5 U.S.C. § 5911(e) requires the Agency to find it necessary

that its employees/students reside in Agency contracted housing. The Agency argues only that the proposal is inconsistent with a policy determination it made pursuant to 5 U.S.C. § 5911(e).1/ Since the policy determination was a matter strictly within the discretion of the Agency, and concerned conditions of employment affecting unit employees, the Agency's argument does not provide a basis for finding the proposal nonnegotiable.

Finally, 41 C.F.R. § 1-3.409(b) sets forth the description and application of "requirements" contracts.2/ Although the Agency asserts that its contract in this case is a "requirements" contract consistent with this regulatory provision, the proposal would have to be inconsistent with the Code of Federal Regulations in order to be barred from negotiations. The Agency has not shown this. Further, in agreement with the Union, the Authority finds that regardless of whether the contract it has negotiated is a "requirements" contract, the contract has provisions which specify that it may be altered or terminated at the will of the Agency. Therefore, there is no inconsistency between the proposal and 41 C.F.R. § 1-3.409(b), nor is there any other apparent reason why the proposal should be barred from negotiations.

IV. Conclusion

For the reasons stated in the foregoing analysis, the proposal is not inconsistent with the Agency's right to determine its budget, under section 7106(a)(1) of the

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1/ Nor does a General Accounting Office (GAO) Memorandum (Certificate of Settlement, Claim No. 2-2624287 (March 30, 1978)) referred to by the Agency support the Agency's conclusion that it is barred from negotiating the Union's proposal. The GAO memorandum would at most indicate that the Agency has satisfied the finding of necessity required by 5 U.S.C. § 5911(e), but cites to no law or regulation preventing the Agency from complying with the provisions of the proposal.

2/ This section of the C.F.R. has been replaced by regulations found at 48 C.F.R. Chapter 1. However, the new regulations do not apply to this case as they only govern contracts executed after April 1, 1984.

Statute, nor is it inconsistent with Federal law or regulation.3/ Moreover, the Agency's view that the proposal conflicts with a policy determination made under the authority of law provides no basis for finding the proposal nonnegotiable. Therefore, the Authority concludes that the proposal is within the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union's proposal.4/

Issued, Washington, D.C., April 30, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ The Authority notes that the proposal is consistent with the applicable Federal Travel Regulations. In this regard, although the Agency has the discretion to bargain over the proposal, it may require proof that students who elect to stay in alternative housing are paying the negotiated amount. The Agency may also adjust the per diem amount for food and miscellaneous expenses based on circumstances resulting from the use of other lodging, for example, when a student elects to stay with friends or relatives at no cost.

4/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

21 FLRA No. 77 [21 FLRA No. 77]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE MAPPING AGENCY
AEROSPACE CENTER
ST. LOUIS, MISSOURI

Respondent

and

Case No. 7-CA-30165

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1827

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

In agreement with the Judge, the Authority concludes that the General Counsel has not met the burden of proving that the Respondent failed to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) or (8) of the Statute when it refused to furnish requested information to the Charging Party in the particular circumstances of this case. See Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 18 FLRA No. 53 (1985); Social Security Administration and Northeastern Program Service Center, 18 FLRA No. 66 (1985);

Department of the Air Force, Scott Air Force Base, Illinois, 18 FLRA No. 75 (1985); and *United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio*, 16 FLRA 52 (1984). We shall therefore dismiss the complaint.*/

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-30165 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In so concluding, however, the Authority does not adopt the Judge's comment that certain requested information relating to position within the bargaining unit is "presumptively relevant" whereas information sought pertaining to positions outside the bargaining unit is not presumptively relevant. As the Authority has previously stated, a determination must be made in the particular circumstances of each case whether data requested by an exclusive representative is "necessary" within the meaning of section 7114(b)(4) of the Statute and whether such information must be disclosed. *See, e.g., Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado*, 17 FLRA 624 (1985), *petition for review filed, sub nom. American Federation of Government Employees, Local 1345 v. FLRA*, No. 85-1378 (D.C. Cir. June 21, 1985); *Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C.*, 18 FLRA No. 74 (1985).

[21 FLRA No. 77]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEFENSE MAPPING AGENCY
AEROSPACE CENTER,
ST. LOUIS, MISSOURI

Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1827

Charging Party

. . . .

Case No. 7-CA-30165

Mr. Louis P. Eaves
For the Respondent

Mr. Virgil Haun
For the Charging Party

Daniel Minahan, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Seven, Federal Labor Relations Authority, Denver, Colorado against the Defense Mapping Agency Aerospace Center, St. Louis, Missouri (Respondent), based on a charge filed by the National Federation of Federal Employees, Local 1827 (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1),(5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by refusing to furnish to the Union copies of certain documents sought by the Union to properly represent an employee who had not been selected for an engraver foreman position. The complaint alleged that the Union was and is entitled to the data under section 7114(b)(4). Respondent's answer denied any violation of the Statute.

A hearing was held in St. Louis, Missouri. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Respondent and the General Counsel filed helpful briefs.[1] Based on the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. At all times material, the Union is and has been a labor organization within the meaning of 5 U.S.C. 7103(a)(4). (GC-1(c); GC-1(d)).

2. At all times material, Respondent is and has been an agency within the meaning of 5 U.S.C. 7103(a)(3). (GC-1(c); GC-1(d)).

3. At all times material, the Union has been certified as the exclusive representative of all General Schedule and wage grade employees of Respondent, excluding management officials, professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Title VII, Public Law 95-454. (GC 1(c), 1(d)). There are approximately 1,300 employees in the unit. Respondent has approximately 2,400 employees outside the unit. (Tr. 90).

4. At all times material, Respondent and the Union have been parties to a collective bargaining agreement with an effective date of 19 February 1982. (GC-2).

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[1] Respondent's request to file a limited reply brief is hereby denied.

[2] The motions of Respondent and the General Counsel to correct the transcript are granted; the transcript is hereby corrected as set forth therein. Respondent's Exhibit 4, an informal settlement agreement in Case No. 57-CO-20012, should not have been received. Accordingly, no consideration has been given to that Exhibit. The General Counsel's request that the receipt of Respondent's Exhibit 6 be reconsidered is denied. However, I agree with the General Counsel that Respondent's Exhibit 6 and the testimony supporting its introduction into evidence fail to establish that the Union waived its rights under section 7114(b)(4).

a. Article 9 contains a "broad-scope" grievance procedure. (Tr. 59, 103). Among other things, it defines a grievance as a complaint by the Union or any unit employee concerning any matter relating to the employment of any unit employee and any complaint by the Union or any employee concerning any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment.

b. Since the February 1982 effective date of the agreement, the negotiated grievance procedure has never been applied to the filling of supervisory or other non-bargaining unit positions. (Tr. 89-91).

c. Article 9-3c. provides, in part, that raising an EEO complaint with an EEO counselor shall constitute an election by an employee and shall preclude raising the same issue(s) as a grievance.

d. Article 9-4e. provides, in part, that a grievance must be filed within 21 calendar days of the date of occurrence of the matter grieved or within 21 calendar days of the date that the aggrieved party could reasonably be expected to have been aware of the occurrence grieved.

e. Article 14 deals with providing the Union information "relevant and necessary for the proper discharge of its obligation under Public Law 95-454 and this agreement." Article 14-1g. provides that specific information requested for investigating and/or processing complaints/grievances/appeals will be provided without undue delay, normally within 7 workdays.

f. Article 36 deals with employee details, reassignments and temporary promotions. Article 37 deals with the merit staffing program. (G.C. Ex. 2).

5. Respondent has consistently refused to engage in negotiations regarding the filling of supervisory positions. (Tr. 66-67, 69, 89).

6. At all times material, Louis Paul Eaves (hereinafter Eaves), has occupied the position of labor relations officer for Respondent, and has been and is now a supervisor and/or management official within the meaning of 5 U.S.C. 7103(a)(10) and/or (11), and an agent of Respondent. (GC-1(c); GC-1(d)).

7. On 12 November 1982, Respondent issued a vacancy announcement for an engraver foreman position. The position is a supervisory position. (G.C. 3; Tr. 20). As such, it is excluded from the bargaining unit represented by the Union.

8. Bargaining unit employees were eligible to apply for the position. (Tr. 20). Applicants would be evaluated and ranked in accordance with the agency's merit staffing plan. (G.C. 3; Res. Ex. 5; Tr. 20). According to the merit staffing plan, a panel is convened to identify essential knowledges, skills, abilities, and personal characteristics (KSAPs) for the position and to establish ranking levels. The Union is not represented on the panel for supervisory and other non-bargaining unit positions. Applicants submit self-rating sheets, also commonly called KSAPs, which describe how they meet the rating and ranking criteria established by the panel. The panel scores the KSAPs submitted by the applicants and compiles a register of the applicants who will be referred for an interview with the selecting official. (Tr. 20-22; 92-93, Res. Ex. 5).

9. Herbert Foster is a bargaining unit employee of the Respondent who works as a negative engraver. (Tr. 17). He is now a special representative of the Union and, from 1977 through 1982, was the Union's chief steward. (Tr. 19, 71). During November 1982, Foster applied for the engraver foreman position. (Tr. 20).

10. By notice dated December 10, 1983, Foster was notified that he would not be referred for an interview for the engraver foreman position. (Res. Ex. 2; Tr. 77). Upon receipt of the notice, Foster decided to investigate the process that led to his nonselection. On December 14, 1983, he asked a staffing specialist in Respondent's personnel office for copies of the KSAPs submitted by other applicants so he could compare them with his own. He also requested that the rating panel be reconvened, so he could persuade it to raise his score, as was once done in the case of another employee. Both requests were refused. (Tr. 24-25).

11. Foster contacted an EEO Counselor regarding his non-selection on December 16, 1982. He alleged various forms of racial discrimination. The EEO Counselor recorded the informal complaint and set forth a plan to investigate it. (Res. Ex. 1). Foster also asked the EEO Counselor for help in obtaining copies of the KSAPs submitted by other applicants. The EEO Counselor said he could not do this; that Foster could only see his own KSAPs. (Tr. 26).

12. Foster then asked his Union steward, Brady Barr, for assistance in securing the documents. (Tr. 26). Foster had not decided what action to take, but wanted to make that determination after a review of the documents. (Tr. 29, 31). By letter dated January 4, 1983, Union steward Barr sent the following letter to Respondent:

> In order for the Union to discharge its obligation under Title VII, CSRA, P.L. 95-454, Local 1827, NFFE hereby request the following:
>
> (1) Copies of all KSAPS and Rating Sheets for all candidates referred for selection on Referral Certificate for above vacancy announcement.
>
> (2) Copy of Position Description for position indicated on announcement, also indicate position number.
>
> (3) POW (Class & Wages) rationale for making position Supervisory rather than non-supervisory.
>
> (4) Copy of SF 52 requesting establishment of position.
>
> (5) Copy of WP-4413-28 (Supervisory) position description.
>
> (6) Copy of referral certificate.
>
> I. A.W. 14-1(g) of Agreement, please expedite - time constraints. (G.C. Exh. 4).

13. Respondent, by L. P. Eaves, denied Barr's request by letter dated January 10, 1983. The letter provided as follows:

> This will respond to your letter of 4 January 1983 requesting information relevant to Vacancy Announcement No. 155-82A, dated 12 November 1982.
>
> The position is a supervisory position (Engraver Foreman, WP-413-30) and is, thus, beyond the scope of the bargaining unit. Article 37 (Merit Staffing Program) is applicable only to positions within the bargaining unit as is the rest of the Agreement.
>
> There has been a number of decisions by the Federal Labor Relations Authority to the effect that management is not obligated to negotiate with regard to the filling of positions outside of the bargaining unit. There is no provision of the Agreement by which management waived its right to exclude from the bargaining process the filling of non-bargaining unit positions and, accordingly, management actions, with

> regard to such positions, are not subject to challenge under the negotiated grievance procedures.
>
> In view of the above, your request must be denied. Your letter does not specify any relationship between conditions of employment of unit employees and filling of the position in question so as to establish a need for the information relevant to any right of representation. If you wish to clarify this matter for me, I will reconsider my decision.

14. On January 19, 1983 Union chief steward Francis Jett responded to Eaves. He requested the exact same information and stated, "[T]his information is necessary and relevant to process a grievance. This information is being requested in accordance with the Labor-Management Agreement Article 14-1-G." (G.C. Ex. 6).

15. Upon receipt of Jett's letter of January 19, 1983, Eaves contacted Jett by telephone and requested additional clarification regarding the relevancy of the information. The conversation took place between 19 January and 25 January 1983, the date of Eaves' written response to Jett. Eaves requested clarification regarding the need or relevancy of the information. Jett stated that the information was relevant to grievances which the Union intended to process under the negotiated grievance procedures. (G.C.-7; Tr. 75-7[illegible]. Eaves learned from the EEO office that Foster had an EEO compl[illegible] pending. (Tr. 104). On January 25, 1983 Eaves replied to Jett's request of January 19, 1983, in part, as follows:

> In your letter you state that the requested information is for the purpose of processing a grievance. In our recent conversation, you indicated that you intended to process the grievance under the negotiated grievance procedures (Article 9).
>
> I continue to be of the opinion that disputes regarding the filling of supervisory position are not subject to resolution under the negotiated grievance procedures. I have also been informed that Mr. Louis Foster has filed an EEO complaint regarding the same matter. Thus, any grievance filed by Mr. Foster would also be precluded by Article 9-3 c. Please provide the name(s) of the employee(s) whom you propose to represent in this matter under the negotiated grievance procedure.
>
> We obviously have a very basic grievability/arbitrability issue. I suggest we submit the issue to arbitration and if the Union ultimately prevails, I will

provide the appropriate information and accept any subsequently filed grievance under the negotiated grievance procedures.

16. Sometime after the exchange of correspondence, Eaves again asked Jett for the name of the employee the Union proposed to represent. Jett replied that it was Louis Foster. (Tr. 76).

17. On January 25, 1983, Foster filed a formal EEO complaint. (Tr. 37).

18. The Union was never furnished the data sought in its letters.

19. Basically, the data requested by the Union would have shown the relative scores and qualifications of the applicants and whether the criteria developed by the rating panel for the position, a newly-established position, fairly reflected the actual duties and responsibilities of the position. (Tr. 31-37, 58). The Union has characteristically reviewed data of this nature before deciding whether, or how, to represent an employee not selected for a promotion to a bargaining unit position. (Tr. 46, 57-58). However, as noted, the Union has never before sought to represent an employee with respect to a position outside the bargaining unit. (Tr. 66, 90). Similarly, Respondent would have routinely provided much or all of the data, perhaps in a sanitized form, if the position for which Foster was not selected had been a bargaining unit position. (Tr. 104-105).

20. Testimony at the hearing disclosed that the Union desired to review the data to determine whether or not to assist Foster in filing a grievance or complaint in a number of possible forums. These included the possibilities of a grievance under the negotiated grievance procedure, a prohibited personnel practice complaint before the Merit Systems Protection Board, an EEO complaint under Equal Employment Opportunity regulations, or an unfair labor practice charge with the Federal Labor Relations Authority for discrimination against a union representative. (Tr. 116).

21. The data requested by the Union is normally maintained by the agency in the regular course of business and does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining. (G.C. Ex. 1(c), 1(d)).

Discussion, Conclusions, and Recommendations

The General Counsel contends that the data sought by the Union in its requests to Respondent was "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining," within the meaning of section 7114(b)(4)[3] of the Statute.

Respondent notes that the Authority has held that procedures for the filling of supervisory or other non-bargaining unit positions do not constitute a condition of employment within the meaning of the Statute, and that an employer is not obligated to bargain regarding such matters.[4] Respondent claims that the parties' negotiated grievance procedure does not extend to disputes regarding supervisory and other non-bargaining unit positions, and Respondent has consistently refused to engage in such bargaining. Therefore, Respondent asserts that the Union is not entitled to information under section 7114(b)(4) regarding a matter beyond the scope of collective bargaining and which does not constitute a condition of employment.

Respondent also maintains that the question of the Union's entitlement to the requested information is a matter of contract interpretation which should have been resolved via arbitration. In addition, Respondent contends that a grievance by, or on behalf of, Foster, even if otherwise viable, would have been precluded by Article 9-3c. of the agreement, since Foster raised the matter with an EEO counselor, and it would also have been untimely under Article 9-4a. of the agreement. Respondent also argues that the Union failed to demonstrate that the requested information was relevant to any representational need.

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[3] Section 7114(b)(4) provides that the duty of an agency and an exclusive representative to negotiate in good faith shall include the obligation -

> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> "(A) which is normally maintained by the agency in the regular course of business;
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> "(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

[4] See, e.g., National Council of Field Labor Locals, 3 FLRA 289 (1980).

Respondent's argument that since the Union referenced Article 14-1g. of the negotiated agreement in making its request for the data, any dispute as to the Union's entitlement to the information involves the interpretation and application of that article and should be resolved under the negotiated grievance procedure rather than as an unfair labor practice is rejected. Article 14-1g basically provides a time frame for responding to requests for information. This dispute does not involve essentially an interpretation of article 14-1g, but rather whether Respondent has engaged in an unfair labor practice by refusing to supply information within the scope of section 7114(b)(4) to the Union. The Union's right, if any, to the requested data in the present case stems from that section of the Statute rather than from the collective bargaining agreement. The refusal to supply information within the scope of section 7114(b)(4) constitutes a violation of sections 7116(a)(1), (5) and (8) of the Statute irrespective of whether the refusal might also constitute a breach of the parties' agreement. Cf. *Department of Defense Dependents Schools*, 12 FLRA No. 12 (1983); *Internal Revenue Service and Brookhaven Service Center*, 6 FLRA No. 127 (1981).

The next issue is whether and to what extent the Authority must or may consider the grievability or arbitrability of a potential grievance in deciding whether a Union is entitled to data under Section 7114(b)(4).

Section 7121(a)(1) of the Statute requires that all collective bargaining agreements contain procedures for the settlement of questions of arbitrability. It also declares that these procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage." The Authority has strictly construed this language. In *Portsmouth Naval Shipyard*, 11 FLRA No. 80, 11 FLRA 456 (1983), the Administrative Law Judge recommended dismissal of a complaint against an agency that had refused to proceed to arbitration, on the ground that the grievance submitted by the union was clearly and unmistakably excluded from the reach of the parties' agreement. The Authority held to the contrary, finding that "all questions of arbitrability must be submitted to an arbitrator." The Authority found that the Judge had erred "by attempting to resolve the arbitrability question himself." See also *Truman Memorial Veterans Hospital, Columbia, Missouri*, 11 FLRA No. 90, 11 FLRA 516 (1983).

The Authority reiterated this view in the context of a request for data in *U.S. Customs Service, Region VII, Los Angeles, California*, 10 FLRA No. 47, 10 FLRA 251 (1982). The Authority rejected the agency's contention that it had no duty to furnish the requested information because the employee's grievance involved a matter which was nongrievable under the parties' negotiated agreement. Without passing upon the merits of the agency's contention and noting its previous interpretations of section 7121 in Interpretation and Guidance, 2 FLRA 273 at 279, n.7 (1979), that questions of arbitrability must be submitted to arbitration unless the parties mutually agree otherwise, the Authority observed simply that the request satisfied the criteria in Section 7114(b)(4) and ordered the activity to furnish the data requested.

In light of the Customs case, it would be improper in this proceeding to pass upon the merits of Respondent's contentions that a grievance relating to nonselection for supervisory positions is not subject to resolution under the negotiated grievance procedure, or that any grievance filed for Foster would, under that procedure, have been both untimely and barred by Foster's EEO complaint. As the Authority emphasized in Portsmouth Naval Shipyard, supra, "all questions of arbitrability must be submitted to an arbitrator." 11 FLRA at 457.

The Authority has ruled that data falls within the standard of section 7114(b)(4) of being "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining" in a case of this nature if it is "necessary and relevant in order to enable the union to effectively carry out its statutory representational obligation in the processing of an employee grievance." Veterans Administration Regional Office, Denver, Colorado, 10 FLRA 453, 455 (1982). The fact that matters pertaining to non-bargaining unit positions do not relate to conditions of employment of unit employees and are outside the duty to bargain under the Statute does not preclude disclosure of information relating to non-bargaining unit positions to an exclusive representative if such information is otherwise shown to be necessary and relevant to the performance of the statutory rights and duties of the exclusive representative.

The statutory representational rights and duties of an exclusive representative include the rights to represent the interests of all employees in the unit and to present and process their grievances through the negotiated grievance procedure and to binding arbitration. See sections 7114(a)(1) and 7121(b)(3)(A)-(C). While a union has no obligation to file a grievance for any employee, it must fairly represent the interests of all bargaining unit employees. It is well settled that a union has a right to information necessary and relevant to determine whether or not to file a grievance in the first instance. Department of the Navy, Portsmouth Naval Shipyard, 4 FLRA 619, 624 (1980).

The record establishes that the Union initially requested the documents "in order to discharge its obligation under Title VII, CSRA, P.L. 95-454." It later stated that the information was necessary and relevant to process a grievance and that the grievance was on behalf of a bargaining unit employee, Louis Foster. However, despite the agency's request for clarification, the Union did not specify the grievant's charges or indicate the issues involved in the potential grievance.

An agency is not obligated to provide information regarding a grievance which is so vague and ill-defined that the relevancy of the requested information cannot be ascertained. Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA 654 (1982). The General Counsel points out that the value of the data in evaluating unfairness or disparate treatment concerning promotion to unit positions is well established and should be equally recognized in this instance. It is true that certain information[5/] used by a panel considering candidates for promotion to a unit position would be presumptively relevant to a unit employee's grievance. U.S. Customs Service, Region VII, supra. However, where the information sought pertains to a position outside the bargaining unit, as here, the information is not presumptively relevant. In such circumstances, the Union is required to show, by reference to the circumstances of the case, more precisely the relevance of the data it desires. Cf. Curtiss-Wright Corp. v. NLRB, 347 F. 2d 61, 69, 59 LRRM 2433 (3rd Cir. 1965).

The General Counsel claims that Foster could grieve his nonselection for the supervisory position, but, even if he could not, he would be entitled to file a grievance, given the broad definition of "grievance" in the agreement, for example, by seeking the removal of any records adversely commenting on his Union activities, or, based on a review of the records, he might be able to claim that the criteria established for the selection were contrary to law or regulation. The Union did not set forth in its request to Respondent any facts which might raise such issues. It cannot merely leave the relevancy open to conjecture or surmise. Cf. San Diego Newspaper Guild v. NLRB, 548 F 2d 863, 868, 94 LRRM 2923 (9th Cir., 1977). It had to show more than an abstract relevance. When seeking information to which the presumption does not apply, a union must demonstrate that the information is of probable or potential relevance under a "discovery - type" standard. Cf. Oil, Chemical & Atomic Workers v. NLRB, 113 LRRM 3163 (D.C. Cir., 1983); NLRB, v. Acme Industrial Co., 385 U.S. 432, 437, 64 LRRM 2069 (1967).

The Union had the duty to demonstrate the relevance and necessity for the information at the time the request was made so that problems could possibly be worked out after some further minimal effort at the bargaining table. It is only after such effort that the problem is properly presented to the Authority and the courts. Cf. Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1098-1099, 107 LRRM 2781, 2806 (1st Cir. 1981) and cases cited therein; Emeryville Research Center, Shell Development Co. v. NLRB, 441 F.2d 880, 77 LRRM 2043 (9th Cir., 1971); 438th Air Base Group, McGuire Air Force Base, 2-CA-609, 4 ALJDR (1982).

[5/] See National Federation of Federal Employees, Local 1745, 13 FLRA No. 91 (1983), concerning the applicability of the Privacy Act to records used by promotion panels.

In view of the Union's failure to initially demonstrate to Respondent that the information requested in this instance was necessary and relevant in order to enable it to discharge its responsibilities under the Statute, a preponderance of the evidence does not support a violation by Respondent of sections 7116(a)(1), (5) and (8) of the Statute by refusing to furnish the information pursuant to section 7114(b)(4), as alleged. Internal Revenue Service, Buffalo District, Buffalo, New York, supra; Director of Administration, Headquarters, U.S. Air Force, 6 FLRA 110, 121-122 (1981).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 7-CA-30165 be, and it hereby is, DISMISSED.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: January 24, 1984
Washington, DC

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Federal Labor Relations Authority

Washington, D.C. 20424

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NEGOTIABILITY CASES

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21 FLRA No. 79 (April 30, 1986)

National Federation of Federal Employees, Local 29 and U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, Case No. 0-NG-878

21 FLRA No. 80 (May 8, 1986)

American Federation of Government Employees, AFL-CIO, National EPA Council and Environmental Protection Agency, Case No. 0-NG-678

21 FLRA No. 81 (May 8, 1986)

Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region, APO New York, Case No. 0-NG-1173

21 FLRA No. 83 (May 8, 1986)

National Treasury Employees Union and Department of the Treasury, Bureau of Government Financial Operations, Case No. 0-NG-755

21 FLRA No. 84 (May 8, 1986)

American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Occupational Safety and Health Administration, Case No. 0-NG-849

21 FLRA No. 85 (May 8, 1986)

National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, Andover Service Center, Andover, Massachusetts, Case No. 0-NG-711

Y 3.F 31/21-3:

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 78 (April 30, 1986)

Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio and American Federation of Government Employees, Local 2221, AFL-CIO, Case No. 5-CA-30215

21 FLRA No. 82 (May 6, 1986)

Internal Revenue Service, National Office and National Treasury Employees Union, Case No. 3-CA-40441

ARBITRATION CASE

21 FLRA No. 86 (May 9, 1986)

Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760 (Florey, Arbitrator), Case No. 0-AR-1016

21 FLRA No. 78

Federal Labor Relations Authority

Dep't of the Air Force, AFLC,
Wright-Patterson AFB, Ohio and
Newark Air Force Station, Newark
Ohio and AFGE, Local 2221,
Case No. 5-CA-30215 (Decided
April 30, 1986)

DIGEST HEADINGS

- 4000 UNFAIR LABOR PRACTICE: AGENCY
  - 4500 Refusal to Negotiate

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Procedures and Appropriate Arrangements
        - Changes in Performance Standards
  - Remedy
    - *Status Quo Ante*
      - Violation Based on Failure to Negotiate Procedures and Appropriate Arrangements
      - Violation Based on Good Faith But Erroneous Belief
- 5 U.S.C. § 4302

STATUTE

7106(a)
7106(b)(2) and (3)
7116(a)(1) and (5)
7118

DIGEST NOTES

The union did not waive its right to bargain over the impact and implementation of a change by management in employees' performance standards. The Authority, contrary to the Judge, concluded that the parties' agreement did not contain any language which specifically relieved the agency of its duty to bargain under § 7106(b)(2) and (3) nor did the record reveal any instances where the agency had unilaterally revised unit employees' performance standards without notifying the union. Accordingly, the agency violated § 7106(a)(1) and (5) when it unilaterally revised employees' performance standards without providing the union with adequate prior notice and an opportunity to bargain over procedures and appropriate arrangements for adversely affected employees.

A *status quo ante* remedy was not warranted where the agency failed to provide the union with the opportunity to negotiate the impact and implementation of a change by management in employees' performance standards, in violation of § 7106(a)(2) and (3) and § 7116(a)(1) and (5). In balancing the nature and circumstances

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

of the violation against the degree of disruption in government operations that would be caused by a status quo ante remedy, the Authority noted that while no advance notice of the revised performance standards was given to the Union, the agency's actions were based upon the good faith but erroneous belief that it was acting in accordance with procedures contained in the parties negotiated agreement. Moreover, no employee had been appraised under the revised performance standards, and it was not asserted that any employee had suffered a loss as a result of the new standards.

Federal Labor Relations Authority

21 FLRA No. 79

NFFE and Army Corps of Engineers, Kansas City District, Kansas City, Mo., Case No. 0-NG-878 (Decided April 30, 1986)

DIGEST HEADINGS

- 2000 NEGOTIABILITY
  - 2150 Management Rights
    - 2152.60 Fill Positions
  - 2210 Mandatory Subjects of Bargaining
    - 2211.05 Appropriate Arrangements
  - 2600 Conditions for Review
    - 2602 Proposal Conflicts with Government-wide Regulation

STATUTE

7105(a)(2)(E)
7106(a)(2)(C)
7106(b)(3)
7117(a)(1)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Conflicts with a Government-wide Regulation
      - FPM Ch. 335, Subch. 1-4, Requirement 4
  - Management Rights
    - Fill Positions
      - Appropriate Source [FPM Ch. 355, Subch. 1-4, Requirement 4]
      - Competitive Levels (5 C.F.R § 351.403)
      - Repromotions Based on Seniority
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangements
      - Repromotions Based on Seniority
- FPM Ch. 335, Subch. 1-5(c)(6)

DIGEST NOTES

A proposal is nonnegotiable which requires that once the agency decides to fill a vacant position with qualified repromotion eligible employees, the position must be filled on the basis of seniority within the competitive level. The proposal does not excessively interfere with management's right to fill positions by making selections from any appropriate source under § 7106(a)(2)(C). Rather, the proposal is an appropriate arrangement under § 7106(b)(3) that otherwise would be negotiable but for the fact that it conflicts with a Government-wide regulation within the meaning of § 7117(a)(1). Requirement 4 of

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

subchapter 1-4, chapter 335 of the FPM, a Government-wide regulation, permits agencies to fill positions by making selections from any appropriate source. While subchapter 1-5(c)(6) of FPM chapter 335 authorizes an agency to except certain repromotions from its competitive selection procedures, such FPM provision does not purport to authorize an agency to relinquish its right under Requirement 4 to make selections from appropriate sources.

21 FLRA No. 80

Federal
Labor Relations
Authority

AFGE, National EPA Council and EPA,
Case No. 0-NG-678 (Decided May 8, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
    2600 Conditions For Review
        2601 Proposal Inconsistent With Federal Law
7500 OFFICIAL TIME

STATUTE

7105(a)(2)(E)
7131(a) and (d)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Conflicts with Applicable Law
      5 U.S.C. §§ 5542, 5543, 5544
      29 U.S.C. §§ 201 *et seq.*
  Official Time
    Additional Official Time Beyond § 7131(a) Requirement
    Compensatory Time for Employees on Official Time
    Overtime Compensation for Employees on Official Time
    Travel and Per Diem
FPM Supplement 532-1, Subch. 8, S8-4(b)(10)

DIGEST NOTES

Official Time beyond that authorized under § 7131(a) may be negotiated under § 7131(d). Also travel and per diem expenses for employees on official time may be negotiated. However, overtime compensation for employees on official time is not negotiable. Representational activities performed by employees outside the normal workday do not constitute the performance of hours of work within the meaning of 5 U.S.C. § 5542 which governs overtime compensation for General Schedule employees, nor are such activities "work" under 5 U.S.C. § 5544 which governs overtime compensation for prevailing rate employees. Likewise, compensatory time off for employees on official time is not negotiable. Representational activity does not make an employee eligible for compensatory time off. In order to be eligible for compensatory time off, a General Schedule employee must be

eligible for overtime pay. Prevailing rate employees have no eligibility for compensatory time off whatsoever, but must be paid for overtime work. [FPM Supplement 532-1, Subchapter 8, S8-4(b)(10)] Consequently, a proposal providing for all of the above is nonnegotiable.

21 FLRA No. 81

Federal Labor Relations Authority

Overseas Federation of Teachers and DOD Schools, Mediterranean Region, APO New York, Case No. 0-NG-1173 (Decided May 8, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2200 Subjects of Bargaining	7106(b)(1)
2201 At the Election of the Agency	7131(d)
7500 OFFICIAL TIME	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Subjects of Bargaining at the Election of the Agency
    Numbers, Types and Grades of Employees
      100% Official Time of Union Representatives
  Official Time
    100% Official Time for a Full-Time Union Representative

DIGEST NOTES

A proposal is negotiable under § 7131(d) which requires that one union representative be granted 100% official time in addition to the one full-time union representative that already receives 100% official time. The agency was unable to show that this proposal would interfere with the accomplishment of the agency's work or otherwise interfere with management's right under § 7106(b)(1) to determine the numbers, types, and grades of employees or positions. In a previous case the Authority had held that 100% official time for 12 union representatives was nonnegotiable because the agency's mission in that case required employees to work in crews where various tasks and skills were highly specialized and were interrelated and independent so that the progress of the work depended on each function in the work process being fulfilled. By contrast, in this case the "crew" concept is not applicable. Rather the employees are teachers for which there is a great deal of interchangeability because the teachers are qualified in multiple fields.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 82

IRS, National Office and NTEU, Case No. 3-CA-40441 (Decided May 8, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS

4000 UNFAIR LABOR PRACTICE: AGENCY
    4500 Refusal to Negotiate
    4800 Otherwise Refuse to Comply with the Statute

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply with Statute
      - § 7114(b)(4)
    - Refusal to Negotiate
      - Information
        - Promotion Package
  - Procedure
    - Forums
      - Grievability Questions
  - Remedy
    - Provide Information

DIGEST NOTES

A grievability dispute does not in and of itself relieve an agency from providing the union with information to which it is otherwise entitled under § 7114(b)(4). The resolution of a grievability question cognizable under law is for an arbitrator under the parties' negotiated agreement. In connection with the processing of a grievance, the union requested information concerning the agency's promotion process. The information was sought in order to determine whether the agency had unlawfully retaliated against an employee for filing an earlier grievance, by lowering his performance evaluation. The agency denied the request based on the its contention that the position in question was not a bargaining unit position and, therefore, the issue was not grievable. The Authority held that in order to process the

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ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

grievance, the union would have had to be able, as it explained to the agency, to make a comparative assessment of the various evaluations involved in the merit promotion. Thus the requested data was clearly necessary under § 7114(b)(4) and the agency's failure to provide the information violated § 7116(a)(1), (5) and (8). Finally, the grievability question was an arbitration matter.

21 FLRA No. 83

Federal Labor Relations Authority

NTEU and Dep't of the Treasury, Bureau of Government Financial Operations, Case No. 0-NG-755
(Decided May 8, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2600 Conditions for Review	7106(a)(2)(A) & (B)
2601 Proposal Inconsistent with Federal Law	7117(a)
2602 Proposal Inconsistent with Government-wide Regulation	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Contrary to Government-Wide Regulation
      - E.O. 12196,§§ 1-201, 1-201(i), 1-301
      - 29 C.F.R. §§ 1960.36(b) 1960.37(a)
    - Proposal Contrary to Applicable Law
      - 29 U.S.C. § 668(a)
  - Joint Labor-Management Committees
    - For Exchanging View
  - Safety and Health Committees, Certified
    - Negotiations Over the Establishment of Committees
    - Role of Unions Under 29 U.S.C. § 668(a) and E.O. 12196

DIGEST NOTES

A proposal by the exclusive representative of an activity is nonnegotiable that would require in effect the entire agency to establish a network of certified safety and health committees under 29 C.F.R. § 1960.36(b) and 29 C.F.R § 1960.37(a) in order to avoid unannounced OSHA inspections. Under 29 U.S.C. § 668(a), agency heads have the responsibility for establishing and maintaining "an effective and comprehensive occupational safety and health program" and agency heads are required to engage in "consultation" with representatives of their employees. Executive Order 12196 implements that statute and specifically defines the role of unions. Executive Order 12196, § 1-301 authorizes exclusive representatives to appoint members to certified committees only at levels where they hold exclusive recognition.

should the decision be made by the agency head to establish certified committees. However, unions are not authorized to negotiate over the establishment of certified safety and health committees.

Federal
Labor Relations
Authority

21 FLRA No. 84

AFGE, Local 644, AFL-CIO and U.S.
Dep't of Labor, OSHA,
Case No. 0-NG-849

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(D) and (E)
2200 Subjects of Bargaining	7106(b)(1), (2) and (3)
2201 At Election of the Agency	7113
2201.05 Technology of Performing Work	7117(a)(1)
2201.10 Methods and Means of Performing Work	
2600 Conditions for Review	
2602 Proposal Inconsistent with Government-wide Reg.	
2700 Petition for Review	
2704 Improper Forum	
2709 Contents of Petition, Requirements	

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Inconsistent with Government-wide Regulation
      - FPMR Temporary Regulation D-69 (41 C.F.R. Chapter 101)
  - Hours of Work
    - Flexitime
  - Management Rights
    - Security
      - Location of Library/Conference Room
  - Subjects of Bargaining, At the Election of the Agency
    - Technology of Performing Work
      - Office Space Design
        - Individual Offices
        - Location of Library/Conference Room
  - Parking - Agency Discretion to Award Free Employee Parking
  - Procedure
    - Allegation of Nonnegotiability
      - Failure to Include Allegation in Appeal
    - Forums - Factual Issues

DIGEST NOTES

Proposals are negotiable that provide most employees with individual offices and is a continuation of the agency's existing practice. The Authority has previously held that for a proposal concerning office space design to violate an agency's right to determine the technology of performing work, an agency must show

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

(1) that its choice of office space design has a technological relationship to the accomplishment and furtherance of its work and (2) that the proposal would interfere with these purposes. The agency did not make such a demonstration. (proposals 1 and 2)

The Authority will not consider factual disputes concerning changes in working conditions in its negotiability appeals proceedings under § 7105(a)(2)(D) and (E). Such factual disputes concerning the duty to bargain may be raised in other appropriate proceedings. (proposals 1, 2, and 5)

Where the union failed to include the agency's written allegation of nonnegotiability for certain proposals, contrary to the requirements of § 2424.4(a)(3) of the Authority's rules and regulations, the Authority did not consider those proposals in negotiability proceedings.

A proposal is nonnegotiable that requires another location for a library/conference room other than the location chosen by management in a upcoming move. The library's location was chosen so that administrative personnel could monitor its use and the removal of library materials. Thus the location of the library constitutes part of the agency's plan to safeguard its property with which the union's proposal would interfere. Consequently, the proposal would excessively interfere with the agency's right under § 7106(a)(1) to determine its internal security practices. (proposal 5)

Where the agency did not provide sufficient support in the record to determine whether a proposal concerning the relocation of a library violates the agency's right to determine its technology, methods and means of performing work under § 7106(b)(1), the proposal was not be found nonnegotiable on this basis. (proposal 5)

Proposals providing for free employee parking are negotiable. The regulation governing federal employee parking is FPMR Temporary Regulation D-69, 41 C.F.R. § 101, a Government-wide regulation under § 7117(a)(1). Section 7 of the regulation provides that, while GSA is vested with the authority to allocate parking spaces, GSA may delegate its authority to occupant agencies "by mutual agreement". Section 8 of the regulation provides that parking spaces not required of official needs may be used for employee parking. Therefore the agency has discretion under the regulation to either request that GSA delegate to the agency the authority to allocate parking spaces or, if GSA does not agree to the delegation, request GSA to allocate a designated number of spaces for employee parking. (proposals 6 and 11)

A proposal that would establish a pilot flexitime program is negotiable. Proposals concerning flexitime, generally, are within the duty to bargain. The agency's argument that the proposal concerns matters outside its control was unclear and the agency provided no basis in the record for the Authority to respond to its contention. (proposal 14)

Federal Labor Relations Authority

21 FLRA No. 85

NTEU and Dep't of the Treasury, IRS, Andover Service Center, Andover, Mass., Case No. 0-NG-711 (Decided May 8, 1986)

DIGEST HEADINGS

- 2000 NEGOTIABILITY
  - 2700 Petition for Review
    - 2702 Timeliness
    - 2704 Forum
    - 2709 Contents of Petition
  - 2150 Management Rights
    - 2152.50 Determine Agency Personnel
  - 2200 Subjects of Bargaining
    - 2201 At Election of Agency
      - 2201.01 Numbers, Types and Grades of Employees
    - 2210 Mandatory Subjects of Bargaining
      - 2210.01 Procedures
      - 2210.05 Appropriate Arrangements

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(1), (2) and (3)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Hours of Work
    - Delay in Implementation of New Shift
    - Starting Times of Shifts
  - Management Rights
    - Determine Agency Personnel
  - Procedure
    - Contents of Petition
      - Statement of Meaning
      - Text of Proposal
    - Forums - Factual Issues
    - Timeliness
      - Agency's Reiteration of Allegation of Nonnegotiability
  - Subjects of Bargaining
    - At Election of the Agency
      - Numbers, Types and Grades of Employees
    - Mandatory Subjects of Bargaining
      - Appropriate Arrangements
      - Procedures
  - Transportation - Posting of Carpool or Transportation Notices

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A proposal is nonnegotiable that would require the agency to continue its present shift starting at 7:45 a.m. and solicit volunteers for the agency's proposed new shift starting at 6:45 a.m. The agency failed to demonstrate that the proposal would interfere, as alleged, with management's right under § 7106(a)(2)(B) to determine the personnel by which its operations are carried out as. However, the proposal would interfere with management's right under § 7106(b)(1) to determine the numbers, types and grades of employees assigned to a work project or tour of duty. Under the proposal, the 7:45 a.m. shift proposed by the union would end at 4:15 p.m. and the afternoon shift established by the agency would commence at 3:45 p.m. As a result, this proposal has the effect of requiring management to have on duty during the overlap period more employees than, in its judgment, are deemed necessary. (proposal 1)

A proposal is negotiable which provides that management will delay for four weeks the requirement that certain employees work a new tour of duty and obligates the agency to post carpool or transportation notices in a preexisting medium. The proposal does not prevent the agency from acting at all to require employees to work the new tour of duty. The proposal pertains to working conditions of unit employees and is a negotiable procedure under § 7106(b)(2) and an appropriate arrangement for adversely affected employees under § 7106(b)(3). (proposal 2)

Where the language of a proposal is included and discussed in the agency's statement of position, an agency argument is spurious that the proposal is not properly before the Authority because the text of the proposal was not included in the petition for review.

Where the union timely cured a defect in its petition for review by providing a statement of the meaning attributed to its proposals, the petition is properly before the Authority.

Where the agency reiterated its position on a proposal when responding to the union's request for a determination on another proposal, the union's petition was timely filed when calculated from the date of the agency's reiteration.

A contention that a dispute is more appropriately resolved in unfair labor practice proceedings because of unresolved factual questions, does not provide a basis for dismissing a negotiability appeal.

Federal Labor Relations Authority

21 FLRA No. 86

SSA, Office of Hearings and Appeals, Region II and AFGE, Local 1760 (Florey, Arbitrator). Case No. 0-AR-1016 (Decided May 9, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1400 Arbitrability
  1600 Grounds for Review
    1601 Award Conflicts with Applicable Law

STATUTE

7106(a)
7106(a)(2)(A) and (B)
7106(b)(3)
7121(e)
7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Arbitrability
    Performance Elements and Standards
  Award Modified
    Award Contrary to § 7106(a)(2)(A) and (B)
    Award Contrary to § 5 U.S.C. § 5596
  Exceptions Asserted in Appeal
    Award Contrary to Applicable Law
      5 U.S.C. § 5596 (Back Pay Act)
    Award Contrary to the Statute
      § 7106(a)
Performance Elements and Standards
  General, Nonquantitative Requirement in Parties' Agreement
  Arbitral Review
    Independent Evaluation of Grievant's Performance
    Substitution of Arbitrator's Judgment for that of Management
Remedy
  Backpay
  Retroactive Promotion

DIGEST NOTES

The grievance in this case concerned the denial of the recommendation of the grievant's supervisor that the grievant be promoted. The grievant's promotion had been denied because it had been determined statistically that he was not averaging at least 1.9 decisions per day, the required level of the next higher grade for a fully satisfactory rating. The arbitrator concluded that the performance standards used to measure the grievant's numerical

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

case production failed to comply with the requirements of the parties' collective bargaining agreement that performance standards must accurately evaluate performance and procedures must be applied which reasonably ensure the accurate evaluation of performance. The arbitrator also concluded that management failed to comply with the agreement obligation that factors affecting performance which are beyond the control of the employee be considered. Additionally, the arbitrator ruled that but for these erroneous applications of the parties' agreement, the recommended promotion of the grievant would originally have been approved. As his award, the arbitrator ordered the grievant promoted retroactively with backpay.

In one of its exceptions the agency contended that the award was contrary to § 7106 because it negated legitimately established performance standards. Such a determination, the agency argued, cannot constitute the required finding under the Back Pay Act (5 U.S.C. § 5596) that the grievant was affected by an unjustified or unwarranted personnel action which directly resulted in a loss of pay and that accordingly the award of a retroactive promotion and backpay was deficient.

The Authority has previously held that an arbitrator may not determine that a grievance directly challenging an agency's identification of job elements or establishment of performance standards is grievable or arbitrable. Also, an arbitrator may not render an award substituting his judgment concerning job elements and performance standards for that of management. However an arbitrator may evaluate, under a "fair and equitable" requirement in the parties' agreement, the application of performance elements and standards that management establishes.

In this case, to the extent of the arbitrator's determination that the performance standards were "unfair," because they failed to account for the grievant's situation, the the Authority found the determination to be deficient. Such a determination constitutes an improper review by the arbitrator of the content of standards and a substitution by the arbitrator of his judgment for that of management as to the proper content of those standards. The determination therefore cannot constitute the finding required in support of the award of retroactive promotion and backpay that the grievant was affected by an unjustified or unwarranted personnel action.

Moreover, by in effect determining that the grievant's performance would have been rated at least as "fully satisfactory," the arbitrator improperly conducted an independent evaluation of the grievant's performance.

In modifying the award, the Authority held that the award was contrary to management's right under § 7106(a)(2)(A) and (B) and contrary to the Back Pay Act.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
AIR FORCE LOGISTICS COMMAND
WRIGHT-PATTERSON AIR FORCE
BASE, OHIO, AND NEWARK AIR
FORCE STATION, NEWARK, OHIO

Respondent

and Case No. 5-CA-30215

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2221, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed. The General Counsel and the Charging Party filed exceptions to the Judge's Decision, and the Respondent filed an opposition to both exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations only to the extent consistent herewith.

The Judge, relying on the language of Article 15, Section 15.01 of the parties' Master Labor Agreement and on the past practice of the parties, concluded that the Respondent did not violate section 7116(a)(1) and (5) of the

Statute when it unilaterally revised the job performance appraisal system elements of employees assigned to the Central Refurbishment Area, NAFS, without providing the Charging Party (the Union) notice and an opportunity to bargain concerning the impact and implementation of the change, as the Union had waived its right to bargain in this regard. The Authority disagrees.

It is well established that the Respondent's decision to revise the performance standards was a reserved management right under section 7106(a) of the Statute. See, e.g., National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 768 (1980), affirmed sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), and Social Security Administration, 8 FLRA 517 (1982), affirmed sub nom. American Federation of Government Employees, Local 1923 v. FLRA, 718 F.2d 1088 (4th Cir. 1983). However, as previously held by the Authority, where an agency exercises a reserved management right under section 7106 of the Statute to change a condition of employment of unit employees, there is nonetheless a duty to bargain consistent with section 7106(b)(2) and (3) of the Statute with respect to the procedures that management will follow in exercising such rights and with respect to appropriate arrangements for employees who may be adversely affected thereby. See, e.g., Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA No. 54 (1985), and cases cited therein.

Therefore, the Respondent was obligated under the Statute to provide adequate prior notice to the exclusive representative and, upon request, bargain pursuant to section 7106(b)(2) and (3) of the Statute, absent a waiver of that right. See American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980) (Union proposal 5); American Federation of Government Employees, AFL-CIO, Local 1940 and Department of Agriculture, Plum Island Disease Center, 16 FLRA 816 (1984). A waiver will be found only if it can be shown that the exclusive representative clearly and unmistakably waived its right to negotiate. See U.S. Department of Labor, Washington, D.C. and Employment Standards Administration, Region 8, Denver, Colorado, 19 FLRA No. 65 (1985).

Article 15, Section 15.01 of the parties' agreement recognizes management's right to revise performance standards, and the right of employees to participate in discussions with supervisors as to what those standards shall be.*/ However, the Authority, contrary to the Judge, finds that neither Article 15, Section 15.01 nor the past practice of the parties constitutes a clear and unmistakable waiver of the Union's right to receive notice and an opportunity to request bargaining concerning procedures and appropriate arrangements for adversely affected unit employees. Article 15, Section 15.01 of the Master Labor Agreement contains no language which specifically relieves the Respondent of this statutory obligation to the Union when it revises unit employees' performance standards. Moreover, contrary to the Judge's unsupported statement, the record does not reveal other instances where the Respondent has unilaterally revised unit employees' performance standards without notifying the Union. Absent a clear and unmistakable waiver, a party will not be deemed to have given up a statutory right, such as an exclusive representative's right to receive adequate notice of proposed changes affecting unit employees' conditions of employment, and an opportunity to request bargaining pursuant to the provisions of the Statute. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA No. 60 (1985); Department of Defense, Department of the Army, Headquarters, XVIII Airborne Corps, and Fort Bragg, 15 FLRA 790 (1984); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981). Accordingly, the Authority concludes that the Respondent's unilateral revision of the performance standards without providing the Union with adequate prior notice and an opportunity to bargain concerning procedures and appropriate arrangements for adversely affected unit employees constitutes a violation of section 7116(a)(1) and (5) of the Statute. See, e.g., Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA 390 (1984); Social Security Administration, 16 FLRA 1135 (1984).

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*/ Of course, both of these rights exist by operation of law. See, e.g., National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, supra, concerning management's right to revise performance standards pursuant to its section 7106(a) rights to direct and assign work to employees. See also Social Security Administration, Baltimore, Maryland, 9 FLRA 909 (1982), with respect to the right of employees to participate in discussions concerning the establishment of their performance standards pursuant to 5 U.S.C. § 4302(a)(2), which provides:

> § 4302. Establishment of performance appraisal systems
>
> (a) Each agency shall develop one or more performance appraisal systems which--
>
> . . . .
>
> (2) encourage employee participation in establishing performance standards[.]

In briefs to the Judge, the General Counsel and the Union requested a status quo ante order which would require the Respondent to rescind the new performance standards. The General Counsel also requested an order which would make whole any employee adversely affected by them. However, the Authority concludes that a status quo ante remedy is not warranted in the circumstances of this case. Thus, balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy and taking into consideration the factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982), the Authority concludes that a prospective bargaining order will fully remedy the violation in the circumstances of this case and will effectuate the purposes and policies of the Statute. The Authority notes that, while no advance notice of the revised performance standards was given to the Union, the Respondent's notice to unit employees concerning the change in question and its refusal to bargain with the Union concerning procedures and appropriate arrangements for employees adversely affected were based upon the good faith but erroneous belief that it was acting in accordance with procedures contained in the negotiated Master Labor Agreement covering the affected employees. Accordingly, contrary to the General Counsel's contention, the Respondent's refusal to bargain herein cannot be found to have been willful. Moveover, as recognized by the Union in its post-hearing brief to the Judge, no employees had yet been appraised under the revised performance standards, and there is no assertion in the exceptions filed with the Authority by either the General Counsel or the Union that there has yet been any application of such performance standards to unit employees or any loss to them as a result. Under these circumstances, the request for a status quo ante remedy must be denied. See, e.g., Social Security Administration, supra.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio shall:

1. Cease and desist from:

(a) Unilaterally implementing new or revised performance standards for its Central Refurbishment Area, NAFS employees, without giving prior notice to the American Federation of Government Employees, Local 2221, AFL-CIO, the designated agent of the employees' exclusive representative, and affording it the opportunity to bargain concerning procedures to be observed in implementing them and concerning appropriate arrangements for employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the American Federation of Government Employees, Local 2221, AFL-CIO, the designated agent of the employees' exclusive representative of its Central Refurbishment Area, NAFS employees, concerning procedures to be observed in implementing new or revised performance standards applicable to those employees, and concerning appropriate arrangements for employees adversely affected thereby.

(b) Post at its facility at Newark Air Force Station, Newark, Ohio, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander of the Air Force Logistics Command, Wright-Patterson Air Force Base, or a designee, and shall be posted for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 30, 1986.

Jerry L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement new or revised performance standards for our Central Refurbishment Area, NAFS employees, without giving prior notice to the American Federation of Government Employees, Local 2221, AFL-CIO, the designated agent of our employees' exclusive representative, and affording it the opportunity to bargain concerning procedures to be observed in implementing them and concerning appropriate arrangements for employees adversely affected thereby.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, Local 2221, AFL-CIO, the designated agent of the employees' exclusive representative of our Central Refurbishment Area, NAFS employees, concerning procedures to be observed in implementing new or revised performance standards applicable to those employees, and concerning appropriate arrangements for employees adversely affected thereby.

(Activity)

Dated: ________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 Jackson Blvd., Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

[21 FLRA No. 78]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE .
AIR FORCE LOGISTICS COMMAND .
WRIGHT-PATTERSON AIR FORCE BASE, .
OHIO, AND NEWARK AIR FORCE STATION, .
NEWARK, OHIO .
.
Respondent .
.
and . Case No.: 5-CA-30215
.
AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, LOCAL 2221, AFL-CIO .
.
Charging Party .
.
. . . .

Major Charles Brower, USAF
For the Respondent

Judith A. Ramey, Esquire
For the General Counsel

Janet T. Wachter
For the Charging Party

BEFORE: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter called "The Statute"), and the Rules and Regulations issued thereunder.

The complaint alleges that on or about November 15, 1982, the Respondent, through the acts of agents employed by the Newark Air Force

Station, Newark, Ohio (NAFS), unilaterally changed the terms and conditions of employment of bargaining unit members assigned to the Central Refurbishment Area, NAFS, without first giving notice to American Federation of Government Employees, Local 2221, AFL-CIO (Charging Party or Union); and without providing the Union with an opportunity to bargain concerning the impact and implementation of the change. It was further alleged that the conduct described pertained to the issuance of revised job performance appraisal system elements to bargaining unit employees, and that the issuance was violative of Section 7116(a)(1) and (5) of the Statute.

Counsel representing the Respondent contends that the Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (AFLC) and American Federation of Government Employees, AFL-CIO, Council No. 214 (Council 214), bargained in good faith at the level of exclusive recognition concerning procedures to be followed when revising performance standards; that the issuance of revised performance standards as alleged herein was effectuated in accordance with procedures established by the AFLC and Council 214 in a collective bargaining agreement; that the Respondent was required to do no more than comply with procedures established by AFLC and Council 214; that the dispute involves issues of contract interpretation which should have been resolved through the grievance and arbitration procedure set out in the parties' collective bargaining agreement; and lastly that constructive notice of the change was received by a Union steward assigned to the Central Refurbishment Area, but that the Union failed to request bargaining.[1]

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[1] This argument, reflected in Respondent's post-hearing brief, has no merit in view of a stipulation to the effect that Respondent provided "no advance notice" of the change to the Union, to Council 214, or to any other organizational level of the American Federation of Government Employees, AFL-CIO (Jt. Exh. No. 3).

Counsel representing the General Counsel moved to strike portions of Respondent's brief which relate to the argument that the Union received constructive notice of the change, noting that the stipulation precluded the argument. An opposition to the motion to strike was filed by counsel representing the Respondent.

The motion to strike must be denied. Although Respondent's argument has no merit in the light of the stipulation entered into the record, Respondent's counsel arguably has the right to contend that the stipulation did not operate to deny counsel the right to rely upon constructive notice of the change received through a Union steward.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including a stipulation of facts, exhibits, and other relevant evidence adduced at the hearing,[2] and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Facts Stipulated

The following stipulations of fact entered into the record are accepted as true:[3]

1. The Respondent submits to the jurisdiction of the Authority in this proceeding, and does not otherwise interpose or raise the question of jurisdiction as an issue. (See also Tr. at 10).

2. At all times material there have been approximately 30 employees in the Central Refurbishment Area, LN Instrument Section, Directorate of Maintenance, Aerospace Guidance and Metrology Center (AGMC), NAFS, and approximately 28 of these employees hold the position of WG-3359-07 Instrument Worker.[4]

3. Central Refurbishment Area employees described are part of a consolidated bargaining unit of employees employed by AFLC, and represented by Council 214. These employees are represented at the local level by the Charging Party.

4. At all times material herein David Tomer was a supervisor and agent of Respondent and was the supervisor of Central Refurbishment Area employees.

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[2] Counsel representing the Respondent moved to correct certain errors in the hearing transcript. Under authority set out in 5 C.F.R. § 2423.19(r), the corrections proposed are approved.

[3] Jt. Exh. No. 3.

[4] These employees are hereinafter referred to as "Central Refurbishment Area employees," or "employees affected."

5. The performance of Central Refurbishment Area employees is appraised under the civilian employee Job Performance Appraisal System of the United States Air Force (JPAS).[5]

6. On or about November 15, 1982, David Tomer furnished to Central Refurbishment Area employees, a copy of the performance standards or "work plan" for his or her position. The work plan furnished was effective for the appraisal period beginning on October 1, 1982.

7. Jt. Exh. No. 1 is a copy of performance standards issued on or about November 15, 1982, to Jane A. Hoskinson.

8. Jt. Exh. No. 2 is a copy of performance standards that had previously been in effect from July 1, 1982 until October 1, 1982 for Jane A. Hoskinson.

9. Performance standards set forth in Jt. Exh. No. 1 are the same in all material respects as the performance standards that were effective for all affected employees for the appraisal period beginning October 1, 1982.

10. The performance standards set forth in Jt. Exh. No. 2 are the same in all material respects as performance standards in effect prior to October 1, 1982 for all affected employees.

11. All employees falling within the coverage of JPAS are evaluated once a year according to the performance standards applicable to their positions. Among other things these annual evaluations are used to determine whether employees will or will not receive performance awards and within grade increases; and it is on the basis of these evaluations that employees are, or are not demoted, or removed from their positions for performance reasons.

12. The performance standards set forth in Jt. Exh. No. 1 are different in some respects from the performance standards set forth in Jt. Exh. No. 2.

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[5] Air Force Regulation 40-452, incorporates what is otherwise referred to in the record as "JPAS" (Tr. 37-38). AFR 40-452 deals with Department of the Air Force policy and procedures for appraisal and rating of Air Force employees. It implemented 5 U.S.C. § 4302 of the Civil Service Reform Act of 1978, which provided for the establishment of performance appraisal systems, including critical elements and performance standards, by each agency, and required that all performance appraisal systems be put into effect by October 1, 1981.

13. The Charging Party was given no advance notice by management that there was to be a change in the performance standards applicable to affected employees for the performance period beginning October 1, 1982, and no such notice was provided by management to Council 214, or to any other organizational level of the Union.

In addition to the previously outlined stipulations, counsel of record also stipulated to the following facts:

1. That the change alleged in the complaint did in fact involve a change in the terms and conditions of employment (Tr. 17-18, 143-144, Respondent's Brief at 9-10).

2. The change which occurred involved a change in critical elements and a change in performance standards (Tr. 43).

Pertinent Contractual Provisions and Bargaining History Outlined

Following establishment of the consolidated unit, the National Office of the AFGE, on behalf of Council 214; together with the AFLC, entered into a three-year Master Labor Agreement. The agreement became effective on May 3, 1979, and the three-year period commenced as of April 3, 1979.[6] (Jt. Exh. No. 4.)

Article 15 (Employee Performance Evaluation) provided certain procedural rules relating to performance standards. Section 15.01 touched upon management changes in this area of concern. It provided:

> SECTION 15.01: PERFORMANCE STANDARDS
>
> Supervisors will establish valid performance requirements for positions of employees which they supervise. Except as may be provided by applicable law, such performance requirements may be oral or written, and they will be discussed with each new employee when he is newly assigned to a position. New or revised performance requirements established as a result of changes in duties and responsibilities, technological changes, performance criteria, etc., will be discussed with the employee when such are imposed; if performance requirements are in writing, such changes will also be in writing.

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[6] This agreement is hereinafter referred to as the "May 1979 Master Labor Agreement."

Article 15, Section 15.03 of the May 1979 Master Labor Agreement gave to the Charging Party the right to negotiate "supplemental implementation procedures" in the following terms:

> SECTION 15.03: SUPPLEMENTAL IMPLEMENTATION PROCEDURES
>
> Procedures for the implementation of this Article are expressly authorized for negotiations in activity Local Supplements to this Agreement.

Article 34 of the 1979 Master Labor Agreement provided rules pertaining to local supplements. In accordance with these, and authority set out in Section 15.03, the Charging Party and AGMC, NAFS, entered into a Supplemental Labor Agreement on January 11, 1980 (Jt. Exh. No. 5). It was approved by AFLC and Council 214 on February 8, 1980. Under the provisions of Article 34, Section 34.09 of the 1979 Master Labor Agreement, this local supplement became effective on February 8, 1980. Article 15, Section 15.01(S) of the Supplemental Labor Agreement reflected the following limited procedures relating to implementing changes in performance standards at AGMC, NAFS:

> SECTION 15.01(S):
>
> A. Performance standards are guides to measure the quality, quantity, timeliness and level of achievement expected by management of an individual's performance. These standards are job-related and based upon the employee's particular duties and responsibilities. Such standards define the level of performance necessary for a satisfactory performance rating.
>
> B. The parties agree that these requirements be a joint effort by the supervisor and the employee.
>
> C. Management agrees to encourage supervisors to establish these performance standards in writing.

Approximately 18 months after the negotiation of the May 1979 Master Labor Agreement, Council 214 and the AFLC moved to reopen contract negotiations under the provisions of Article 35, Section 35.03 of the Agreement (Tr. 26--27, 151). Negotiations ensued, and were continuing in February of 1981 (Tr. 149). Council 214 representatives made specific proposals concerning Article 15, and AFLC representatives disagreed with the Council position on the subject (Tr. 151).

During this same period of time the negotiating parties were, in the context of a different forum, leading up to impact and implementation bargaining concerning JPAS as presented in AFR 40-452. By memorandum dated November 4, 1980, AFLC had forwarded copies of AFR 40-452 to Council 214 for the purpose of soliciting proposals leading to impact and implementation bargaining (R. Exh. No. 1). In a letter dated November 6, 1980, Council 214 requested, for personal and other reasons, that bargaining on AFR 40-452 be deferred (R. Exh. No. 2). However, detailed proposals concerning AFR 40-452 were subsequently supplied to AFLC by Council 214 (R. Exh. No. 3). These proposals, offered by Council 214 with respect to AFR 40-452, were not the same as those offered during reopened Master Labor Agreement negotiations (Tr. 157-158). Proposals submitted in the latter forum were described as possessing elements which the Council wished to utilize in AFR 40-452 negotiations (Tr. 158).

The issue posed by the parties was whether to resolve key questions relating to employee performance evaluations in the context of the Master Labor Agreement negotiations, or during separate, and perhaps much later, impact and implementation negotiations relating to AFR 40-452.

The parties resolved the issue by deciding to carry over Article 15 of the May 1979 Master Labor Agreement without change, and by agreeing to be governed by the provisions of Article 15 until the issue could be thoroughly addressed during negotiations pertaining to AFR 40-452 (Tr. 30, 153, 166-167). It was then anticipated that the issues posed would be handled as mid-term bargaining after execution of a new Master Labor Agreement. A new Master Labor Agreement, incorporating the earlier version of Article 15 in its entirety was executed on June 1, 1982 (Jt. Exh. No. 6). It became effective on June 28, 1982, the date on which it was approved.[7]

Negotiators representing AFLC and Council 214 were not able to reach agreement in collateral negotiations pertaining to AFR 40-452. Bargaining had commenced on March 4, 1981,[8] after the parties decided to handle employee performance evaluation negotiations separately from negotiations pertaining to the Master Labor Agreement (Tr. 83-84, R. Exh. No. 4). The representative of the Charging Party acknowledged that there was substantial bargaining on the subject (Tr. 165-166). R. Exh. No. 3 reflects that these negotiations involved bargaining over procedures that Council 214 wished to add to the summary procedures reflected in the May 1979 and June 1982 Master Labor Agreements (Tr. 43-45).

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[7] This agreement is hereinafter referred to as the June 1982 Master Labor Agreement. The parties have considered it binding despite inclusion of a statement in Section 35.01 of Article 35, to the effect that it would remain in effect only for the three year period ending on April 3, 1982 (Tr. 27-29).

[8] These negotiations commenced and reached impasse prior to execution of the June 1982 Master Labor Agreement.

A series of eight negotiating sessions, the first of which had commenced on March 4, 1981, culminated in the Union filing a March 27, 1981 request for Federal Service Impasses Panel assistance (R. Exh. No. 4).[9] On June 5, 1981, the Panel declined to assert jurisdiction on the ground that duty to bargain issues were inextricably related to the Council's proposal (R. Exh. No. 5). The Panel ruled that the determination was without prejudice to either party's right to refile once duty to bargain issues had been resolved in an appropriate forum.

Because 5 U.S.C. § 4302, required that all performance appraisal systems be put into effect by October 1, 1981, AFLC determined that it would be necessary to implement AFLC's last offer to Council 214 (Tr. 52, 56, R. Exh. No. 6). Accordingly, on or about July 1, 1981, AFLC notified its field activities that AFLC's last offer relating to AFR 40-452 would be implemented to insure compliance with the October 1, 1981 deadline (Tr. 52-53, 56-67). AFR 40-452 continued in effect thereafter, and was in effect as of the date of the hearing.

On October 8, 1981, the AFGE National Office, on behalf of Council 214, filed a negotiability appeal with the Authority. On October 13, 1981, an unfair labor practice charge was filed by Council 214 in Case No. 5-CA-20018, alleging, that the Department of the Air Force, AFLC, Wright-Patterson Air Force Base, Ohio, refused to bargain with Council 214, by declaring some of the Council's proposals to be nonnegotiable, and by thereafter implementing AFR 40-452 without first bargaining on impact and implementation. On November 2, 1981, the AFGE National Office requested that the Authority hold the negotiability appeal in abeyance, and the unfair labor practice charge thereafter proceeded to complaint.

Administrative Law Judge Salvatore J. Arrigo heard the case, and on October 20, 1982, issued a recommended decision finding certain proposals to be negotiable. A bargaining order was also recommended. However, under the facts presented a status quo ante remedy was not considered appropriate. The case is pending before the Authority on exceptions filed by the parties. There was no showing during the hearing held in this case, nor does it otherwise appear, that the decision issued by Judge Arrigo in Case No. 5-CA-20018, has any bearing upon questions posed in this litigation. It was noted that none of the proposals found to be negotiable by Judge Arrigo related to the obligation of the Respondent herein to bargain with the Charging Party concerning changes made in performance standards or critical elements relating to Central Refurbishment Area employees.[10]

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[9] It is noted that this request was filed over a year before the parties executed the June 1982 Master Labor Agreement (Jt. Exh. No. 6).

The June 1982 Master Labor Agreement brought about an attempt on the part of the Charging Party to renegotiate Article 15 of the earlier February 8, 1980 Supplemental Labor Agreement executed by NAFS and the Charging Party. By memorandum dated August 16, 1982, the President of the Charging Party requested mid-term bargaining concerning the Supplemental Labor Agreement (R. Exh. No. 10), and submitted to NAFS representatives a proposed replacement article for Article 15, Section 15.01(S) (R. Exh. No. 11). The proposal reflects numerous procedural elements of concern to the Charging Party in the area of employee evaluation. However, NAFS took the position that Article 15 of the Supplemental Labor Agreement was not in conformity with the June 1982 Master Labor Agreement (Tr. 103-104, R. Exh. No. 12). Being then in dispute, it became inoperative pending disposition of the issue in an arbitration proceeding (Tr. 104).[11] On September 29, 1982 the President of the Charging Party withdrew the earlier August 16, 1982 request for mid-term bargaining on the Supplemental Labor Agreement, and all Charging Party proposals submitted in connection therewith (R. Exh. No. 13). As of the date of the hearing, issues involving the appropriateness of the inclusion of Article 15 in the Supplemental Labor Agreement had not been resolved. However, the matter was scheduled to be heard by an arbitrator in November of this year (Tr. 104).

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[10] Also, the record did not reflect that the specific change alleged in the case herein under consideration contravened AFR 40-452 as implemented, or the bargaining order recommended to the Authority by Judge Arrigo. The recommended cease and desist order in Case No. 5-CA-20018 addressed the issue of instituting changes in the AFLC performance appraisal program without affording the Council 214 the right to bargain. In this case both the May 1979 and June 1982 Master Labor Agreements reflect that responsibility for the establishment of performance standards was within the purview of authority exercised by Respondent's supervisory personnel. It follows therefore, that the changes alleged in the complaint should not be construed as falling within the meaning of the recommended cease and desist order in Case No. 5-CA-20018. Also, it is noted that the latter case did not involve the possible applicability of Master Labor Agreement terminology, or issues of possible waiver of bargaining rights.

[11] Section 34.07 of the June 1982 Master Labor Agreement provided for inclusion of disputed Supplemental Labor Agreement articles only after an arbitration decision determining the appropriateness of such inclusion (Jt. Exh. No. 6 at page 138). NAFS took the position that reopening negotiations relating to Article 15 of the Supplemental Labor Agreement could ensue only after a determination in favor of inclusion (Tr. 100-102).

The record clearly reflects that the effectuation of changes in individual performance standards in the past has not involved prior notice to the Charging Party. Instead, the procedures set out in Article 15, Section 15.01 of the May 1979 and June 1982 Master Labor Agreements have governed (Tr. 32-33). This section provides for supervisory establishment of performance standards after discussions with employees; for the formulation of "valid performance requirements," for guidance concerning the form in which an employee receives performance requirements (oral or written), and for discussion of such changes with employees prior to putting them into effect.

Although counsel representing the General Counsel made an attempt to show that during AFLC - Council 214 negotiations leading to the June 1982 Master Labor Agreement the parties entered into an oral side agreement imposing a greater duty on the AFLC with respect to notification of the Charging Party of changes in individual performance standards, the record does not support this contention. Instead, the record indicates a clear desire on the part of AFLC and Council 214 to rely entirely upon the sparse procedural language in Article 15, Section 15.01 of the Master Labor Agreement as the guide for effecting changes in performance standards.

Discussion and Conclusions

The record in this case makes it clear that the parties were governed by the provisions of Article 15 of the June 1982 Master Labor Agreement when the changes alleged in the complaint occurred. Section 15.01 of this Article, together with evidence of longstanding practice of the parties, reflects that the Respondent had a contractual right to change individual performance requirements without first incurring a bargaining obligation. Article 15 did impose certain requirements; however, the obligation to bargain was not included.[12] Instead,

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[12] It is noted that AFLC - Council 214 bargaining in connection with the renegotiation of the Master Labor Agreement, and in connection with AFR 40-452, theoretically could have produced the bargaining obligation that the Charging Party so eagerly sought in this case. It is also conceivable that such rights might have been generated by bargaining at the local level in connection with the Supplemental Labor Agreement. However, the fact remains that bargaining to date has not produced such a result.

Section 15.01 specifically provided for the establishment of performance requirements by Respondent's supervisory personnel. It would be difficult to see how the Charging Party could be accorded the right to participate in the formulation of performance standards in this case without doing irreparable damage to the procedures reflected in Article 15, Section 15.01 of the June 1982 Master Labor Agreement. Thus, it is concluded that the contractual language referred to, and the practice of the parties, demonstrate that the June 1982 Master Labor Agreement reflects a clear and unmistakable waiver of the statutory right to bargain concerning changes in performance standards. In the light of these circumstances the obligation to bargain on impact and implementation does not arise. Department of the Treasury, United States Customs Service, Region I, Boston, Massachusetts, and St. Albans, Vermont District Office, 10 FLRA No. 100, 10 FLRA 566 (December 3, 1982); Nuclear Regulatory Commission, 8 FLRA No. 124, 8 FLRA 715 (May 20, 1982); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2, 5 FLRA 9 (January 15, 1981).

Since the question of the legal status to be attributed to Article 15 of the Supplemental Labor Agreement, was, as of the date of the hearing, proceeding to arbitration, it is not possible to determine whether or not the provisions contained in this Article are applicable in this case. However, if Article 15 is deemed to be currently in effect, it too reflects clear elements of a waiver in that Article 15, Section 15.01(S)(B) of the Supplemental Labor Agreement indicates that the Charging Party and NAFS agreed that performance standards would be established "by the supervisor and the employee," as a "joint effort." If Article 15 of the Supplemental Labor Agreement is found to be null and void because in conflict with the June 1982 Master Labor Agreement, then the provisions of Article 15, Section 15.01 of the June 1982 Master Labor Agreement, without more, suffice as a basis for a finding that a waiver exists.

The record does show that the provisions of AFR 40-452, as implemented by AFLC, were in effect on the date of the change alleged in the complaint. However, AFR 40-452, as implemented did not operate to modify or otherwise change the provisions of Article 15, Section 15.01 of the June 1982 Master Labor Agreement by imposing a bargaining obligation of the type alleged in the complaint; nor did AFR 40-452, otherwise remove the clear and unmistakable waiver reflected in the Master Labor Agreement. Moreover, AFLC proposals considered by Judge Arrigo in Case No. 5-CA-20018, and found to be negotiable in that case, may not be construed as conferring on the Charging Party, or Council

214, bargaining rights specifically withheld in the June 1982 Master Labor Agreement. It is noted that counsel representing the General Counsel and counsel representing the Charging Party make no such argument.[13]

Lastly, it is also observed that even in the absence of a finding of waiver, the essence of this unfair labor practice complaint would involve differing and arguable interpretations of Article 15, Section 15.01 of the June 1982 Master Labor Agreement, as distinguished from a clear and patent breach of the agreement. That is, the issues posed would merely involve matters of contract interpretation. In such cases the aggrieved party's remedy lies within the grievance and arbitration procedures in the negotiated agreement rather than through unfair labor practice procedures. Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90, 11 FLRA 516 (March 9, 1983); Iowa National Guard and National Guard Bureau, 8 FLRA No. 101, 8 FLRA 500 (May 7, 1982); Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA No. 71, 8 FLRA 307 (March 26, 1982); Social Security Administration, District Offices in Denver, Pueblo and Greely, Colorado, et al., 3 FLRA No. 10, 3 FLRA 61 (April 14, 1980); U.S. Patent and Trademark Office, 3 FLRA No. 123, 3 FLRA 823, (July 31, 1980); Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA No. 82, 3 FLRA 511 (June 27, 1980); Department of Health, Education and Welfare, Social Security Administration, 1 FLRA No. 37, 1 FLRA 297 (May 9, 1979).

The Respondent relies heavily upon interpretations to be accorded Article 15, Section 15.01 of the June 1982 Master Labor Agreement. At a bare minimum, this Section arguably may be construed as relieving the Respondent of the obligation to bargain concerning changes in performance standards. Thus, an alleged refusal to bargain concerning the implementation of a change in performance standards would, even in the absence of a waiver, necessarily involve an interpretation of Section 15.01.

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[13] Briefs filed on behalf of the General Counsel and the Charging Party do assert that the change in performance standards alleged in the case under consideration did involve a breach of AFR 40-452 procedures implemented on or about July 1, 1981. However, such conduct is not relied upon as a basis for the complaint, and it is not otherwise referred to in the complaint. Moreover, the specific provision alluded to confers no bargaining rights on Council 214 or the Charging Party, but merely provides: "Prior to a supervisor implementing the final decisions on the identification of job performance elements and standards the Union will be informed of such decisions and given a copy of the work plan if requested by the employee. The copy will be provided to the Union at least three days prior to implementation. . . ." (R. Exh. No. 6 at 1).

In light of the conclusions outlined, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 5-CA-30215, be, and it hereby is, dismissed.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: December 7, 1983
Washington, DC

21 FLRA No. 79

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29
Union

and

Case No. 0-NG-878

U.S. ARMY CORPS OF ENGINEERS,
KANSAS CITY DISTRICT, KANSAS
CITY, MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of one proposal submitted during the course of mid-term contract negotiations.

II. Union Proposal

> Employees who have been downgraded because of reduction-in-force actions will obtain repromotion to their former grades as follows:
>
> 1. Repromotion to positions at their former grades and competitive levels will be effected in accordance with seniority. [The disputed portion of the proposal is underscored.]

A. Positions of the Parties

The Agency and the Office of Personnel Management (OPM)[1] assert that the proposal, by mandating the selection of repromotion eligible employees solely on the basis of seniority, would interfere to an excessive degree with the Agency's right to fill positions by making selections from any appropriate source under section 7106(a)(2)(C) of the Statute. The Agency and OPM further argue that the proposal is outside the duty to bargain under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation, namely, Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual (FPM), which permits agencies to fill positions by making selections from any appropriate source.

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[1] OPM filed an *amicus curiae* brief in this case without opposition from the Union.

The Union argues first that the proposal is negotiable as an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute, for employees adversely affected by the exercise of management's right. In support of its position, the Union cites the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981). The Union also argues that an agency is permitted to select a repromotion eligible for a vacancy without going through competitive promotion procedures pursuant to subchapter 1-5(c)(6) of chapter 335 of the FPM which provides as follows:

> c. Agencies may at their discretion except other actions from their plans. These include, but are not limited to:
>
> . . . .
>
> (6) Repromotion to a grade or position from which an employee was demoted without personal cause and not at his or her request.

Thus, the Union claims its proposal constitutes an "exception" to Requirement 4, subchapter 1-4 of FPM chapter 335 within the meaning of subchapter 1-5(c)(6) of FPM chapter 335.

B. Analysis

The Agency states that the proposal "is, in all materiel respects, identical to that" in the case cited above, which resulted in the Authority's Decision and Order on Remand in

AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984). The Union states that this proposal "would only come into play after the agency decides to fill a vacant position and there are repromotion eligibles who had previously successfully competed for the position in that competitive level and grade." In other words, according to the Union "these employees have demonstrated their ability to successfully perform the duties of the position." In support, the Union relied on the definition of competitive level, currently set out in 51 Fed. Reg. 321 (1986) (to be codified at 5 C.F.R. § 351.403). This definition provides in relevant part as follows:

> § 351.403 Competitive level.
>
> (a) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade . . . and classification series and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully perform the critical elements of any other position upon entry into it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee . . . .

This proposal, unlike the one in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), does not expressly permit the Agency to decide whether to fill a vacant position or expressly permit the Agency to make qualifications determinations. We find, however, in view of the positions of the parties, that such requirements are implicit in the proposal. Interpreted in this manner the proposal has the same effect as the proposal in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984). In that case the Authority concluded that the proposal constituted a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.[2]

---

[2] Subsequent to the filings in this case the Authority issued National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), in which we specifically adopted the rationale of the District of Columbia Circuit in AFGE, Local 2782. Thus, as

(Continued)

Accordingly, the Authority finds, for the reasons stated more fully in that decision, the proposal here does not excessively interfere with management's rights and, therefore, constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.

However, the Authority also concluded in its Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census that while the proposal constituted an appropriate arrangement under section 7106(b)(3), it nevertheless was outside the duty to bargain under section 7117(a)(1) of the Statute because it was inconsistent with a Government-wide regulation, that is, Requirement 4 of subchapter 1-4, chapter 335 of the FPM, which would permit agencies to fill positions by making selections from any appropriate source. This conclusion was not altered by the Union's claim, proffered in its Motion for Reconsideration of the Authority Decision and Order on Remand, that based on subchapter 1-5(c)(6) of FPM chapter 335 its proposal constituted an exception to Requirement 4 of subchapter 1-4, FPM chapter 335. In denying the Motion for Reconsideration (July 11, 1985) the Authority found that while subchapter 1-5(c) authorized an agency to except certain repromotions from its competitive selection procedures, such FPM provision did not purport to authorize an agency to relinquish its right under Requirement 4 of subchapter 1-4 to make selections from appropriate sources. In terms of the proposal at issue in this case, it would have the same effect as the proposal in AFGE, Local 2782 and Bureau of the Census. That is, the proposal would prevent the Agency from making selections from any appropriate source. Thus, for the reasons stated more fully in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, as affirmed in our denial of the Union's Motion for Reconsideration, the proposal in this case also violates Requirement 4 of subchapter 1-4, chapter 335 of the FPM, a Government-wide regulation, and is outside the duty to bargain.

(Continued)

we stated in the Kansas Army National Guard decision, we will henceforth determine whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute by determining whether the proposal excessively interferes with the exercise of management's rights.

C. Conclusion

The Authority finds, therefore, for the reasons set forth in the foregoing analysis, that the proposal in this case would not excessively interfere with management's rights and, thus, that the proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of such rights, within the meaning of section 7106(b)(3) of the Statute. However, contrary to the Union's contention that the proposal does not in any way conflict with Government-wide regulations, the Authority concludes, based upon the analysis provided in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), affirmed in the Authority's Decision and Order on Motion for Reconsideration (July 11, 1985), petition for review filed, No. 85-1562 (D.C. Cir. September 6, 1985), that the proposal conflicts with FPM, chapter 335, subchapter 1-4, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., April 30, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL EPA COUNCIL

Union

and Case No. O-NG-678

ENVIRONMENTAL PROTECTION AGENCY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of the following two Union proposals which relate to official time, overtime compensation, and travel and per diem for employees representing the Union in negotiations.

Union Proposal 1

> The employer agrees to provide official time, including travel and per diem costs, for three union representatives to prepare union counter proposals and other negotiations related duties for the union during actual negotiations. These representatives will not be negotiators for the union.

Union Proposal 2

> EPA employees who are union negotiators will receive the same type of compensation, compensatory time or overtime, as does management where negotiations extend beyond normal duty hours.

II. Positions of the Parties

According to the Union, Union Proposal 1 is in response to the Agency's history of consistently limiting its negotiating team to one person. Consequently, under section 7131(a) of the Statute, the Union's entitlements as to official time have been limited to one negotiation team member. Union Proposal 1 is intended to allow official time, travel and per diem for an additional three representatives who will be available to provide support (e.g., preparation of counter proposals, research and clerical functions) to the Union team during negotiations.

The Agency argues that employees representing unions in negotiations may receive only the amount of official time to which they are entitled under section 7131(a) of the Statute. Because Union Proposal 1 would exceed that amount, the Agency argues that it is outside the duty to bargain. As to the question of travel and per diem, the Agency argues that the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) (BATF) requires a conclusion that the subject is not within the duty to bargain. Regarding Union Proposal 2, the Agency contends that neither the Statute nor the laws governing payment for overtime permit overtime compensation for employees representing a union in negotiations.

The Union disputes the Agency's contentions. It asserts that the official time aspect of Union Proposal 1 is negotiable under section 7131(d) of the Statute. It contends that the travel and per diem aspect concerns a negotiable condition of employment and is not inconsistent with statute. Concerning Union Proposal 2, the Union argues that employees on official time are eligible for overtime compensation under the laws which govern overtime in the Federal sector. Therefore, even if they are not actually entitled to overtime compensation, the subject is within the Agency's obligation to bargain.

III. Analysis and Conclusions

A. Negotiation of Additional Official Time

The Authority has found that official time, beyond that authorized under section 7131(a), for employees who are participating in negotiations on behalf of the union in a support capacity is negotiable under section 7131(d). National EPA Council, American Federation of Government Employees, AFL-CIO and Environmental Protection Agency, 16 FLRA 625 (1984). Based on the reasons set forth in that case, the Authority finds that aspect of Union Proposal 1 which concerns official time within the duty to bargain.

B. Negotiation of Travel and Per Diem

In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) the Authority took the BATF decision into consideration in deciding the question of the negotiability of travel and per diem. Contrary to the Agency's arguments, BATF does not compel a conclusion that the issue of payment by an agency of otherwise appropriate and proper travel expenses for employees on official time pursuant to section 7131 is outside the duty to bargain. The Authority notes particularly that there is nothing in the proposal or the submissions of the parties which indicates that the travel and per diem provisions of Union Proposal 1 are to be applied in any manner which is inconsistent with governing legal and regulatory provisions. Therefore, the Authority concludes, based on its reasoning set forth in the Customs Service case, that the travel and per diem provisions in Union Proposal 1 are within the duty to bargain.

C. Negotiability of Overtime Compensation

The Statute and its legislative history are silent on the subject of overtime compensation for employees who are on official time pursuant to section 7131. Consequently, the various statutory provisions which relate to overtime compensation of Federal employees control the issue raised by Union Proposal 2. Those relevant provisions are:

(1) 5 U.S.C. §§ 5542, 5543 - overtime compensation for General Schedule employees;

(2) 5 U.S.C. § 5544 - overtime compensation for prevailing rate employees; and

(3) Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201 *et seq.* - overtime compensation for certain Federal employees.

These provisions basically authorize overtime compensation for "work" in excess of 8 hours per day and/or 40 hours per week. The question then is whether representational activities performed on behalf of a union are "work." In addressing this question, the Authority held in Patent Office Professional Association and Patent and Trademark Office, Department of Commerce, 21 FLRA No. 74 (1986), that representational activities performed by employees outside the normal workday do not constitute the performance of hours of work within the meaning of 5 U.S.C. § 5542. In that case the Authority relied on NTEU v. Gregg, No. 83-546, slip op. at 4-5 (D.D.C. Sept. 28, 1983), in which the district court held that, in order for activities to be considered "work" under 5 U.S.C. § 5542 and the Fair Labor Standards Act, they must be primarily for the benefit of the agency. The same standard has been applied to determining what constitutes "work" under 5 U.S.C. § 5544. 60 Comp. Gen. 431, 433 (1981). In NTEU v. Gregg the court specifically ruled that representational activities performed on behalf of a union did not meet the required standard and, therefore, did not make a General Schedule employee eligible for overtime compensation. Because the standards are the same, the same conclusion must be reached with respect to the prevailing rate overtime provisions. The Authority therefore concludes that payment for overtime for union representational activity is not consistent with law.

Additionally, the Authority concludes that representational activity does not make an employee eligible for compensatory time off. In order to be eligible for compensatory time off, a General Schedule employee must be eligible for overtime pay. In Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO, 19 FLRA No. 4 (1985), the Authority rejected a portion of an arbitrator's award which ordered that compensatory time off be given for time spent outside a normal work day in representational activity because it was inconsistent with the General Schedule overtime provisions contained in 5 U.S.C. §§ 5542, 5543. See also Patent and Trademark Office, supra. Similarly, under the Fair Labor Standards Act, compensatory time off may in some circumstances be granted in lieu of overtime pay. 5 CFR § 551.531. Prevailing rate employees have no eligibility for compensatory time off whatsoever, but must be paid for overtime work. Federal Personnel Manual, FPM Supplement 532-1, Subchapter 8, S8-4(b)(10).

Thus, there is no legal authorization to pay overtime or allow compensatory time off to employees engaged in representational activities on behalf of a union. Therefore, Union Proposal 2 conflicts with Federal statute and is not within the duty to bargain.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 1.*/ IT IS FURTHER ORDERED that the Union's petition for review insofar as it relates to Union Proposal 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding this proposal within the duty to bargain the Authority makes no judgment as to its merits.

21 FLRA No. 81

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OVERSEAS FEDERATION OF TEACHERS

Union

and

Case No. O-NG-1173

DEPARTMENT OF DEFENSE DEPENDENT
SCHOOLS, MEDITERRANEAN REGION,
APO NEW YORK

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal:

> Official Time
>
> Both parties agree that the Union is authorized to designate at least two (2) representatives who will be released from duty and will receive their full pay and benefits. These representatives would be entitled to permissive TDY orders, at no cost to the government, when traveling, when not on official TDY orders. At the conclusion of their term of office these representatives will be authorized to return to their former positions. Upon request of the Union the contract may be opened for renegotiation of official time for representation within one year of the initiation of the above requested negotiations.

II. Preliminary Issue

The Union contends that the Agency's written allegation that the proposal is nonnegotiable is defective because it fails to state the reason for its determination. Contrary to the Union's position, the Authority concludes that under section 2424.6 (a)(2) of the Authority's Rules and Regulations, the Agency's statement of position sets forth a full and detailed statement of its reasons supporting the allegation. As it appears from the record that the Union has been given full notice of the Agency's position and was not prejudiced by the brevity of the Agency's initial nonnegotiability allegation, the Union's contention in this regard must be denied.

III. Positions of the Parties

The Agency contends that the proposal concerns the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," which, under section 7106(b)(1) of the Statute, is a matter negotiable only at the election of the Agency. The Agency argues, in essence, that the proposal would require it to hire additional full-time or substitute teachers, and, hence, is determinative of the number and type of employees assigned to the schools the Agency operates.

The Union states, on the other hand, that the proposal would have at most a negligible effect on staffing, and, therefore, interferes neither with the number of employees assigned to the schools nor with the mission of the Agency.

IV. Background

This proposal arises as the result of a reopener provision included in the parties' collective bargaining agreement by order of the Federal Service Impasses Panel (the Panel). After the Union chose, pursuant to the provision, to reopen negotiations and the parties bargained to impasse, the Panel directed the parties to submit the dispute to an arbitrator. Both prior to and during the mediation/arbitration sessions held before the Arbitrator, the Agency held that the proposal was negotiable only at its election, and that it did not wish to negotiate over the matter. Based on the Agency's declaration of nonnegotiability, the Arbitrator ruled that he would not decide the merits of the case until the Authority determined specifically that the proposal is within the duty to bargain.

V. Analysis

It appears from the record that only that part of the proposal is in dispute which would authorize the Union to designate at least two (2) full-time Union representatives, that is, unit employees whose 40-hour workweek would be spent performing representational activities instead of the duties of their positions.

The basic issue in this case concerns the relationship between the right of an exclusive representative, under section 7131(d), to negotiate for "official time," that is, time when an employee would otherwise be in a duty status, for employee use in the performance of representational activities, and management's rights under section 7106 of the Statute. As the Authority stated in Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 89 (1985) petition for review filed sub nom. National Association of Government Employees, Local R7-23 v. FLRA, No. 86-1011 (D.C. Cir., January 7, 1986), section 7101 of the Statute provides both for the right of employees to participate in the collective bargaining process through labor organizations of their own choosing and for the safeguarding of the public interest in maintaining an effective and efficient Government. Thus, the Authority has held that management cannot deny official time for representational functions to a representative of the exclusive representative unless it can show that the use of official time will interfere with the accomplishment of the agency's work. Scott Air Force Base at 765. On the other hand, the Authority has also explained that an exclusive representative cannot claim that it is entitled to negotiate a contract provision regarding the allocation of official time for representational functions without regard to management's needs and requirements regarding the performance of its assigned work. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 15 FLRA 867 (1984); Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri and American Federation of Government Employees (AFL-CIO), Local No. 3399, 14 FLRA 103 (1984); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA No. 9 (1985). Compare Bigelow v. Department of Health and Human Services, 750 F.2d 962 (Fed. Cir. 1984) (an employee may not refuse a training assignment based on a claim that he or she was entitled to 100% official time for representational functions). Simply stated, section 7131(d) does not mandate the granting of official time under any and all circumstances. Local 1770, American Federation of Government Employees, Fort Bragg, North Carolina and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, North Carolina, 8 FLRA 242 (1982). Thus, under Authority precedent, the right to negotiate for an amount of official time available to employees for union representational purposes is not without limitations. Rather, as the cases cited above demonstrate, where the agency can show, in the circumstances of a given case, that the use of official time will interfere with the accomplishment of the agency's work, the exercise of management's rights will take precedence.

Turning to the instant case, in support of its contention that the proposal is determinative of the number and types of employees assigned to its schools, the Agency cites, among other things, American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 23 (1985); petition for review filed sub nom. American Federation of Government Employees, Council of Locals No. 214 v. FLRA, No. 85-1500 (D.C. Cir., August 12, 1985), where the Authority found, based on the particular facts and circumstances pertaining there, that a proposal which would have granted 12 union representatives 100% official time under section 7131(d) of the Statute was negotiable only at the election of the agency. However, we find, contrary to the Agency's position, that the facts and circumstances of this case are substantially different from those in Wright-Patterson Air Force Base, and clearly warrant an opposite result.

The agency in Wright-Patterson Air Force Base made a substantial demonstration on the record that its primary mission required its employees to work in crews. In these crews, various tasks and skills were highly specialized and were interrelated and independent so that the progress of the work depended on each function in the work process being fulfilled. Moreover, the agency there demonstrated that it was undermanned and subject to congressionally imposed limitations on the numbers of positions available for staffing its work. For these reasons, in the circumstances of that case, the Authority determined that the proposal was integrally related to, so as to be determinative of, the numbers of employees or positions assigned to a work project or organizational entity. By contrast, in this case, the Agency's contentions are merely speculative and insufficiently supported by the record evidence. In this regard, it appears from the record that under the parties' current contract, the Union is at present entitled to 1 full-time representative on 100% official time.

Therefore, the proposal would require the addition of only 1 full-time representative. The Agency has failed to demonstrate, however, that it would have to hire more employees to cover the absence of an additional full-time Union representative or that such a result, if necessary, would actually cause it to exceed the limitations on hiring that it asserts exist. In addition, the Agency has not shown, in contrast to the circumstances present in Wright-Patterson Air Force Base, that the "crew" concept is applicable to teaching, that is, that the removal of one additional employee from his or her teaching position would be so disruptive that the progress of the work of the Agency would be seriously affected. On the other hand, according to the Union's uncontroverted statement, "there is a great degree of interchangeability in teaching skills because teachers are qualified in multiple fields. This allows for the change of one teacher for another because similar skills are possessed by a number of colleagues."[1]

Although the Agency maintains that it is subject to personnel ceilings, it is clear from the record that, even if it had demonstrated that it would have to hire more employees to cover the addition of a full-time representative, the personnel ceilings imposed upon the Agency are not congressionally mandated, nor is there a limit on the number of teachers that can be hired either in the Overseas Teachers Pay and Personnel Practices Act[2] or in the annual Defense Appropriations Acts. Moreover, in agreement with the Union, various logistical problems hypothetically raised by the Agency in its statement of position could be addressed through substantive negotiations with the Union on the implementation of the proposal.

VI. Conclusion

For the reasons stated above, the Authority concludes that, in the circumstances of this case, the Agency has failed to show how the addition of one full-time Union representative on official time would either be determinative of the number or types of employees assigned to the schools the Agency operates, or interfere with the accomplishment of the Agency's work. Compare American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis,

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[1] Union Petition for Review at 8.

[2] 20 U.S.C. 901, et seq.

Minnesota, 2 FLRA 641 (1980) (where the Authority concluded that the effect of the proposal there would have been to require management to hire additional nurses and that, thus, the proposal was integrally related to and determinative of the number of employees assigned to a work project or tour of duty, and, hence, that the proposal was negotiable only at the election of the agency.) Therefore, the Union proposal is within the duty to bargain under section 7131(d) of the Statute.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union's proposal.3/

Issued, Washington, D.C., May 8, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

21 FLRA No.82

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
NATIONAL OFFICE

Respondent

and

Case No. 3-CA-40441

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case to the Federal Labor Relations Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record in this case, including the parties' stipulation of facts, accompanying exhibits, and the parties' contentions, the Authority finds:

The complaint alleges that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to furnish, as required by section 7114(b)(4) of the Statute,[1] information requested by the National Treasury Employees Union (the Union), the exclusive representative of its employees, in connection with the Union's processing of a grievance on behalf of employee

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[1] Section 7114(b)(4) provides:

§ 7114. Representation rights and duties

. . . .

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(Continued)

Michael Santoro. The grievance alleged that the Respondent had unlawfully retaliated against Santoro for filing an earlier grievance by lowering his evaluation for purposes of consideration for merit promotion to a Tax Law Specialist position.

The Union, in connection with its representation of the grievant, and its pursuit of what it considered to be a discriminatory appraisal, requested information concerning the promotion process, including a "promotion package." The Union asserted that only by comparative assessment of the promotion material would it be able to prove discrimination on the part of the Respondent. The Respondent denied this request, stating that because the position in question is not a bargaining unit position, the Union was not entitled to receive the requested material under section 7114(b)(4) of the Statute. The Respondent contends also that, as the position in question is a non-bargaining unit position, the issue was not grievable under the parties' negotiated agreement. The parties stipulated that the data requested by the Union is normally maintained by the Respondent, is reasonably available, and does not constitute guidance,

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(Continued)

. . . . . .

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

advice, counsel, or training provided to officials or supervisors relating to collective bargaining. The Respondent stipulated also that, if the information had been requested in connection with a bargaining unit position, it would have been provided.

Under section 7114(b)(4) of the Statute, an agency has a duty to furnish upon request by an exclusive representative, to the extent not prohibited by law, data which, among other things, is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. Such data must be necessary to enable the Union to fulfill its representational responsibilities, including the effective evaluation and processing of grievances. However, a union's bare assertion that it needs data to process grievances does not automatically oblige an agency to supply such data. The duty to supply data under section 7114(b)(4) thus turns upon the nature of the request in the circumstances of each particular case.[2] Therefore, the threshold issue is whether the data requested by the exclusive representative is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining, including specifically the Union's evaluation and processing of the grievance involved herein.

In the Authority's view, in order to process the instant grievance, the Union would have had to be able, as it explained to the Respondent, to make a comparative assessment of the various evaluations involved in the merit promotion action involved, that is, all material pertinent to the promotion process contained in the "promotion package." Thus, the Authority finds that the General Counsel has demonstrated that the data requested by the Union is clearly necessary under section 7114(b)(4) of the Statute in order for the Union to determine whether the Respondent engaged in deliberate discrimination against the grievant by lowering his promotion appraisal in retaliation for his having processed a previous grievance to arbitration.[3]

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[2] See Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 18 FLRA No. 53 (1985); Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624 (1985), petition for review filed sub nom. American Federation of Government Employees, Local 1345 v. FLRA, No. 85-1378 (D.C. Cir. June 21, 1985).

Accordingly, the Authority concludes that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to furnish the Union with necessary data as required by section 7114(b)(4), and we shall order that the requested data be furnished to the Union upon request.[4]

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Internal Revenue Service, National Office, Washington, D.C., shall:

1. Cease and desist from:

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[3] As the Authority has previously noted, the resolution of grievability questions cognizable under law is for an arbitrator under parties' negotiated agreements, unless they mutually agree otherwise, and the existence of such a threshold question herein, contrary to the Respondent's assertion, would not in and of itself relieve the Respondent of its obligation to furnish otherwise necessary information pursuant to section 7114(b)(4) of the Statute. See, e.g., U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251 (1982). Compare Director of Administration, Headquarters, U.S. Air Force, 17 FLRA 372 (1985), wherein the Authority held that if the underlying matter is not cognizable under law (e.g., the filing of a grievance concerning a probationary employee's termination), then the question may not go to an arbitrator. It follows that in the latter circumstances, unlike here, there would be no section 7114(b)(4) obligation to furnish such data for the purpose that the exclusive representative was seeking it.

[4] See Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C., 18 FLRA No. 74 (1985). In so concluding, the Authority notes that there is no allegation herein that providing the requested data is prohibited by the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 256 (codified as amended at 5 U.S.C. § 552 (1982)) or the Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)). See generally Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, supra.

(a) Failing and refusing to furnish, upon request by the National Treasury Employees Union, the exclusive representative of its employees, the data which the Authority has deemed necessary to enable the exclusive representative to perform its representational duties in connection with Michael Santoro's grievance.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, furnish the National Treasury Employees Union, the exclusive representative of its employees, the data which the Authority has deemed necessary to enable the exclusive representative to perform its representational duties in connection with Michael Santoro's grievance.

(b) Post at its Washington, D.C. offices, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 8, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish, upon request by the National Treasury Employees Union, the exclusive representative of our employees, the data which the Authority has deemed necessary to enable the exclusive representative to perform its representational duties in connection with Michael Santoro's grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish the National Treasury Employees Union, the exclusive representative of our employees, the data which the Authority has deemed necessary to enable the exclusive representative to perform its representational duties in connection with Michael Santoro's grievance.

____
(Activity)

Dated: _______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

21 FLRA No. 83

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. 0-NG-755

DEPARTMENT OF THE TREASURY,
BUREAU OF GOVERNMENT FINANCIAL
OPERATIONS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one provision of a negotiated agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute.[1]

II. Procedural Issue

The Agency moved for dismissal of the Union's petition for review because the petition failed to include a precise statement of the provision's meaning as required by section 2424.4(a)(2) of the Authority's Rules and Regulations. While the original petition did not contain a statement of meaning, the Union subsequently amended its petition to include the requisite statement, thus curing the defect in accordance with established Authority practice. See, e.g., American Federation of Government Employees, Local 2578,

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[1] The Union withdrew its request for negotiability determinations on two additional provisions, one concerning military leave and the other covering automatic performance ratings. Hence those provisions are not considered here.

AFL-CIO and General Services Administration, National Archives and Records Service, 12 FLRA 545 (1983).

III. Provision

Section 2

A. Each Center will establish an occupational safety and health team consisting of two (2) members appointed by the Union.

1. Employees on the committee will receive appropriate training as available.

2. Employees have the right to report health and safety complaints to the health and safety team, who will investigate the complaints and submit reports.

3. The health and safety team will conduct at least quarterly inspections (or more frequently if in accordance with a past practice) and submit reports.

4. Time spent on team activities will be official time.

A. Positions of the Parties

The Agency argues, that by giving the Union the right to appoint two members to the proposed occupational safety and health team, the provision is inconsistent with its reserved management rights under section 7106(a)(2)(A) and (B) of the Statute to assign employees, to assign work and to determine the personnel by which Agency operations shall be conducted.

According to the Union, the language of the disputed provision "requires the agency to select the option of a joint health and safety committee rather than unannounced OSHA [Occupational Safety and Health Administration] inspections as that option exists in E.O. 12196 and 29 CFR Part 1960." Union Amended Petition for Review at 1.

The Union advances three arguments to support its position that the disputed provision is negotiable. First, since the proposed team is not a product of law or regulation, but, rather, is to be created by the collective bargaining agreement, serving on that team does not constitute the work of the Agency. Because the reserved management right to assign work extends only to the work of the Agency, the Union's authority, pursuant to the provision, to designate two team members does not contravene a management right. Second, the Union notes that the Agency is free to appoint as many members to the team as it wishes under the terms of the provision. Finally, the Union argues that the provision constitutes a procedure which assures fairness and equity in assigning members to the safety and health committee.

B. Analysis

1. Establishment of a Certified Safety and Health Committee

In order to achieve the Union's stated objective of avoiding unannounced OSHA inspections the safety and health committee sought to be established must be "certified" by the Secretary of Labor under law and regulation. See, section 1-301, Executive Order 12196 and 29 C.F.R. § 1960.36(b). Further, in order to obtain certification by the Secretary of Labor, a network of committees must be established at both the national level of the agency and, for agencies with field or regional offices, at other appropriate levels within the agency. Section 1-301, E.O. 12196, 29 C.F.R. § 1960.37(a). The Union here represents Disbursing Center (Field) employees in the Bureau of Government Financial Operations (BGFO). The BGFO is a bureau of the Department of the Treasury. The record in this case, however, indicates that the Agency head, the Secretary of the Treasury, has not established, and is not attempting to establish, the network of committees required for certification under the executive order and regulations. Thus it is clear that the Union is not merely attempting to negotiate over membership on a joint labor-management safety committee concerned with matters of safety and health within the bargaining unit. Rather, in view of the Union's professed objective to avoid unannounced OSHA inspections, the provision seeks to bind the Agency to a course of action requiring the forming of similar committees throughout the Agency.

Although the parties focused their arguments on whether the Union may negotiate over membership on the safety and health committee, the issue to be resolved initially is whether bargaining over the establishment of a certified safety and health committee is itself authorized by governing law, the implementing executive order and relevant Government-wide regulations.

The legislation creating safety and health programs for Federal agencies prescribes specific roles for agency heads and employee representatives in the establishment of safety and health committees. 29 U.S.C. § 668(a) charges agency heads with responsibility for establishing and maintaining "an effective and comprehensive occupational safety and health program" and requires agency heads to engage in "consultation" with representatives of their employees. In the legislative history the statutory objective is described as follows:

> The above requirements are intended to establish clear responsibility for the Federal Government's internal safety and health efforts, and provide the Secretary [of Labor] with an active role in coordinating the multiplicity of programs devised by various agencies.[2] [Footnote added.]

The relevant executive order, issued pursuant to statutory authorization, implements the expressed intent of the law by identifying agency heads as having responsibility, inter alia, for providing their employees with safe workplaces and for operating occupational safety and health programs in accordance with the executive order and with regulations promulgated by the Secretary of Labor. E.O. 12196, section 1-201. This executive order specifically defines the role of employee unions. In section 1-201(i), agency heads are required to assure that employee representatives accompany safety and health inspectors when inspecting agency workplaces. The executive order authorizes, in section 1-301, exclusive representatives to appoint members to certified committees only at levels where they hold exclusive recognition, should the decision be made by the agency head to establish certified committees. The order also provides for circumstances where there is no certified bargaining representative. In such situations, committees will be comprised of management representatives "and an equal number of nonmanagement employees or their representatives." However, the Union provides no evidence to indicate that Congress, the President or the Secretary of Labor intended to give unions a greater role in the Federal safety and health programs than that expressly prescribed for them in the law, the executive order or in existing regulations. That is, in light of the specific responsibilities assigned, it does not appear that unions are authorized to negotiate over the establishment of certified safety and health committees. See, for example, U.S. Department of Labor, Labor-Management Services Administration, Cleveland, Ohio and National Union of Compliance Officers, 13 FLRA 677 (1984) wherein it was held that the available legislative and regulatory evidence did not support the position that the termination of probationary employees was includable within the scope of negotiated grievance procedures.

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[2] S. REP. NO. 1282, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5177, 5196.

Finally, this view is not altered by the fact that the Authority has found proposals seeking to establish joint labor-management committees to serve as vehicles for exchanging views on matters affecting conditions of employment within a bargaining unit to be negotiable. See, e.g., American Federation of Government Employees, AFL-CIO, Local 2761 and U.S. Department of the Army, U.S. Army Adjutant General Publication Center, St. Louis, Missouri, 14 FLRA 438 (1984). The committee sought to be created here, however, would have more than an advisory role, in that it would have the various powers and responsibilities authorized by the statutory and regulatory framework. Thus, the provision in this case is readily distinguishable from the provision before the Authority in American Federation of Government Employees, AFL-CIO, Council of Prison Locals and Department of Justice, Bureau of Prisons, 11 FLRA 286 (1983) which sought only the establishment of an uncertified safety and health committee and which was found to be within the duty to bargain.

2. Union Membership on Certified Safety and Health Committee

Assuming that the Agency head in this case were to exercise his exclusive discretion to establish certified safety and health committees, as that option exists in the cited executive order and related regulations, then Union representation on such committees would be governed by other provisions of the Executive Order. Specifically, section 1-301 of E.O. 12196 provides: "Where there are exclusive bargaining representatives for employees at the national or other level in an agency, such representatives shall select the appropriate nonmanagement members of the [occupational safety and health] committee." Thus, the Union's right to select members for the certified committee would arise directly from the governing executive order and consequently would not be inconsistent with rights reserved to management by the Statute.

C. Conclusion

For the reasons stated above, bargaining on the disputed provision is inconsistent with law and applicable Government-wide regulations and, consequently, is outside the duty to bargain pursuant to section 7117(a)(1) of the Statute. However, should the Agency head decide in the future to establish occupational safety and health committees in accordance with the governing statutory and regulatory prescriptions, the Union could pursuant to the executive order designate the individuals who will represent the Union on such committees.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 8, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 84

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 644, AFL-CIO

Union

and

Case No. O-NG-849

U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of six union proposals.[1] The proposals concern the relocation of the employees of the Occupational Safety and Health Administration's (OSHA) Area offices at Erie and Pittsburgh, Pennsylvania.

II. Procedural Issue

The Union's Petition for Review sets forth proposals both as originally presented at the bargaining table and as subsequently modified in the course of bargaining. Section 2424.4(a)(3) of the Authority's Rules requires the union in its petition to submit the agency's written allegation as to the nonnegotiability of the proposals for which review is being sought. The Union's petition in this case included written declarations of nonnegotiability for the original proposals only. There is no indication in the record that the Union requested a written allegation of nonnegotiability as to the subsequent proposals. Consequently, the Authority will only decide the negotiability of the original proposals.

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[1] The Union withdrew one proposal involving the use of shower facilities and did not appeal the Agency's declaration that a proposal regarding the cost of printing employee business cards was nonnegotiable. These proposals will not be considered further here. The Union did not file a Reply Brief in this case.

III. Union Proposals 1 and 2

Union Proposal 1 (Erie)

> The new space will be structured to provide individual offices for each bargaining unit employee.

Union Proposal 2 (Pittsburgh)

> All CSHO's will be provided with offices in accordance with what they have at the present time (9 private offices and 6 offices with 2 CSHO's per office).

A. Positions of the Parties

The Agency argues that the Union has not shown any impact to which Proposals 1 and 2 relate, and that the Agency's actions, therefore, do not constitute changes in conditions of employment sufficient to create a duty to notify the Union and afford it an opportunity to request bargaining. The Agency also contends that the proposals would require it to negotiate over the technology of performing work in violation of section 7106(b)(1) of the Statute.

The Union states that Proposals 1 and 2 were intended to ensure that employees obtain in the new locations the same amount of work space they had in their prior locations. The Union contends that the proposals do not concern the technology of performing work.

B. Analysis and Conclusion

As to the argument concerning changes in working conditions, the Authority has consistently held that it will only decide in a negotiability appeal issues which are before us under section 7105(a)(2)(D) and (E) of the Statute. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

As to the Agency's contention that the proposals are nonnegotiable, the Authority has held that for a proposal concerning office space design to violate an agency's right to determine the technology of performing work, an agency must show (1) that its choice of office space design has a technological relationship to the accomplishment and furtherance of its work and (2) that the proposal would interfere with these purposes. See Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois, 16 FLRA 141, 143 (1984) and cases cited there. The Agency contends that the field investigatory personnel covered by the proposals are "expected to be away from the office a preponderant percentage of work time in the conduct of inspection activities required to be performed at the worksites of employers ...." The Agency argues that open space technology represents a balance between "cost and Governmental efficiency and accomplishment of OSHA's enforcement programs." Agency Statement of Position at 2,3.

The Union states, and the Agency does not dispute, that the covered employees are currently housed in private offices even though they currently spend the bulk of their time in the field. Union Petition for Review at 1,3. Since the proposals would not alter the Agency's current practice, and the Agency has not shown how continuing its current practice would interfere with the accomplishment and furtherance of its work, the Authority concludes that the Agency has not demonstrated that open space design has a sufficient technological relationship to accomplishing or furthering the Agency's work to interfere with its determination regarding "technology" in any significant way. Accordingly, the Authority finds that Union Proposals 1 and 2 are within the duty to bargain. Contrast American Federation of State, County and Municipal Employees, AFL-CIO, Local 2910 and Library of Congress, 19 FLRA No. 130 (1985) (Union Proposal 1) in which the Authority concluded that a proposal to allow employees their preference of seating assignments was contrary to the agency's right under section 7106(b)(1) of the Statute to determine the methods and means of performing work because the grouping of employees based on their "primary function" was designed to enhance the agency's ability to accomplish its function in a more efficient and effective manner.

IV. Union Proposal 5 (Pittsburgh)

> The library/conference room shall be relocated and that space converted into office space.

A. Positions of the Parties

The Agency argues that the Union has not shown any adverse impact to which Proposal 5 relates, and that the Agency's actions, therefore, do not constitute changes in conditions of employment sufficient to create a duty to notify the Union and afford it an opportunity to request bargaining. The Agency also contends that the proposal violates its rights under section 7106(b)(1) to determine the technology, methods and means of performing its work and under section 7106(a)(1) to determine its internal security practices.

The Union contends that the proposal is intended to lessen the impact on employees of the move itself by making the larger space intended as a library/conference room into office space and placing the library/conference room in a smaller area.

B. Analysis and Conclusion

As to any factual disputes concerning the existence of an obligation to bargain, see Wurtsmith Air Force Base discussed above with respect to Proposals 1 and 2.

As to whether the proposal violates section 7106(b)(1), the Authority finds that the Agency has not provided sufficient support in the record to determine whether the proposal violates the Agency's right to determine the technology, methods and means of performing work. See above discussion concerning Union Proposals 1 and 2.

With respect to the argument concerning internal security, the Authority finds that Union Proposal 5 was intended as an arrangement for employees adversely affected by the office move. In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4, slip op. at 8-10 (1986) the Authority set forth the factors it will consider in determining whether a proposal constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute or is outside the duty to bargain because it excessively interferes with the exercise of management's rights. One of the factors to be weighed in determining whether a proposed arrangement is appropriate is the nature and extent of the impact on management's ability to act pursuant to its statutory rights. Id. at 9. An agency's right to determine its internal security practices includes the right to determine policies and actions necessary to secure its property against internal or external risks. National Association of Government Employees, SEIU, AFL-CIO and Department of the Air Force, Scott Air Force Base, Illinois, 16 FLRA 361, 362 (1984). The Agency contends that the library's location was chosen so that administrative personnel could monitor its use and the removal of library materials. Agency Statement of Position at 4. The Union agrees that the Agency's concern is "valid." Union Petition for Review at 3. The Authority finds that the location of the library/conference room where it could be monitored by administrative personnel constitutes part of the Agency's plan to safeguard its property and that the Union's proposal would interfere with the Agency's determination. The Authority also finds that the benefit to the employees of having the additional space is not sufficient to overcome the detriment to the Agency's security plan. Consequently, the Authority concludes that Union Proposal 5 excessively interferes with the Agency's right under section 7106(a)(1) of the Statute to determine its internal security practices and is outside the duty to bargain.

V. Union Proposals 6 and 11

Union Proposal 6 (Erie)

Free parking spaces will be provided.

Union Proposal 11 (Pittsburgh)

Free parking will be provided for GOV's and POV's within walking distance of the Federal building.

A. Positions of the Parties

The Agency contends that employee parking is governed by Government-wide regulation within the meaning of section 7117(a)(1) of the Statute. It argues that the General Services Administration (GSA) retains exclusive responsibility for determining allocations of space for vehicle parking and that the Agency, therefore, is without discretion to provide parking facilities on its own. Additionally, the Agency argues that, because the subject is covered by Government-wide rule or regulation, national consultation rights under section 7113 of the Statute apply rather than collective bargaining.

The Union contends that the Agency has discretion to provide employees with free parking as was done at the previous location.

B. Analysis

The Authority has held that proposals regarding the distribution of parking spaces to employees in the bargaining unit are within the duty to bargain if they are consistent with applicable laws, rules, and regulations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61, 66 (1982) (Union Proposal 2) (citing National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747 (1980)). The regulation governing federal employee parking is FPMR Temporary Regulation D-69 (Temp. Reg. D-69), 41 CFR Chapter 101 at Appendix to Subchapter D (superseding 41 CFR 101-20.111) (extended through March 31, 1987, 51 Fed. Reg. 11022 (1986)). The Authority has held that the FPMR applies to the federal civilian work force as a whole and is, therefore, a Government-wide regulation within the meaning of section 7117(a)(1) of the Statute. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 755 (1980). Consequently, Temp. Reg. D-69 is a Government-wide regulation which would bar negotiation on a conflicting union proposal.

As to whether Union Proposals 6 and 11 conflict with Temp. Reg. D-69, the Agency contends and the Union does not dispute that the facilities which the Agency occupies in Erie and Pittsburgh are within the control of GSA. However, GSA control of the facilities does not leave the Agency without discretion concerning employee parking. First, section 7 of the regulation provides that, while GSA is vested with the authority to allocate parking spaces, GSA may delegate its authority to occupant agencies "by mutual agreement."2/ Further, section 8 of the regulation

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2/ Section 7 of FPMR Temp. Reg. D-69 provides in relevant part:

> 7. Allocation and assignment of parking for official needs. GSA has responsibility for

(Continued)

provides that parking spaces not required for official needs may be used for employee parking.[3] Additionally, section 10(f) of Temp. Reg. D-69 recognizes that implementation of the regulation "may require negotiation . . . with recognized labor organizations."

The Authority therefore finds that an agency has discretion under Temp. Reg. D-69 to either request that GSA delegate to the agency the authority to allocate parking spaces in accordance with sections 7 and 8, or, if GSA does not agree to the delegation, request GSA to allocate a designated number of spaces for employee parking. See IRS, New Orleans District at 759-60.[4] This discretion is not unlimited. One limit on an agency's discretion is that GSA is not required to comply with an agency's request. Additionally, contrary to the Union's contention, an agency is without discretion under Temp. Reg. D-69 to secure

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(Continued)

> ensuring the availability of parking spaces for official needs. GSA may, by mutual agreement, delegate allocation and assignment responsibilities to occupant agencies . . . .

[3] Section 8 of FPMR Temp. Reg. D-69 provides in relevant part:

> 8. Allocation and assignment of employee parking spaces.
>
> a. Parking spaces not required for official needs may be used for employee parking.
>
> b. GSA (or other agencies having assignment responsibilities) will determine the total number of spaces available for employee parking.

[4] In IRS, New Orleans District, the Authority held that an agency is without discretion to provide parking for its employees free of charge in that FPMR Temporary Regulation D-65, a Government-wide regulation, required employees to be charged for the use of government-controlled parking. However, that regulation is no longer in effect. Under Temp. Reg. D-69, which currently governs federal employee parking, an agency is no longer required by Government-wide regulation to assess a charge for the use by its employees of government-controlled parking facilities.

parking away from the GSA controlled facility without GSA having delegated such authority to the agency.

The Agency's argument concerning national consultation rights under section 7113 of the Statute is based upon the proposal's inconsistency with Government-wide regulation. However, in light of our determination that the proposal is not inconsistent with Temp. Reg. D-69, the Authority rejects the Agency's contention.

C. Conclusion

As discussed above, to the extent that the Agency has discretion to carry out the general requirement of proposals 6 and 11 by requesting GSA to take appropriate action, they are within the duty to bargain.

VI. Union Proposal 14 (Pittsburgh)

> Due to traffic problems and in accordance with Article 25, Section 4, of the negotiated agreement, a pilot flexitime project will be instituted in the Pittsburgh Area Office for all bargaining unit employees.

A. Positions of the Parties

The Agency contends that Article 25 of the parties' Master Agreement defines the standard work week for employees and is not subject to bargaining under section 7106(b)(2) and (3) of the Statute absent a management-initiated change or a reopener clause. The Agency also argues that it has no obligation to bargain concerning matters over which it has no control.

The Union contends that the proposal merely implements Article 25, Section 4 of the parties' Master Agreement.

B. Analysis and Conclusion

As to any factual issues concerning the existence of an obligation to bargain, see Wurtsmith Air Force Base discussed above with respect to Union Proposals 1 and 2.

Union Proposal 14 would establish a pilot flexitime program in the Agency's Pittsburgh office. The Authority has held as a general matter that proposals concerning flexitime are within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 2875 and

[21 FLRA No. 84]

Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441 (1981). The Agency's argument that the proposal concerns matters outside its control is unclear and the Agency has provided no basis in the record for the Authority to respond to its contention. Since the Agency has not alleged and it is not otherwise apparent that the proposal is inconsistent with applicable law, regulation, or the Statute, it is within the duty to bargain.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review as to Union Proposal 5 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 1, 2, 6, 11, and 14.5/

Issued, Washington, D.C., May 8, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

5/ In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and Case No. O-NG-711

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
ANDOVER SERVICE CENTER,
ANDOVER, MASSACHUSETTS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of two Union proposals which were made in response to a management determination to modify tours of duty.

II. Procedural Issues

The Agency contends that one of the proposals (Union Proposal 2) is not properly before the Authority because its text was not included in the petition for review. The Agency's argument is spurious, since the language of Proposal 2 was included and discussed in the Agency's Statement of Position. The record provides an adequate basis for an Authority determination on Proposal 2. The Agency also contends that the Union's petition for review should be dismissed for failure to furnish a statement of meaning attributed to its proposals as required by section 2424.4(a)(2) of the Authority's Rules and Regulations. In accordance with established practice, the Union was afforded an opportunity to, and did, timely correct its failure to furnish a statement of the meaning attributed to its proposals. The procedural defect has therefore been corrected and the Agency's motion to dismiss is denied. See American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration, 15 FLRA 909 (1984). The Agency further asserts that the petition for review is untimely with regard to Union Proposal 2. The Authority notes that, in response to the Union's request for an Agency head determination with respect to a revised Union Proposal 1, the Agency reiterated its position with respect to Union Proposal 2. The Union's petition was timely when calculated from the date of that Agency response. Finally, the Agency contends that the dispute is more appropriately resolved by resort to unfair labor practice procedures because of unresolved factual questions. Such an argument does not provide a basis for dismissing a negotiability appeal. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

III. Proposal 1

> Volunteers will be solicited to change their shift to 6:45 a.m. The numbers of employees needed to accommodate the overlap of shifts will be selected either by lowest SCD [service computation date] in unit if not enough volunteers are obtained or highest SCD in the unit if too many volunteers come forward.

A. Positions of the Parties

The Agency argues that this proposal conflicts with management's right, under section 7106(a)(2)(B) of the Statute, to determine the personnel by which its operations are carried out. Further, the Agency asserts that this proposal concerns the numbers, types and grades of employees and positions assigned to a tour of duty, and is negotiable only at the election of the Agency pursuant to section 7106(b)(1). The Union did not file a Reply Brief in this case.

B. Analysis

The proposals in this case were offered in response to the Agency's announced plan to change the bargaining unit employees' tour of duty from a 7:45 a.m. to 4:15 p.m. tour to a 6:45 a.m. to a 3:15 p.m. tour. The Agency also planned to add a second shift, running from 3:45 p.m. to 12:15 a.m.

This proposal would, in effect, require the Agency to continue the 7:45 a.m. starting time and solicit volunteers for the new 6:45 a.m. starting time. Selection for the earlier starting time would be based on earliest or latest service computation date depending on whether too many or too few employees volunteered for the shift starting at 6:45 a.m.

The Agency has failed to demonstrate how this proposal would interfere with management's right to determine the personnel by which agency operations are carried out. Since the Union did not propose a change in the 3:45 p.m. starting time of the afternoon shift planned by the Agency, retention of the shift beginning at 7:45 a.m., as required by the proposal, would result in a shift overlap of 30 minutes. That is, the 7:45 a.m. shift proposed by the Union would end at 4:15 p.m. and the afternoon shift established by the Agency would commence at 3:45 p.m. This circumstance contrasts with the Agency's proposed shift scheme which would result in a 30 minute gap between the end of the morning shift and start of the afternoon shift. As a result, this proposal has the effect of requiring management to have on duty during the period from 3:15 p.m. to 4:15 p.m. more employees than, in its judgment, are deemed necessary.[1] In our view, Union Proposal 1 has the same effect as the proposed shift structure found nonnegotiable in Department of the Air Force, Lowry Air Force Base, Colorado and American Federation of Government Employees, AFL-CIO, Local 1974, 16 FLRA No. 1104 (1984). In that case the Authority found that, because of a change in a commissary store's operating hours, the Union's proposed shift structure would have required the agency to employ workers before the store opened and, later in the day, to operate the store without employees. Thus, the Authority concluded, the Union's proposed shift structure had "the effect of determining the numbers, types and grades of employees assigned to a work project or a tour of duty, a matter which is bargainable at management's election under section 7106(b)(1) of the Statute." Since Union Proposal 1, in this case, would require a certain number of employees to be at work when the Agency has determined that no employees or a fewer number of employees are needed, it, too, falls within the ambit of section 7106(b)(1).

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[1] This conclusion is reached by reference to the proposed Agency plan. Under its plan, no employees would be at work between 3:15 p.m. and 3:45 p.m., and only the afternoon shift would be at work from 3:45 p.m. to the end of its tour.

C. Conclusion

Proposal 1 relates to a matter which is negotiable only at the Agency's election under section 7106(b)(1) of the Statute. Since the Agency has elected not to bargain concerning this proposal, it is nonnegotiable.

IV. Proposal 2

> Employees forced onto the 6:45 a.m. shift and (sic) have transportation problems will remain on their current shift for 4 weeks. "Centerings" be utilized for 4 weeks to assist the employee in locating a ride to and from work.

A. Positions of the Parties

The Agency asserts that no obligation to bargain is created by this proposal because it does not concern a "condition of employment" as that term is defined in section 7103(a)(14) of the Statute. The Union did not submit a Reply Brief in this case.

B. Analysis

The Agency contends that Proposal 2 does not address a condition of employment because "it relates to arrangements for employees' transportation to and from work." Agency Statement of Position at 3. However, the proposal does pertain to working conditions of unit employees, that is, procedures and appropriate arrangements in connection with management's changing the tour of duty. Further, it does not require any substantive action on the part of the Agency with respect to employee transportation. The first portion of the proposal provides that management will temporarily delay for four weeks the requirement that certain employees work the new tour of duty. The second portion of the proposal merely obligates the Agency to post carpool or transportation notices in what appears from the record to be a preexisting medium. The Agency does not allege that this proposal would prevent management from acting at all to require all employees to work the new tour of duty. Therefore, Proposal 2 in this case has the same effect as Union Proposal 11 in American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982). That proposal would have required the agency to give notice prior to changing certain employee assignments.

The Authority found that proposal to constitute a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. Thus, based on *U. S Marshals Service*, we find that Proposal 2 in this case is a negotiable procedure under section 7106(b)(2). In addition, because Proposal 2 does not interfere with management's decision to change the existing tour of duty but, rather, merely attempts to alleviate the effects of that decision, it also constitutes an "appropriate arrangement" under section 7106(b)(3) of the Statute.

C. Conclusion

We find this proposal to be both a negotiable procedure under section 7106(b)(2) of the Statute and an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Union Proposal 1 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 2.[2]

Issued, Washington, D.C., May 8, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding Union Proposal 2 to be within the duty to bargain, the Authority makes no judgment as to its merits.

21 FLRA No. 86

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF HEARINGS AND APPEALS,
REGION II

Activity

and

Case No. 0-AR-1016

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Peter Florey filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance concerned the denial of the recommendation of the grievant's supervisor that the grievant, a hearing specialist, be promoted to GS-11 as of June 10, 1984. The grievant thereafter was promoted prospectively, but the grievance was submitted to arbitration protesting the earlier denial. The Arbitrator noted that in order for a hearing specialist to be eligible for promotion, the specialist must be determined to be performing at least at the fully satisfactory level of the job elements of the position to which the employee is to be promoted. The Arbitrator further noted with respect to the grievant that his promotion had been denied because it had been determined statistically that he was not averaging at least 1.9 decisions per day, the fully satisfactory level established for the quantitative case-processing element of the GS-11, hearing specialist position. The Arbitrator concluded that the performance standards used to measure the grievant's numerical case production, at least up until the time of the grievance, failed to comply with the requirements of the parties' collective bargaining agreement that performance standards must accurately evaluate performance and procedures must be applied which reasonably ensure the accurate evaluation of performance. The Arbitrator also concluded that management had failed to comply with the agreement obligation that factors affecting performance that are beyond the control of the employee be considered. Moreover, the Arbitrator ruled that but for these erroneous applications of the dictates of the collective bargaining agreement, the recommended promotion of the grievant would originally have been approved. Thus, as his award, the Arbitrator effectively ordered the grievant promoted retroactively to June 10, 1984, with backpay.

III. EXCEPTIONS

In one of its exceptions, the Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, and section 7106(a) of the Statute. In support the Agency essentially maintains that the sole basis for the award of a retroactive promotion and backpay was the Arbitrator's determination that but for management's failure to comply with the parties' collective bargaining agreement with respect to the appraisal of the grievant's case production as not qualifying him for promotion, his recommended promotion would originally have been approved. In this respect the Agency first argues that this determination as to the appraisal of the grievant's performance is contrary to section 7106(a) because it negated legitimately established performance standards. The Agency further argues that consequently such determination cannot constitute the required finding under the Back Pay Act that the grievant was affected by an unjustified or unwarranted personnel action which directly resulted in a loss of pay and that accordingly the award of a retroactive promotion and backpay is deficient.

IV. ANALYSIS AND CONCLUSIONS

In Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO, 20 FLRA No. 39 (1985), and Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148, 21 FLRA No. 15 (1986), the Authority discussed in detail the role of an arbitrator in resolving disputes pertaining to performance appraisal matters. Specifically, on the basis of section 7106(a)(2)(A) and (B) of the Statute, providing for management's right to direct employees and to assign work, and on decisions of the Authority and the courts, the Authority stated that an arbitrator may not determine that a grievance directly challenging an agency's identification of job elements or establishment of performance standards is grievable or arbitrable. The Authority further stated that an arbitrator also may not render an award substituting his or her judgment concerning job elements and performance standards for that of management. Bureau of Prisons, slip op. at 3-4; Bureau of Engraving and Printing, slip op. at 2.

In both of these cases, the Authority also acknowledged that there is a duty to bargain under section 7106(b)(3) on appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a), e.g., actions which adversely affect employees taken under the performance standards established by management. Bureau of Prisons at 4; Bureau of Engraving and Printing at 3 (both cases citing American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784, 791-92 (1980) (proposal 5)). In OPM, Washington the Authority specifically found that the proposal in dispute merely established a general, nonquantitative requirement by which the application of critical elements and performance standards established by management may subsequently be evaluated in a grievance by an employee who believes that he or she has been adversely affected by the application of management's performance standard to him or her. To that extent, the Authority held that the proposal was within the duty to bargain. The Authority noted that under such a proposal an employee against whom management takes disciplinary action for unacceptable performance may, in a grievance of such action pursuant to section 7121(e) of the Statute, raise the issue of whether the performance standards as applied to him or her meet the contractual requirements, i.e., the arbitrator of such a grievance would simply determine if the standard established by management as applied to the grievant complied with the "fair and equitable" requirements of the parties' agreement. In finding that proposal to be within the duty to bargain, the Authority specifically noted that such an arrangement did not affect management's discretion to determine the content of performance standards nor did it authorize an arbitrator to substitute his or her judgment for that of management as to the content of the standards. The Authority has distinguished between proposed grievance procedures subjecting management's identification of critical elements and establishment of performance standards to arbitral review and grievance procedures relating only to the application of such elements and standards to an individual employee through the appraisal process. Bureau of Prisons at 4; Bureau of Engraving and Printing at 3.

Consistent with these holdings and the Statute, the Authority in both cases specifically advised that an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his or her performance appraisal by management's application of the established standards. The Authority further advised that in resolving the grievance, the arbitrator properly may determine that management applied the established standards in violation of an appropriate, nonquantitative review criterion, and the arbitrator to that extent may sustain the grievance. The Authority also stated that in sustaining the grievance, an arbitrator as a remedy may direct that the grievant's work product be properly evaluated by management or where appropriate that the grievant's work product as appraised by management be granted the rating to which entitled under the established elements and standards. The Authority cautioned, however, that the arbitrator may not substitute his or her judgment for that of the agency as to the appropriateness of elements and standards established by management. The Authority further cautioned that the arbitrator may not conduct an independent evaluation of an employee's peformance under the elements and standards established by management and may not substitute his or her own judgment for that of management as to what that employee's performance evaluation and rating should be. Bureau of Prisons at 5-6; Bureau of Engraving and Printing at 4.

In this case the Authority finds that in sustaining the grievance, the Arbitrator improperly substituted his judgment for that of the Agency as to the appropriateness of the established standards. Specifically, the Authority concludes that in substantial part, the Arbitrator's determination that management's appraisal of the grievant's case production failed to comply with the parties' agreement is contrary to management's right under the Statute to establish the content of performance standards. Thus, to the extent that the Arbitrator's determination that the agreement was violated is based on his finding that the performance standards were "unfair," because they failed to account for the grievant's situation of having to write for six judges and of primarily having prepared affirmations, see Award at 12, the Authority finds that determination deficient because it constitutes an improper review by the Arbitrator of the content of the standards and a substitution by the Arbitrator of his judgment for that of management as to the proper content of those standards. See, e.g., American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA 948 (1984)(proposal 3). Such determination by the Arbitrator was not limited to an assessment of the application of the established standards to the grievant. Instead, it constituted an improper inquiry by the Arbitrator into whether the established standards themselves made appropriate allowances for the grievant's situation. See, e.g., American Federation of Government Employees, Local 32 and Office of Personnel Management, 19 FLRA No. 9 (1985)(proposal 3). Consequently, to this extent the Arbitrator's determination that management's appraisal of the grievant's case production was contrary to the parties' agreement is contrary to the Statute. That determination therefore cannot constitute the finding required in support of the award of retroactive promotion and backpay that the grievant was affected by an unjustified or unwarranted personnel action.

Moreover, by in effect determining that the grievant's performance would have been rated at least as "fully satisfactory," the Arbitrator improperly conducted an independent evaluation of the grievant's performance. As indicated in the discussion of Bureau of Prisons and Bureau of Engraving and Printing, it was appropriate for the Arbitrator to have determined that the appraisal by management of the grievant's production violated the collective bargaining agreement because in applying the established performance standards to the grievant, management failed to consider factors that were beyond the control of the grievant. However, in the circumstances of this case, the Arbitrator was in no manner authorized to determine, as he in effect did, that the grievant's case production would have been rated at least as "fully satisfactory" but for the violation of the agreement. As noted, management's appraisal of the grievant's numerical case production was based on the statistical determination of the grievant's average daily production and the rating of that production under the established standards. The Authority finds that this is not the type of appraisal that would permit an arbitrator in an objective, nondiscretionary, and essentially mechanistic manner to determine without an independent evaluation that an aggrieved employee was entitled to a different rating under the established standards. See Bureau of Prisons at 5-6; Bureau of Engraving and Printing at 4. In this case, the Arbitrator, in determining that the grievant's performance would have been rated higher but for the violation of the agreement, necessarily conducted an independent evaluation of the grievant's case production performance under the established standards and clearly substituted his judgment for that of management as to what the grievant's performance evaluation should have been. Although the Arbitrator properly could have ordered the grievant reevaluated on finding that management had failed to consider factors that were beyond the control of the grievant, the Arbitrator instead independently determined what that rating would have been. Compare Bureau of Prisons (in which case the arbitrator expressly examined the performance standards and the regulatory definition of outstanding performance, specifically evaluated the application of the standards to the grievant's performance as described in his performance appraisal, and, as his award, determined in accordance with the definition of outstanding performance and management's own appraisal of the grievant's performance that the grievant was entitled under the established standards to a rating of "outstanding" as to three of his job elements). For these reasons, the Arbitrator's determination that the grievant's performance would have been rated higher is also contrary to the Statute and the decisions of the Authority. Such determination cannot constitute the finding required in support of the award of retroactive promotion and backpay that but for the violation of the collective bargaining agreement by management in failing to consider factors affecting performance beyond the grievant's control, the recommended promotion of the grievant originally would have been approved.

V. DECISION

The Authority finds that the Arbitrator's determination with respect to the appraisal of the grievant's quantitative case production performance is deficient as contrary to management's rights under section 7106(a)(2)(A) and (B) of the Statute. Consequently, such determination cannot constitute the requisite finding that the grievant was affected by an unjustified or unwarranted personnel action which directly resulted in the withdrawal or reduction in the pay, allowances, or differentials that the grievant otherwise would have earned or received. The Authority further finds that the award of a retroactive promotion and backpay is contrary to the Back Pay Act. Therefore, paragraphs 1-2 of the award, constituting the Arbitrator's determination with respect to management's appraisal of the grievant's performance and the award of a retroactive promotion and backpay, are struck from the award and the following language substituted:*/

> For the period in dispute, management shall reevaluate the grievant's numerical case production under the quantitative case-processing element of the GS-11 hearing specialist position considering factors that were beyond the control of the grievant. After reevaluating the grievant's performance, management shall take whatever action may be appropriate concerning the denial of the recommendation that the grievant be promoted to GS-11 as of June 10, 1984.

Issued, Washington, D.C., May 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, the Authority need not address the Agency's other exception to the award.

READEX FICHE best copy available

9/Case 363

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 363 REPORT OF CASE DECISIONS May 19, 1986

NEGOTIABILITY CASES

21 FLRA No. 89 (May 9, 1986)

American Federation of Government Employees, AFL-CIO, Local 3106 and U.S. Department of Agriculture, Case No. 0-NG-916

JUN 13 1986
DEPOSITORY 376

21 FLRA No. 91 (May 12, 1986)

National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-1124

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 87 (May 9, 1986)

United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, AFL-CIO, Local 916, Case Nos. 6-CA-40375 and 6-CA-40376

21 FLRA No. 88 (May 9, 1986)

Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina and American Federation of Government Employees, AFL-CIO, Case No. 4-CA-40341

21 FLRA No. 90 (May 9, 1986)

162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and American Federation of Government Employees, Local 2924, AFL-CIO, Case No. 8-CA-30429

21 FLRA No. 92 (May 12, 1986)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, Case No. 7-CA-40172

21 FLRA No. 93 (May 12, 1986)

Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center and Barry Nelson, An Individual, Case No. 4-CA-20273

Y3.F31/21-3:

Num. 563

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 563 REPORT OF CASE DECISIONS May 19, 1986

NEGOTIABILITY CASES

21 FLRA No. 89 (May 9, 1986)

American Federation of Government Employees, AFL-CIO, Local 3106 and U.S. Department of Agriculture, Case No. 0-NG-516

JUN 3 1986

21 FLRA No. 91 (May 12, 1986)

National Treasury Employees Union and Internal Revenue Service, Case No. 0-NG-1124

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 87 (May 9, 1986)

United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, AFL-CIO, Local 916, Case Nos. 6-CA-40375 and 6-CA-40376

21 FLRA No. 88 (May 9, 1986)

Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina and American Federation of Government Employees, AFL-CIO, Case No. 4-CA-40341

21 FLRA No. 90 (May 9, 1986)

162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and American Federation of Government Employees, Local 2924, AFL-CIO, Case No. 8-CA-30439

21 FLRA No. 92 (May 12, 1986)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, Case No. 3-CA-40178

21 FLRA No. 93 (May 12, 1986)

Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center and Betty Nelson, An Individual, Case No. 4-CA-20[illegible]3

3.F31/21.3:

21 FLRA No. 87

Federal Labor Relations Authority

DOD, Dep't of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker Air Force Base, Okla. and AFGE, Local 916, Case Nos. 6-CA-40375 and 6-CA-40376 (Decided May 9, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1), (5) and (6)
4500 Refusal to Negotiate	7118
4600 Refusal to Cooperate in Impasse Procedures and Decisions	

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Information
        - 3 Weeks Advance Notice is Ample Time to Request Information
      - Procedures and Appropriate Arrangements
    - Refusal to Cooperate in Impasse Proceedings
      - Reasonable Opportunity to Invoke FSIP Processes
  - Hours of Work
    - Compulsory Overtime
    - 7-day Workweek
  - Remedy
    - Bargaining Order
  - Waiver of Rights
    - Ordinary vs. Extraordinary Overtime (Contract Provision)

DIGEST NOTES

Three weeks advance notice of a change in working conditions provided the union with ample time to request additional information and to invoke the processes of FSIP, the Judge held in a decision adopted by the Authority. Thus the activity did not violate § 7116(a)(1) and (5) for not providing the union with specific details of the change when the activity announced its intention to implement a 7-day workweek for employees in the paint hanger. The union was aware of the urgency of the change in order to meet the activity's work load and the union was also aware of management's strong opposition to negotiating a 15 minute break period. Thus, impasse in negotiations was clearly foreseeable and the union had a reasonable opportunity to invoke the processes of FSIP. The union failed to either request postponement of the implementation for the purpose of seeking the services of FSIP; indicate that filing with FSIP was imminent; or directly invoke the services of FSIP. Therefore the Judge held that the activity did not violate § 7116(a)(1) and (6). (Case No. 6-CA-40375)

The union did not waive its right to negotiate the impact and implementation for an extraordinary change in overtime when it negotiated a contract provision concerning ordinary overtime matters. The contract provision treats ordinary concerns of overtime assignments such as equal opportunity for overtime, overtime rosters, advance notification of scheduled overtime, a ten minute paid break, etc. However, a management initiated change that required all employees to work five 10 hour days and a sixth day of eight hours each week was an extraordinary change from past practice over which the activity was required to bargain. Thus, the Judge held that the activity violated § 7116(a)(1) and (5) by failing to negotiate procedures management would observe and appropriate arrangements for adversely affected employees. (Case No. 6-CA-40376)

Federal Labor Relations Authority

21 FLRA No. 88

HUD, Columbia Area Office,
Columbia, S.C. and AFGE
Case No. 4-CA-40341 (Decided
May 9, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4200 Discrimination as to Conditions of Employment 4400 Discipline for Filing a Complaint	7116(a)(1), (2) and (4)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Discipline for Filing a Complaint
      Employee RIFed - Anti-Union Animus Not Shown
      Non-Selection for a Position - Anti-Union Animus Not Shown
    Encouraging or Discouraging Union Membership by Discrimination
      Employee RIFed - Anti-Union Animus Not Shown
      Non-Selection for a Position - Anti-Union Animus Not Shown
  Procedure
    Credibility Resolutions of ALJ

DIGEST NOTES

The fact that an employee who was very active in union affairs was not selected for a position opening and was later terminated in a reduction-in-force, does not establish a violation of § 7116(a)(1), (2) and (4) absent any indication of anti-union animus, the Judge held in a decision adopted by the Authority. Although the union representative had a higher performance rating than the other employee who was selected for the new position, the Judge credited the activity's testimony that the other employee was selected based on her greater desire for the position. There was no evidence of anti-union animus. On the contrary, management adjusted the employee's workload to accommodate her union duties; the employee was rated "highly satisfactory" for the latest period; when RIFed, she was granted a 45 day extension to perform union representational duties; subsequent to her RIF, she was reemployed as a clerk-typist. Her position, that of an Occupancy Clerk, was eliminated due to an overall reduction in staff levels and an effort by management to establish a more versatile staffing arrangement by using Program Aides which could perform Occupancy Clerk work as well as other types of work.

21 FLRA No. 89

Federal Labor Relations Authority

APGE, Local 3106 and Dep't of Agriculture, Case No. 0-NG-916 (Decided May 9, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY 2150 Management Rights 2151.05 Budget	7105(a)(2)(E) 7106(a)(1)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Budget
      - Not A Significant Increase in Budget
      - 1.7% Increase in Cost of Program
      - Horse Allowance

DIGEST NOTES

A proposal is negotiable which requires an annual increase in the "horse allowance" of $ 5.00 per pay period that is paid to employees who are required to provide a horse, trailer, and other related equipment in order to travel by horseback into remote areas where they administer the Tick Eradication Program. The payment is neither compensation nor a fringe benefit. Rather the "horse allowance" is designed solely to reimburse employees for expenses they would not have had but for the agency's requirement. The proposal concerns only one item in an already existing program. Although the proposal might require an additional $50,000 for the "horse allowance", the alleged increase in cost represents only 1.7% of the total budget for the program and an even smaller percentage of the budget for the activity which administers the program. Consequently, the proposal does not interfere with management's right under § 7106(a)(1) to determine its budget.

reemployed as a clerk-typist. Her position, that of an Occupancy Clerk, was [illegible] due to an overall reduction in staff levels and an effort by management to establish a more versatile staffing arra[illegible] which could perform [illegible] Clerk [illegible] types of work.

Federal
Labor Relations
Authority

21 FLRA No. 90

162nd Tactical Fighter Group, Arizona Air Nat'l Guard, Tucson, AZ and AFGE, Local 2924, Case No. 8-CA-30429 (Decided May 9, 1986).

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1)
4100 Interference, Restraint, Coercion	7118 7131(c) 7132

SUBJECT MATTER ENTRIES

- Official Time
  - Employee Required by FLRA to Attend a Hearing
    - Agency Lacks Discretion to Refuse Official Time
    - Agency May Not Require Military Uniform to be Worn
  - Requirement that Employees Wear Military Uniform
- Unfair Labor Practice
  - Agency Violations
    - Interference
  - Procedure
    - Opposition to Cross Exceptions
  - Remedy
    - Provide Official Time

DIGEST NOTES

An agency may not impose a condition that those employees whose participation had been deemed necessary by the Authority at unfair labor practice hearings either had to wear their official work uniform in order to receive official time or had to participate at the hearings in an annual leave status. The Respondent had instructed those employees who had been subpoenaed by the Authority to testify in a pending unfair labor practice hearings to wear the appropriate military work uniform if they would be participating on official time. Otherwise employees were instructed to take annual leave if they wished to wear civilian clothing. Once the participation of an employee has been deemed necessary by the Authority in any phase of any proceeding before the Authority, there is no discretion in the agency to determine whether or not an employee should be on official time. Therefore, the agency interfered with the employees' protected rights under the Statute in violation of section 7116(a)(1).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The Authority, contrary to the Respondent's contention, concluded further that the Judge found, not a § 7131 violation, but rather, a § 7116(a)(1) premised upon the requirements of § 7131(c) and the provisions of § 7132 concerning the issuance of subpoenas. Thus, as such matters were fully litigated at the hearing with all parties having an opportunity to present evidence and witnesses relevant to their positions, the Respondent was not denied due process in respect to that portion of the Judge's decision.

Federal Labor Relations Authority

21 FLRA No. 91

NTEU and IRS, Case No. 0-NG-1124 (Decided May 12, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2600 Conditions for Review	7114(c)
2601 Proposal Alleged to be Inconsistent with Federal Law	7117(a)(1)
2602 Proposal Alleged to be Inconsistent with Government-wide Regulation	

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Alleged to be Inconsistent with Federal Law
      5 U.S.C. § 2301(b)(1)
    Proposal Alleged to be Inconsistent with Government-wide Rule or Regulation
      FPM Chapter 335, Appendix A, § A-4(c)
      5 C.F.R. § 335.103
  Promotion
    Restrictions on Priority Consideration

DIGEST NOTES

A provision is negotiable that would prevent an agency from giving priority consideration for promotion to an employee unless that employee filed a grievance or complaint, or priority consideration was ordered by a higher authority such as OPM, EEOC, or the FLRA. Under 5 U.S.C. § 2301(b)(1) and its implementing regulation [5 C.F.R. § 335.103], a agency is required to make selections for promotion according to merit. Although the provision would prohibit the agency from granting priority consideration to certain employees, the provision would not prevent the agency from considering those employees as candidates for promotion and, consequently, making selections for promotion according to merit. Additionally, under FPM chapter 335, Appendix A, § A-4(c), a employee "may be given priority consideration" in corrective actions taken to correct an erroneous promotion. While the agency has the discretion to grant priority consideration to an employee under the FPM, it also has the discretion not to grant priority consideration. Accordingly, the provision is not contrary to the cited FPM section.

21 FLRA No. 92

HHS, SSA, Baltimore, MD and AFGE, AFL-CIO, Case No. 7-CA-40172 (Decided May 12, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICES: AGENCY 4500 Refusal to Negotiate	7106(a)(2)(A) and (B) 7116(a)(1) and (5) 7118

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Employees
      - Assignments Based Solely on Employee Preference and Seniority
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Assignments Based Solely on Employee Preference and Seniority

DIGEST NOTES

An agency has no duty to bargain over a proposal that requires agency management to fill positions by assigning employees to building locations based strictly on their preference and seniority. The right to assign employees under § 7106(a)(2)(A) encompasses management's discretion to establish the qualifications and skills necessary to perform the duties generally assigned to the position as well as such job-related individual characteristics as judgement and reliability and to determine whether an employee meets those qualifications. Proposals regarding the selection or assigning of employees based upon seniority and/or preference are nonnegotiable where such proposals do not provide that management retains the discretion to limit the selection to qualified employees. The Authority adopted the Judge's decision that since the union's proposal that the assigning of employees to building locations to meet staffing needs would be based on their preference and seniority did not limit such assignments to qualified employees, as determined by management, the proposal interfered with the agency's discretion to determine which employees to assign and was inconsistent with § 7106(a)(2)(A). Therefore, the Respondent did not violate the § 7116(a)(1) and (5) when it refused to bargain on the proposal.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

corrective action taken to correct an erroneous promotion. While the [illegible] priority consideration to an [illegible] has the discretion not to grant priority consideration [illegible] the provision contrary to the cited FPM section.

21 FLRA No. 93

Federal Labor Relations Authority

HHS, SSA, SE Program Service Center and Barry Nelson, an Individual, Case No. 4-CA-20273 (Decided May 12, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7102
4100 Interference, Restraint, Coercion	7116(a)(1)
4115 Protected Union Activity	

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Interference, Restraint, Coercion
      - Employees' Protected Rights
        - Solicitation and Distribution of Literature
  - Elections
    - Solicitation and Distribution of Literature
  - Remedy
    - Rescind Election Campaigning Rules
  - Waiver of Rights
    - Reserve Employees Rights May Not be Waived
      - Solicitation and Distribution of Literature

DIGEST NOTES

Section 7102 affords employees the same right to engage in solicitation and distribution of literature on behalf of candidates for union office as they would have if they were acting on behalf of or in opposition to representation by a labor organization generally. The identity of the officers and representatives of a labor organization substantially influences the character and nature of the labor organization as a collective bargaining agent. The right to solicit or distribute literature on behalf of candidates for union office is interwoven with the right to campaign for or against an exclusive representative. An employer violates the protected rights of employees under § 7102, and therefore also § 7116(a)(1), when in the course of an intra-union election it enforces overly broad no-solicitation/ no-distribution rules, absent a showing of disruption of agency

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

operations or unusual circumstances. Moreover, the union may not waive employees' statutorily protected rights by agreeing to restrictive provisions in the parties' collective bargaining agreement. Thus, the Authority concluded that when management imposed rules, although embodied in the parties' agreement, that were not necessary to protect against disruption of the agency's operations, the agency interfered with employees' rights under § 7102 in violation of § 7116(a)(1).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE AIR FORCE
AIR FORCE LOGISTICS COMMAND
OKLAHOMA CITY AIR LOGISTICS CENTER
TINKER AIR FORCE BASE, OKLAHOMA

Respondent

and Case Nos. 6-CA-40375
6-CA-40376

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 916

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in Case No. 6-CA-40375. No exceptions were filed with regard to such finding. The Judge further found that the Respondent had engaged in the unfair labor practices alleged in Case No. 6-CA-40376, and recommended that the Respondent be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions with regard to the Judge's Decision in Case No. 6-CA-40376, and the General Counsel filed an opposition to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings and conclusions,[1] and his recommended Order as amended.[2]

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[1] In adopting the Judge's conclusion herein, the Authority finds it unnecessary to address any implication in his decision as to the effect of an invocation for assistance of the Federal Service Impasses Panel.

[2] In agreement with Respondent's exception pertaining to the clarity of the Judge's recommended Order, the Authority has amended the Order to specifically conform to the Judge's findings.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered in Case No. 6-CA-40376 that the United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma shall:

1. Cease and desist from:

(a) Requiring all employees in the paint hangar to work regularly scheduled overtime on normal workdays and days off without first notifying the American Federation of Government Employees, AFL-CIO, Local 916, the designated agent of the employees' exclusive representative, of the decision and affording it the opportunity to negotiate concerning the procedures that management will observe in effecting such scheduling and appropriate arrangements for employees adversely affected by the scheduling.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 916, the designated agent of the employees' exclusive representative, concerning the procedures that management will observe in requiring all employees in the paint hangar to work regularly scheduled overtime on normal work days and days off and appropriate arrangements for employees adversely affected by such act.

(b) Post at its Tinker Air Force Base facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Oklahoma Air Logistics Center, Tinker Air Force Base, Oklahoma, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegations in Case No. 6-CA-40375 be, and they hereby are, dismissed.

Issued, Washington, D.C., May 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require all employees in the paint hangar to work regularly scheduled overtime on normal workdays and days off without first notifying the American Federation of Government Employees, AFL-CIO, Local 916, the designated agent of the employees' exclusive representative, of the decision and affording it the opportunity to negotiate concerning the procedures that management will observe in effecting such scheduling and appropriate arrangements for employees adversely affected by the scheduling.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 916, the designated agent of the employees' exclusive representative, concerning the procedures that management will observe in requiring all employees in the paint hangar to work regularly scheduled overtime on normal work days and days off and appropriate arrangements for employees adversely affected by such act.

____
(Agency or Activity)

Dated: ____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

OALJ-85-77

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

UNITED STATES DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE AIR FORCE,
AIR FORCE LOGISTICS COMMAND,
OKLAHOMA CITY AIR LOGISTICS CENTER,
TINKER AIR FORCE BASE, OKLAHOMA

Respondent

and

Case Nos. 6-CA-40375
6-CA-40376

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 916

Charging Party

. . . .

Lt. Col. Jerry M. Brasel
For the Respondent

John B. Monnet, Esq.
For the Charging Party

Susan E. Jelen, Esq. and
Christopher J. Ivits, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq*.

Upon unfair labor practice charges filed by the American Federation of Government Employees, AFL-CIO, Local 916 (herein referred to as the Union) the General Counsel of the Authority, by the Regional Director for Region VI, issued Complaints against the United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City

Air Logistics Center, Tinker Air Force Base, Oklahoma (herein referred to as Respondent). The Complaint in Case No. 6-CA-40375 alleges Respondent violated section 7116(a)(1) and (5) of the Statute by failing and refusing to bargain with the Union on the impact and implementation of its decision to extend its employees' workweek from four to seven days at the Tinker Air Force Base paint hanger. The General Counsel also contends Respondent violated section 7116(a)(1) and (6) of the Statute by allegedly failing and refusing to allow the Union reasonable time to invoke the proceedings of the Federal Service Impasses Panel (FSIP) before implementing the extended workweek. In Case No. 6-CA-40376 the General Counsel alleges Respondent violated section 7116(a)(1) and (5) of the Statute when it required employees to work 10-hours a day for five days and 8-hours on the employees' first regular day off and failed and refused to bargain with the Union on the impact and implementation of that action.

A hearing on these matters was conducted in Oklahoma City, Oklahoma at which all parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Counsel for the General Counsel and Respondent and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the American Federation of Government Employees (AFGE) has represented a national consolidated unit of various of Respondent's Air Force Logistics Command employees and AFGE Local 916 has been the union representative at the Oklahoma City Air Logistics Center. Respondent and AFGE are parties to a master collective bargaining agreement covering employees in the national consolidated unit and Respondent and Local 916 are parties to a local agreement executed July 5, 1983 which supplemented the master agreement.

Case No. 6-CA-40375

Sometime prior to January 12, 1984 Respondent was experiencing problems keeping up with the work load in its Tinker Air Force Base paint hanger.[1] The paint hanger work load was not being met on the standard five day week despite employees working substantial overtime due, at least in part, to "some continuous problems with work flow." Indeed, there was

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[1] Paint hanger employees organizationally are part of Respondent's Maintenance Directorate, Aircraft Division and numbered approximately 175.

"some talk" about the possibility of contracting out work if the work load requirements were not met. Similar problems in 1981 and 1982 precipitated Respondent putting paint hangar employees on a seven day workweek. Accordingly, on January 12, Freddie Demerson, Chief of the Aircraft Paint Unit, sent the following letter to James Edgar, Local 916 Division Steward:

> "1. This letter is to inform you, in accordance with Article 33 of the 1979 Master Labor Agreement, as amended, of Management's intent to implement a seven day work week in the Aircraft Paint Hangar, MABPCB, Bldg 2280. The proposed effective date of this action is 1 Feb 84.
>
> "2. Change is necessary because of facility deficiencies which remain after the buildings airflow modification. A continuing high workload in B52, A7, KC135 and MISTR paint projects causes work staging which can best be managed on a 7 day work sheet.
>
> "3. Should you wish to negotiate, contact the undersigned within 5 calendar days of the date of receipt of this letter."

By letter dated January 17, 1984 from Edgar to Demerson the Union made a demand to bargain on the seven day workweek and requested a meeting to "clarify the issues involved." After stating, "there will be no implementation of this policy until negotiations are completed in accordance with Public Law," Edgar suggested the parties meet on January 20. Demerson's January 19 reply to Edgar viewed the Union's demand to bargain unaccompanied by written proposals "as an attempt to circumvent the spirit and intent of article 33 of the (master agreement)."[2] Demerson went on to suggest meeting January 23 but required the Union to submit written proposals by the close of business that day if it wished to negotiate on the "impact" of the decision.

On January 24, 1984 Edgar and Chief Steward Phil Porter met with Demerson, Labor Relations Specialist Richard Schamahorn and Section Chief Wesley Bynum. The Union presented a five page list of negotiation proposals to management. During the meeting, which was in response to the Union's request for clarification of the issues, *supra*, management explained why Respondent felt the seven day workweek was necessary and the Union's list of proposals were discussed item by item. The meeting lasted approximately one hour at the conclusion of which management indicated to the Union that it would prepare a counterproposal.[3]

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[2] Section 33 of the master agreement sets forth procedures dealing with negotiations during the term of the agreement. Section 33.03 pertains to negotiations at the activity level and requires the Union to submit written proposals to the activity within five calendar days after notification "if circumstances permit that much time."

On February 17, 1984 Respondent delivered its counterproposal to the Union which contained, inter alia, a rotation schedule of employees' days off. Around this time Division Steward Edgar was relocated to another Division and Steward Frederick Jaynes assumed responsibility for negotiations on behalf of the Union. By letter of February 27, 1984 Demerson indicated the agency had not received a response to its counterproposal of February 17 and set a meeting with the Union for February 29. Demerson further stated that failure to attend the meeting would result in immediate implementation of "management's final offer."

The parties met again on March 1, 1984.[4] Jaynes represented the Union and Respondent was represented by Schamahorn, Demerson and another supervisor. Jaynes asked for and received a copy of Respondent's February 17 counterproposals which he did not have and Jaynes presented Respondent with a copy of the Union's latest proposals. According to Jaynes' testimony, when he was handed his copy of Respondent's one page list of proposals Schamahorn said "something to the effect that they need to get this thing on the road so we can either sign them or they were going to implement it." Jaynes "jokingly" told Schamahorn that he knew Jaynes wouldn't sign anything without studying it first. Jaynes asked Schamahorn if he wasn't going to read the Union's latest proposals indicating that some changes from the original proposals had been made. Jaynes then noted his objection to a management proposal which provided: "Employees shall have two consecutive scheduled days off except as mutually agreed between the employee and the employee's supervisor." Jaynes felt that it was the Union's right to negotiate on such a matter, not the employees'. Schamahorn agreed to strike the proposal and "change it." According to Jaynes, Schamahorn agreed to at least read the Union's proposals but added that if the Union" . . . didn't buy theirs, then . . . it was over with.

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[3] Porter recalled the meeting went on for about 15 minutes and Schamahorn estimated the meeting was an hour to an hour and a half long. Both witnesses testified that the meeting covered management's explanation of its reason for going to a seven day workweek and a review of the Union's proposals. Considering the amount of material covered in this meeting, I find Schamahorn's recollection as to the duration of the meeting to be more reliable.

[4] Jaynes was unable to attend the meeting on February 29 and the meeting was rescheduled.

They were going to implement it. We were at impasse, so to speak." Jaynes testified that the meeting ended after about 30 minutes.

According to Schamshorn, who denied the "take it or leave it" statement attributed to him by Jaynes, during the March 1 meeting management reviewed the Union's two and a half page list of proposals submitted at that time and compared them with the Union's prior proposals. The Union's main concerns remained the same as during the parties' first meeting: a 15 minute break period; how employees were to be rotated; and days off. Schamshorn told Jaynes that the Union's proposals were regressive and unless there was some movement on it, the parties were at impasse.[5] Before concluding the meeting management had a letter to Jaynes typed which indicated Respondent considered the Union's latest proposals to be a regression from its original proposals; that management felt the parties were at impasse; and Respondent intended to implement its last proposal on March 19, 1984. Schamshorn estimated the meeting lasted an hour.

Jaynes contacted the Federal Mediation and Conciliation Service (FMCS) for assistance on March 8 and the parties met on Wednesday, March 14, 1984 under FMCS auspices. At this meeting Jaynes represented the Union and Respondent was represented by Neal Hamilton, an Employee Relations Officer, and Demerson who arrived about 10 minutes after the meeting began.[6] The Union submitted its third set of proposals, which modified its previous proposals somewhat, and Respondent resubmitted its prior proposals. At the request of Mr. Libby, the FMCS mediator, the parties discussed the proposals. Agreement was reached on various proposals even on some that management had previously rejected. The wording of some proposals was changed to facilitate mutual acceptability. However, there was no agreement on the subject of "days-off" and the Union's demand for a 15 minute break. The Union indicated it could not sign any agreement unless it contained a 15 minute break period for employees and management took the position that it was not obligated to entertain the 15 minute break proposal and indeed refused to discuss it. Management contended that break periods were the subject of lengthy discussions when the parties local agreement was negotiated in 1983 and the terms of that agreement remain in effect until the contract was renegotiated or the parties mutually agreed to modify the contract.[7] When it became apparent that the parties were not going to reach agreement on the disputed issues Demerson said to Hamilton "well, there is no point in going any further here. Implement it Sunday as scheduled and we will bite the bullet." Mediator Libby indicated it would be futile to continue and the meeting which lasted about an hour, ended.[8] On Sunday, March 18, at 10:30 p.m., the beginning of the "grave-yard" shift, Respondent implemented the seven day workweek in the paint hanger. The extended workweek schedule was in effect for about nine months and thereafter the parties resumed their prior workweek.

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[5] Schamshorn "felt" that during the January 24 meeting with Edgar and Porter there was agreement that the Union would modify their demands and, in recognition thereof, management's current proposals were drawn up to address what they percieved to be the Union's concerns.

[6] Jaynes and Hamilton testified as to what occurred at this session. The following account is a composite of their credited testimony. While their versions of what transpired differed somewhat, neither specifically contradicted the essentials of the others' testimony.

According to Jaynes, when Respondent previously extended the workweek in 1981 and 1982, supra, proposals were exchanged and ". . . the agency did the same thing . . . they did this time."

Case No. 6-CA-40376

On March 28, 1984 Respondent notified paint hanger employees that due to increased workload, effective March 31 all employees would start working a 10 hour mandatory workday and employees would be required to work an 8 hour workday on the employees' first regular day off. Previously, while employees were frequently required to work overtime on regular workdays and on days off, employees were scheduled to work eight hours a day, five days a week with two days off.

The Union received no prior notification of this change. On March 28, 1984 Local 916 made a demand that Respondent bargain with it on the change. On March 30 Respondent refused to bargain with the Union on the matter. Respondent took the position that it retained the right to determine overtime requirements and stated: "When overtime must be worked the oppertunity [sic] to work will be offered in accordance with Article 14 of the (Local) Supplement." Article 14 provides:

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[7] The Supplemental Agreement provides for a 10 minute paid break at the beginning of any overtime period of 2 hours or more immediately following an 8 hour shift and a 10 minute break during the middle of each period of 4 consecutive hours of overtime work, infra.

[8] When asked why he didn't subsequently contact the FSIP, Jaynes testified: "Well, I was really a little bit unfamiliar with that procedure, and I didn't see how we could come and solve an impasse when they were already doing it."

"SECTION A: The opportunity for overtime assignments will be rotated equitably, at the lowest supervisory or work crew level, among employees, by grade, who have the ability to perform the tasks for which overtime is required. Overtime work will not be assigned as a reward or penalty. When an employee has been loaned or detailed to the same organization in excess of 30 consecutive days the employee will be removed from the overtime rosters of his/her assigned organization on the 31st day and placed in the appropriate spot on the overtime roster of the organization to which loaned or detailed.

"SECTION B: Supervisors will maintain overtime rosters (Appendix), based on service computation date, to record all overtime that employees work, decline or for which they lack the necessary ability, to assure that each employee receives an equal opportunity for overtime assignment. Employees' abilities, as they relate to overtime assignment, will be discussed with employees upon request and a written record of the discussion will be placed in the employees 971 file. Rosters may be reviewed, upon request by the Steward who has been designated as representative for the particular organization. Separate rosters will be established for overtime on scheduled work days and for overtime on scheduled days off of employees.

"SECTION C: When employees are scheduled to work overtime on their regular days off, they will be normally given a minimum of one and one half work day's notice before the overtime is scheduled to begin. The designated Division Steward, upon request, will be informed of overtime worked, the number of hours and employees involved, and the abilities required for the work performed.

"SECTION D: Overtime work will be compulsory only when organizational requirements must be met. When non-volunteer employees have been compelled to work four consecutive scheduled days off, the appropriate Branch Steward may request and will be granted a meeting with the appropriate Branch Chief to discuss the situation. If the problem is not resolved it may be elevated to the next supervisory level. Upon presentation of valid documentation to the supervisor, an employee may request exemption from compulsory overtime for reasons of health, education, hardship of religion. The supervisor, upon consideration of the provided documentation and the need to have the employee on duty, may grant the exemption. When overtime requirements cannot be met by volunteers within the supervisory area or work crew, the supervisor responsible for the work to be performed may solicite [sic] volunteers from other supervisory work areas or work crews.

"SECTION E: Employees will be allowed a ten minute paid break at the beginning of any overtime period of two hours or more immediately following an eight hour shift. Employees will be allowed a paid ten minute break during the middle of each period of four consecutive hours of overtime work.

"SECTION F: Employees called in to work outside of, and unconnected with, their basic work week shall be paid a minimum of two hour's pay, regardless of whether they are required to work the entire two hours. Normally an employee shall not be required to stand by or perform make-work routine duties awaiting the elapse of the entire two hours.

"SECTION G: When employees cannot take advantage of their turn for overtime work assignment opportunities due to required military meetings they shall not be counted as having declined to work overtime. In such situations employees will retain their priority on the overtime rosters provided they submit to their supervisors, upon their return to duty, a statement of attendance signed by the proper military authority.

"SECTION H: When it is determined through the grievance or arbitration process that the grievant, or grievant's have been denied the opportunity for overtime work in accordance with this article, the sole remedy shall be payment for the overtime. Such payment is limited to the grievant or grievant's that were improperly bypassed and cannot exceed the number of employees worked in violation of this article."

Thereafter, the 10 hour workday was put into effect as scheduled. In practice employees were generally required to work both of their days off and all requests for exemptions from working overtime were denied by management except for reasons of family death or emergencies.

The record reveals that prior to March 1984 substantial mandatory overtime work had been required of employees in the paint hanger since 1982 and both before and after the March 1984 change numerous grievances were filed with regard to overtime assignments and Respondent's alleged misuse of Article 14. At the time of the hearing paint hanger employees were no longer working the mandatory 10 hour workday. However, about half of the work crew was still required to work on Saturdays or Sundays due to the lack of sufficient volunteers for such assignments.

Testimony was also received at the hearing that in the Accessories Division, also a component within Respondent's Maintenance Directorate,[9] Union representatives were notified by a Branch Chief in June 1984 and November 1984 that mandatory overtime schedules would be imposed. On both occasions management representatives of the affected units negotiated with Union representatives on the impact of the decision without raising Article 14 of the Local Supplement as a bar to negotiations.

Discussion and Conclusions

Counsel for the General Counsel alleges Respondent violated the Statute by: (1) failing to give the Union on January 12, 1984 information sufficient for it to negotiate on the impact and implementation of the 7 day workweek; (2) failing to give the Union sufficient opportunity to invoke FSIP procedures prior to implementation after impasse on the 7 day workweek negotiations; and refusing to bargain with the Union on the impact and implementation of the 10 hour workday. Respondent contends: the Union had adequate notice of the 7 day workweek; the Union had ample opportunity to seek the services of the FSIP before implementation of the 7 day workweek; and the 10 hour day was an overtime issue covered by the provisions of Article 14 of the parties local agreement negotiated in July 1983.

Case No. 6-CA-40375

In reject the contention that Respondent failed to give the Union adequate information to negotiate on the 7 day workweek. Management notified the Union of the change almost three weeks before it was to be implemented thereby giving the Union ample opportunity to make known its desires on the matter. The Union, by letter dated five days after the date of the notice of the change, indicated an interest in negotiating on the change and requested clarification of the issues. One week later the parties met and an explanation was given to the Union and the Union's proposals were received and discussed item by item. The change was not implemented on February 1 as scheduled and, after receiving Respondent's counterproposals on February 17, the parties met again for discussions on March 1 when an implementation date of March 19 was set. The parties had still another discussion on March 14 before implementation finally occurred on March 19. It is clear from the record that at no time did Respondent fail to provide the Union with any and all information the Union needed or sought for its discussion with Respondent prior to implementation of the change. Nor do the facts reveal the Union was in any way harmed by not getting full details of the change until such time as they sought such data. Accordingly, in the circumstances herein I find Respondent committed no violation of the Statute by its failure to give the Union specific details of the change when it announced its intention to implement a 7 day work week on January 12.

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[9] The Maintenance Directorate is composed of various Divisions and is comprised of approximately 10,000 employees.

I further conclude that Union had reasonable opportunity on the facts herein to invoke the processes of the FSIP prior to implementation of the 7 day workweek. The Union was aware that Respondent attached some urgency to the change. Despite employees working substantial amounts of overtime, the paint hanger was not keeping up with its workload. The change was first announced on January 12 to take effect on February 1, 1984. However, implementation was postponed while negotiations on the subject took place, as the Union requested. The Union also knew on March 1 that the implementation of the change was rescheduled for March 19. Indeed management explicitly indicated their concern to "get this thing on the road." However, at no time after such notification did the Union request postponement of the implementation date. On March 14 the Union again was told that since the parties were still at impasse, implementation would occur on Sunday (March 18). Thereafter the Union failed to either request postponement of the implementation for the purpose of seeking the services of the FSIP, indicate that filing with the FSIP was imminent, or directly invoke the services of the FSIP.

Further at all three meetings the Union's main concern included obtaining a 15 minute break period which Jaynes revealed at the March 15 meeting management would have to agree to if a final agreement on the matter was to be achieved. The Union was well aware of management's strong opposition to such a provision. Thus, impasse in negotiations was clearly foreseeable and in such circumstances the Union should have been alerted early on in negotiations that resolution of the matter would in all likelihood involve the services of the FSIP.

While the time between the March 14 meeting and implementation of the change in workweek at 10:30 p.m. on March 18 was indeed short, under all the circumstances herein I conclude Respondent did not violate the Statute by implementing the 7 day workweek herein. Cf. U.S. Customs Service, 16 FLRA No. 31 (1984) and Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA No. 32 (1984).

Case No. 6-CA-40376

With regard to Respondent's unilateral implementation of the 10 hour work day, while employees had been frequently working overtime prior to March 31, 1984, the overtime assignment thereafter was a substantial departure from the nature and scope of the past practice. Thus, after the change all employees were regularly scheduled to work 13 hours a week overtime.

Respondent contends that Article 14 of the Local Supplement controls the assignment of overtime and a method of dealing with problems arising from overtime assignments. However, Article 14 does not by its terms specifically indicate that all matters concerning the assignment of overtime and questions arising therefrom are governed by that provision. Rather, Article 14 appear to treat ordinary concerns regarding ordinary overtime assignments and questions which might arise in those circumstances. By its notice of March 28 Respondent created an extraordinary situation by dramatically changing overtime from frequent assignment to placing all employees on a regular schedule of substantial overtime. Such conduct gave rise to the possibility of significant questions as to the procedures management would observe in implementing its decision and appropriate arrangements for employees adversely affected thereby. For example, the Union might wish to have proposals considered concerning whether employees would be permitted to work both scheduled days off on one week and be off both days on the following week; whether agency paid physical examinations might be provided after a certain time due to the exhausting nature of extensive overtime for a sustained period; and due to the abnormal amounts of overtime required, whether disciplinary procedures and standards might be modified.

In sum, Respondent essentially urges that with regard to overtime matters, by executing Article 14 the Union waived its right to negotiate on any matter relating to the assignment of overtime. The Authority has consistently held that a waiver can be established only by clear and unmistakable conduct. Internal Revenue Service (District, Region, National Office Units), 16 FLRA No. 124 (1984); Library of Congress, 9 FLRA of 21 (1982). Article 14 does not by its terms waive all Union interest in overtime assignments nor does it address the question herein. In the absence of other evidence bearing on the application of Article 14, and considering the extraordinary imposition of overtime herein, I conclude Respondent was obligated to negotiate with the Union on the procedures management would observe in implementing its decision and appropriate arrangements for employees adversely affected thereby. Accordingly, by its failure and refusal to negotiate with the Union I conclude Respondent violated section 7116(a)(1) and (5) of the Statute.[10]

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[10] I reject the request that as part of the remedy for Respondent's conduct disciplinary actions which may have occurred during the period Respondent failed to bargain over the change be rescinded. Imposing this remedy would be tantamount to ordering a return to the status quo ante for remedy purposes and in my view, the record herein does not support such a remedy. Cf. Federal Correctional Institution, 8 FLRA 604 (1982) and Headquarters, 77th U.S. Army Command, Fort Totten, New York, 9 FLRA 762 (1982).

In view of the entire foregoing I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered in Case No. 6-CA-40376 that the United States Department of Defense, Department of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma shall:

1. Cease and desist from:

(a) Requiring employees in the paint hanger to work regularly scheduled overtime on normal workdays and days off without first notifying the American Federation of Government Employees, AFL-CIO, Local 916, the employees' exclusive representative, of the decision and affording it the opportunity to negotiate concerning the procedures that management will observe in effecting such scheduling and appropriate arrangements for employees adversely affected by the scheduling.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 916, the employees' exclusive representative, concerning the procedures management will observe in requiring employees in the paint hanger to work regularly scheduled overtime on normal work days and days off and appropriate arrangements for employees adversely affected by such act.

(b) Post at its Tinker Air Force Base facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Oklahoma Air Logistics Center, Tinker Air Force Base, Oklahoma, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VI, Federal Labor Relations Authority, Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202, in writing, within 30 days from the date of this Order, as to what steps have been take to comply herewith.

It is further ordered that the allegations in Case No. 6-CA-40375 be, and hereby are, dismissed.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 18, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require employees in the paint hanger to work regularly scheduled overtime on normal workdays and days off without first notifying the American Federation of Government Employees, AFL-CIO, Local 916, the employees' exclusive representative, of the decision and affording it the opportunity to negotiate concerning the procedures that management will observe in effecting such scheduling and appropriate arrangements for employees adversely affected by the scheduling.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request, negotiate with the American Federation of Government Employees, AFL-CIO, Local 916, the employees' exclusive representative, concerning the procedures management will observe in requiring employees in the paint hanger to work regularly scheduled overtime on normal work days and days off and appropriate arrangements for employees adversely affected by such act.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

21 FLRA No. 88

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, COLUMBIA AREA OFFICE
COLUMBIA, SOUTH CAROLINA

Respondent

and

Case No. 4-CA-40341

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of exceptions filed by the Charging Party to the attached Decision of the Administrative Law Judge. The issue concerns whether the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to select employee Flora Tewksbury for the position of Program Aide and by issuing a Notice of Reduction-in-Force separating her from the position of Occupancy Clerk because of her protected union activity. The General Counsel filed no exceptions to the Judge's dismissal of the complaint.

II. Background Facts

As the pertinent facts in this case are fully set forth in the Judge's Decision, they will be discussed only briefly. The Charging Party has been certified as the exclusive bargaining representative of a unit of all non-professional employees and a unit of all professional employees who are assigned to the Respondent Activity. As found by the Judge, it is undisputed that Flora Tewksbury was engaged in protected union activities while employed by the Respondent and that much of her representational duties, including a request to management for information and the filing of charges as well as a grievance, occurred between June 1983 and the spring of 1984. The Respondent does not deny its awareness of such activities. Further, as admitted by the Respondent in its answer, Tewksbury was not selected on April 30, 1984, for the position of Program Aide and was issued on or about May 23, 1984 a Notice of Reduction-in-Force separation from the position of Occupancy Clerk.

III. Judge's Decision

The Judge found that the Respondent did not violate section 7116(a)(1), (2) and (4) of the Statute either by abolishing an Occupancy Clerk position held by unit employee Tewksbury which resulted in her receiving a Reduction-in-Force notice terminating her employment or by failing to select the employee for a Program Aide position. More particularly, with respect to the separation of the employee from the Occupancy Clerk position, the Judge, noting that no anti-unionism had been shown to exist and that there had been no showing that any acts of interference or coercion were directed against Tewksbury by the Respondent, found that the evidence did not establish that such position was abolished because of the employee's protected activities. Concerning the non-selection of the employee for the Program Aide position, the Judge similarly found that the evidence did not show that Tewksbury's non-selection was discriminatory under the Statute, noting in particular that management in fact accommodated the employee in the performance of her representational functions. Therefore, the Judge concluded that the General Counsel had not made out a *prima facie* case of discrimination under section 7116(a)(1), (2) and (4) of the Statute, and recommended dismissal of the complaint in its entirety.

IV. Positions of the Parties

The Charging Party's exceptions basically take issue with the Judge's findings of fact and credibility determinations and disagree with his conclusions. Thus, in its brief, the Charging Party argues that given the conflict in testimony of Respondent's witnesses and the Judge's failure to resolve it or to set forth any basis for his credibility determinations, the testimony of Respondent's witnesses should have been disregarded. No exceptions to the Judge's decision dismissing the complaint were filed by the General Counsel.

V. Analysis

The Charging Party excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings. Accordingly, in agreement with the Judge and based on his credibility resolutions and rationale, the Authority concludes that the Respondent did not violate section 7116(a)(1), (2) and (4) of the Statute by abolishing an Occupancy Clerk position held by unit employee Tewksbury or by its failure to select that employee for a Program Aide position.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order. The Authority therefore finds, in agreement with the Judge, that General Counsel has failed to establish a prima facie case of discrimination by the Respondent as to employee Tewksbury based on her protected union activity under section 7116(a)(1), (2) and (4) of the Statute and will order the dismissal of the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-40341 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 9, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 88]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, COLUMBIA AREA OFFICE
COLUMBIA, SOUTH CAROLINA

Respondent

and

Case No.: 4-CA-40341

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

. . . .

William C. Cregar, Esquire
William E. House
For the Respondent

Linda Norwood, Esquire
Michael Cornfield, Esquire
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on July 27, 1984 by the Regional Director for the Federal Labor Relations Authority, Region IV, a hearing was held before the undersigned on September 24, 1984 at Columbia, South Carolina.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (herein called the Statute). It is based on a first amended charge filed on July 20, 1984 by American Federation of Government Employees, AFL-CIO (herein called the Union) against Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina (herein called Respondent).

The Complaint alleged, in substance, that (a) on or about April 30, 1984 Respondent failed and refused to select Flora Tewksbury for the position of Program Aide (Typing), (b) on or about May 23, 1984 Respondent issued Flora Tewksbury a Notice of Reduction-in-force separation from the position of Occupancy Clerk. It was further alleged that Respondent engaged in such conduct because (a) Tewksbury engaged in activities on behalf of the Union, (b) Tewksbury provided information and/or gave testimony in proceedings before the Authority - all in violation of Section 7116(a)(1), (2) and (4) of the Statute.

Respondent's Answer, dated July 27, 1984, admitted that Tewksbury was not selected on April 30, 1984 for the position of Program Aide. It further admitted that on or about May 23, 1984 the agency issued the employee a Notice of Reduction-in-force separation from the position of Occupancy Clerk. However, Respondent denied it engaged in such conduct for the reasons alleged in the Complaint, as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded an opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been certified as the exclusive bargaining representative of a unit of all non-professional and a unit of all professional employees, with certain exclusions, who are assigned to Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina, the Respondent herein.

2. At all times material herein the Union and the Respondent have been parties to a collective bargaining agreement covering the employees in the aforesaid units. This agreement was, by its terms, effective from September 7, 1983 for a period of three years.

3. Respondent's Housing and Management Division is comprised of three branches: Assisted Housing Management, Loan Management, and Property Disposition. The Director of the Housing and Management Division is William H. Nixon; Chief of the Loan Management Branch is Arlena Esposito; and her Deputy is David Ball.

4. The Loan Management Branch is composed of three divisions: multi-family, which monitors HUD insured and Farmers Home Insurance projects; single-family, which monitors single-family homes that have HUD mortgages; Title 1, handling defaulted mobile homes and home improvement loans.

5. Record facts show that prior to September-October, 1982 there were two voucher clerks in the Loan Management Branch. The voucher clerk[1] examines vouchers submitted from projects, reviews tenant applications which accompany vouchers, and advises the project manager re adjustments to be made to vouchers. Since one of the voucher clerks felt the work was boring, supervisor Esposito suggested that the only way to solve that problem would be to set up a Program Aide position.

6. Two Program Aide jobs were established by management in the fall of 1982. The Program Aide position calls for more versatility than is demanded of a voucher clerk. In addition to typing, the Program Aide orders inspections on projects, examines financial statements, fills out computer forms, and keeps time and attendance records. Esposito asked Flora Tewksbury, who was a voucher clerk in the Loan Management Branch, whether she would be interested in a Program Aide job if three of such positions were established. Record testimony reflects that Tewksbury declined the offer, saying she liked doing Section 8[2] vouchers.

7. While the record does not reflect the exact dates, Tewksbury testified she was secretary-treasurer of the Union in 1983. In June, 1983 the president of the Union herein, Marie W. Vevito, designated Flora Tewksbury as Alternate Principal Representative - 2nd Alternate, on behalf of the Union. For the next few months Tewksbury used very little official time. Upon assuming her role as alternate representative this employee became more active in union affairs. On August 10, 1983 she filed two different charges against Respondent alleging a failure to furnish information to the Union; on September 19, 1983 Tewksbury filed a charge against the agency herein alleging a unilateral reassignment of two employees without bargaining as to the impact and implementation thereof with the Union;[3] on October 6, 1983 she filed a charge, amended thereafter, to allege a denial by Respondent to Tewksbury of a key card for access to the premises to perform government related work;[4] on March 16, 1984 Tewksbury filed a charge against Respondent alleging a refusal to participate in mediation sessions during contract negotiators. In addition to filing the foregoing charges, Tewksbury filed a grievance against management on November 22, 1983 for not having received an "outstanding" rating on her performance during the past year.

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[1] Also designated as "Occupancy Clerk".

[2] This involved a very large funding program.

[3] This charge resulted in the issuance on October 31, 1983 of a Complaint by the Regional Director, Region IV against Respondent.

[4] This charge resulted in the issuance on December 14, 1983 of a Complaint by the Regional Director, Region IV, against Respondent.

8. In June, 1983 Tewksbury used about 10% of official time for representational activities. Having become more active thereafter, her use of such time advanced to 25% - 30% through April, 1984.[5] Tewksbury's workload was adjusted by management, at her request, on July 21, 1983, November 8, 1983 and December 12, 1983 due to her representational duties.[6]

9. In a memorandum dated November 23, 1983 the Atlanta Regional Office directed the Columbia Area Office to reduce its staff by 15 positions. Three positions to be abolished were to be from the Loan Management Branch, and the decision as to which ones would be abolished was left to Area Director Nixon.

10. After due consideration Nixon decided to recommend abolishing a position from the technical field in both single and multi-family sections. He decided not to cut the Program Aide position since it was deemed a versatile one. Nixon recommended cutting the Occupancy Clerk (Voucher) position since that clerk just handled vouchers. He concluded that such a decision would be the best for the office as others could be called upon to handle voucher work.

11. Two months later the Columbia area office was permitted to increase its staff by five positions. It was decided to reestablish the two Loan Specialist positions (single and multi-family), and to add a financial analyst as well as a lead clerk. Nixon adhered to his decision[7] to abolish the Occupancy Clerk position due to a change in the workload. Esposito, who conferred with Nixon in this regard, testified that Tewksbury had been able to handle the bulk of Section 8 vouchers. However, new projects were coming in and some rent supplement projects were converting to Section 8. The Loan Management Branch was being assigned 47 projects from Assisted Housing, which were all Section 8, and there was a total of over 200 Section 8 projects. There was no way for one person to handle all Section 8 vouchers. Thus, Esposito suggested establishing a third Program Aide, assigning one to two Loan Specialists. This would not involve crossing lines which occurred between a Program

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[5] On November 4, 1983 Tewksbury was designated by the Union President as "Principal Union Representative".

[6] Under Article 7, Section 7.04 of the collective bargaining agreement Tewksbury, in her position as "Principal Office Representative" was entitled to 50% official time where the office has 100 or more employees.

[7] Although the decision to abolish the Occupancy (Voucher) Clerk was made in December, 1983, the plan to do so - as well as reestablish other positions - was not approved till April 2, 1984. The actual notice of a reduction-in-force from this position was issued on May 23, 1984.

Aide and the Occupancy Clerk.[8] The Program Aide would do everything in a certain defined territory for the loan specialist, including the vouchers that fell in that territory.

12. On March 11, 1984 Yvonne Hall, Director of Administration, called Alice Taylor, Vice-President of the union a former President thereof. She asked the union official how the latter felt re staffing of new positions. Taylor insisted it should, as in the past, be merit staffed. Nixon, who intended to transfer Tewksbury laterally into this position, was informed it should be so filled. In accordance therein Hall sent over to Nixon the "best qualified" list of employee for the additional position of Program Aide. Two applicants were qualified: Flora Tewksbury and Margaret Brasington, who had been a Program Aide in Assisted Housing previously. Neither the rating sheets nor the supervisory appraisals for these employees was sent to Nixon. Further, Taylor was not consulted re the selection of either employee for the third Program Aide position.

13. Both Esposito and Nixon interviewed Tewksbury for the Program Aide position.[9] During the interview the employee mentioned she was ready for a change; that she really liked working in the Architectual and Engineering Branch. When asked if she wanted the Program Aide job, Tewksbury replied that she would take it but was anxious to gain experience in another section. Nixon stated he had to know if Tewksbury was interested in the position, and the employee said she did want to be considered.

14. The record reflects that Nixon knew Tewksbury was rated "highly satisfactory"[10] in regard to her performance evaluation; that he assumed she and Brasington were equal in ability and had about the same rating. Based on the recommendation of Esposito and Ball, the Director decided to choose Brasington for the Program Aide position. Esposito testified she did not make a recommendation but that Nixon made the selection.[11] Nixon was advised by Esposito that Brasington was very

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[8] Although Nixon testified he expected Tewksbury would bump someone when this position was abolished, no other job existed on her competitive level.

[9] While the testimony of the participants varies to some extent re the particulars of the discussion, the undersigned sets forth the credited version of the relevant portion.

[10] This employee was so rated during the period January 1982 - October 31, 1982, and for the period November 1, 1982 - October 31, 1983.

[11] While Nixon testified he was not present during the interview of Brasington, Supervisor Esposito testified she conducted the interview with the Director. Inasmuch as Nixon was made aware, in either instance,

(continued)

positive about wanting the job, and he concluded that Tewksbury had not shown a decisive interest in same.

Nixon testified that both Tewksbury and Brasington were capable of handling the Program Aide position. The record indicates management did not reject Tewksbury on the ground that she was not qualified for the job. The Director testified he chose Brasington because of her eager desire, in contrast to Tewksbury, to become a Program Aide. He also testified it was his "intention to transfer Tewksbury laterally into that position. However, the Union reminded him it should be merit staffed. Further, that Tewksbury's union activities played no part in his non-selection of that employee for the position.

15. In and about April-May, 1984 Tewksbury was detailed to a GS-5 Title I clerical position where she remained until June 23. At the time of the detail Taylor inquired of Esposito as to the reason therefor. Taylor testified that Esposito informed her they needed a full-time person to do vouchers; that it was Nixon's decision. While Esposito testified in accord with Taylor that she told the latter the decision was made by Nixon, the supervisor denied saying they needed a full-time person to do vouchers. Record facts do show that Esposito did ask Taylor, during Tewksbury's detail, how the latter was doing; that Taylor suggested the supervisor could check the basket which contained the finished work. Further, Esposito on a particular occasion inquired whether Tewksbury was on union time and Taylor replied she had no knowledge thereof.

16. On May 23, 1984 Tewksbury received a notice stating she would be "riffed" on June 23. However, Respondent granted her a 45 day extension until August 11 to perform certain Union duties involving representation of employees. Subsequent to her being "riffed" on August 11, Tewksbury was reemployed as a GS-4 clerk-typist in the Property Disposition Branch.

Conclusions

The sole issue herein is whether Respondent abolished Flora Tewksbury's position as Occupancy Clerk, as well as refused to select her for a Program Aide position, because of her protected concerted activity in violation of Section 7116(a)(1), (2) and (4) of the Statute.

General Counsel contends that, based on the record, a prima facie case of discrimination has been established. It insists that, as set down in Department of Transportation, Federal Aviation Administration, Boston Air

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(footnote continued)

that Brasington was more positive in wanting the position than Tewksbury - which was the basis for his selection of the former - I do not find it necessary to resolve this particular conflict in testimony, or whether an explicit recommendation was made by Esposito.

Route Traffic Control Center, Nashua, New Hampshire, 11 FLRA No. 67, the requisite factors to show such discriminatory action have been proven. Thus, it is asserted that Tewksbury was engaged in protected activities, i.e. requesting information from management, filing of unfair labor practice charges, filing a grievance against the agency, acting on behalf of unit employees; that such activities were known to Respondent; and that such conduct was the basis for the action taken by management toward said employee.

Record facts make it quite clear, and it is undisputed, that Tewksbury engaged in protected concerted activity while employed by Respondent. Further, the record reflects that much of her representational duties, including a request of management for information and the filing of charges as well as a grievance, occurred between June, 1983 and the spring of 1984. Moreover, it cannot be gainsaid that management was aware of Tewksbury's activities as a union representative, and there is no denial by Respondent thereof. In respect to the basis for (1) the abolition of this employee's position as Occupancy Clerk, and (2) the failure to select her as a third Program Aide, the parties are in substantial disagreement. Conceding that direct evidence of illegal motivation in the form of an admission, declaration or the like, may not be apparent herein, General Counsel submits that all the events warrant an inference of a discriminatory motive. It is insisted that the various inconsistencies in the testimony of Respondent's witnesses demonstrate the pretextual nature of the justification advanced by the agency for its conduct toward Tewksbury.

(1) In respect to the termination of the Occupancy Clerk position held by this employee, the decision to abolish it stemmed from the directive issue on November 23, 1983 by the Atlanta Regional office. While it was left to Area Director Nixon to choose the positions to be eliminated, the record indicates he abolished two loan management positions as well as that of the Occupancy (Voucher) Clerk. Pointing to the fact that the Loan Management positions were reestablished by Nixon but not that of the Occupancy Clerk, it is argued that such omission is significant in light of the increased representational duties performed by Tewksbury at that period. Further, it is contended that Esposito admitted she needed every one of her complement of employees and could afford no cuts; that she needed someone to do vouchers 100% of the time.

While it is true that the increase in Tewksbury's "protected activity" was contemporaneous with the decision to abolish her position, it does not follow that management decided to eliminate her job due to such activity. No evidence appears in the record to support a conclusion that either Esposito or Nixon opposed Tewksbury's union activities or took steps to frustrate her representational functions. Contrariwise, management adjusted the employee's workload to accommodate her union duties in July, November and December of 1983. Moreover, Respondent had rated Tewksbury as "highly satisfactory" for the latest period, i.e. November 1, 1982 - October 31, 1983. The record reflects that, in agreement with Esposito, Director Nixon concluded it would be more efficient to establish a third Program Aide in lieu of having a voucher clerk. Further, management decided a better staffing arrangement called for having the Program Aide perform the duties of said clerk and assign each Aide to two Loan Specialists with a defined territory. One may disagree with Respondent's judgment in this respect and deny that the alleged versatility of the Program Aide warrants the addition of a third such position in place of the Occupancy Clerk. However, it does not lie with others to substitute their views in regard to efficiency of operations. Unless it is shown that Respondent's action was a pretext for discriminatory motivation, one cannot fault an employer for its determination concerning such operation.

Despite the fact that Tewksbury became more active after June, 1983 in performing her union duties, including the filing of a grievance and unfair labor practice charges, I do not believe it has been shown that her job as Occupancy Clerk was abolished because of such activities. No anti-unionism has been shown to exist, nor were any acts of interference or coercion directed against Tewksbury. The evidence does not support an inference that her position was eliminated as a result of said employee's union activities, and I conclude that Respondent did not discriminate against Tewksbury by reason of such elimination in violation of the Statute.

(2) Regarding Respondent's non-selection of Tewksbury as a Program Aide in April, 1984, General Counsel adverts to several factors in support of the contention that there was discriminatory motivation therefor. It is maintained, inter alia, that said employee was very well qualified for the position and capable of handling that work; that, while Margaret Brasington was rated "satisfactory," Tewksbury had a higher performance rating; that Nixon had intended to transfer Tewksbury laterally before the Union insisted upon merit staffing; that Esposito and Nixon differed as to whether the latter was present at Brasington's interview; and that said employee was selected on a subjective basis.

Under other circumstances, which are not present herein, such factors might be more persuasive in concluding that the failure to select Tewksbury as a third Program Aide was illegally motivated. None of the foregoing, however, militates against the conclusion that Respondent did not base its decision in this regard upon Tewksbury's union or protected concerted activities. Thus, while not disputing that said employee was well qualified for the Program Aide position, management insists it chose Brasington because she showed more interest in wanting the job. The record supports the fact that, although Tewksbury asked to be considered for the position, she did evince a desire to gain experience in another area of the work. Moreover, in 1982 this employee declined the Program Aide position when asked if she'd be interested in the event an additional Aide was established. It is true that management did not examine the performance appraisals and ratings in making a selection. However, one cannot substitute his judgment for that of the employer in choosing the applicant even though the basis be subjective in nature.

Unless sufficient evidence appears in the record which reflects significant anti-union *animus*, the undersigned would be reluctant to conclude that the basis for Respondent's selection of Brasington, albeit deemed to be subjective, is a pretextual one. As heretofore indicated, Respondent never interfered with Tewksbury's representational functions and, in fact, accommodated them. It has not been shown that management - despite having knowledge of her activities - resented Tewksbury's union activities or ever attempted to limit or restrain the employee in performing them. Under these circumstances I am not persuaded that Nixon's selection of Brasington over Tewksbury for the third Program Aide position was due to the latter's concerted activities. Accordingly, I conclude that the failure to so select Tewksbury has not been shown to be discriminatory under the Statute.

Having concluded that General Counsel has failed to make out a *prima facie* case of discrimination under Section 7116(a)(1), (2) and (4) of the Statute, based on the allegations herein, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 4-CA-40341 be, and the same is hereby, dismissed.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: July 2, 1985
Washingoon, DC

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3106

Union

and

Case No. 0-NG-916

U.S. DEPARTMENT OF AGRICULTURE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of a single Union proposal.[1]

II. Union Proposal

> Employees covered by the agreement and required by management, as a condition of employment, to furnish horse and necessary equipment to be used on the job will be entitled to an allowance of: $115.00 per pay period the first year of the agreement, $120.00 per pay period the second year of the agreement, $125.00 per pay period the third year of the agreement, for its use.

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[1] The Agency has requested permission to file an additional submission in this case. However, the Authority finds that no additional submissions are necessary and, pursuant to section 2424.8 of its Rules and Regulations, denies the Agency's request.

> The effective date for payment of this allowance shall be the first full pay period following the beginning of FY 83.

A. Positions of the Parties

The Agency contends that the proposal violates its right to determine its budget under section 7106(a)(1) of the Statute. The Union contends that the Agency has not met its burden under the test established by the Authority in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 995 (1982).

B. Analysis and Conclusion

The Department of Agriculture (the Agency) conducts the Tick Eradication Program (TEP), which is designed to prevent the reestablishment of cattle fever ticks in the United States. The Agency determined that in order to implement the TEP employees would need to travel by horseback into remote areas. Employees who work in this program are therefore required, as a condition of their employment, to maintain a horse, trailer, and other related equipment. At the time this negotiability dispute arose, the Agency was reimbursing those employees for costs incurred in complying with this requirement at a rate of $110.00 per pay period.[2] This payment is designed solely to reimburse employees for expenses they would not have had but for the Agency's requirement. For this reason, the "horse allowance" is not a part of an employee's wages. That is, it is not a part of the compensation paid to employees in exchange for their labor. For the same reason, it is not a fringe benefit. Matters such as retirement, life and health insurance are not reimbursable employee expenses, but are part of a total compensation package paid to employees.

The Union's proposal requires the Agency to increase the rate of reimbursement of the "horse allowance" to $125.00 over a period of three years. As to the Agency's contention that the proposal is nonnegotiable under section 7106(a)(1), the Authority held in Wright-Patterson that in order to demonstrate that a union proposal directly interferes with management's right to determine its budget it is necessary for the agency either to show that the proposal prescribes the programs and operations to be included in the agency's budget or the amount to be allocated for them, or to make a substantial demonstration that the anticipated increase in costs is significant and unavoidable and is not offset by compensating benefits. It is clear from the record that the proposal concerns a program which already exists, i.e., TEP, and is currently funded by the Agency's budget. Moreover, the proposal does not prescribe the amount to be allocated to this program. Rather, it concerns the cost of only one item within that program, i.e., the "horse allowance."3/ Under the first part of the Wright-Patterson test, therefore, the proposal does not directly interfere with the Agency's right to determine its budget.

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[2] Agency Statement of Position at 1-2; Union Reply to Agency Statement of Position at 2.

Under the second part of that test, the Agency has not demonstrated that implementation of the Union's proposal would result in a significant increase in costs. In particular, while the Agency claims that the proposal would require an additional $50,000 for the "horse allowance"4/ that figure represents only 1.7% of the total budget for the TEP5/ and an even smaller percentage of the budget of the Animal and Plant Health Inspection Service, which administers the program.6/ It is not necessary, therefore, to consider whether the alleged increase in costs is outweighed by compensating benefits. Consequently, in this respect also the Union's proposal does not directly interfere with the right of the Agency to determine its budget under section 7106(a)(1) of the Statute. National Treasury Employees

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3/ See Attachment to Agency Statement of Position.

4/ Agency Statement of Position at 2.

5/ Attachment to Agency Statement of Position. The "Grand Total" of all costs for the TEP is stated therein as $2,809,068. The alleged increase in costs for the "horse allowance" of $50,000 is 1.7% of the total. As the Union points out, it is unclear whether that increase in costs represents the additional amount needed for the first fiscal year or for all three fiscal years covered by the proposal. If it is for all three years, of course, the increase is even less significant.

6/ See Appendix To The Budget For Fiscal Year 1983 For The Animal And Plant Health Inspection Service attached to the Union Reply to Agency Statement of Position.

Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 764-66 (1980) (an agency had not demonstrated significant and unavoidable increased costs based upon the percentage increase in costs to that agency for the fiscal year). See American Federation of Government Employees, AFL-CIO, Local 3477 and Commodity Futures Trading Commission, 21 FLRA No. 18 (1986) (Authority held that even if a proposal required the agency to budget larger amounts for its incentive awards program, the agency had not shown that such an increase would not be offset by compensating benefits).

Since the Agency has not demonstrated that the Union's proposal would directly interfere with its right to determine its budget, the proposal is within the Agency's duty to bargain under the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the proposal.[7]

Issued, Washington, D.C., May 9, 1986.

Jerry D. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[7] In deciding that the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

162ND TACTICAL FIGHTER GROUP
ARIZONA AIR NATIONAL GUARD
TUCSON, ARIZONA

Respondent

and Case No. 8-CA-30429

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision; the General Counsel filed a brief answering Respondent's exceptions; the Charging Party filed an opposition to Respondent's exceptions and cross-exceptions to the Judge's Decision; and the Respondent filed an opposition to the Charging Party's cross-exceptions.[1]

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

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[1] Part 2423 of the Authority's Rules and Regulations, entitled "Unfair Labor Practice Proceedings," has no provision for the filing of an "opposition to cross-exceptions" and the Respondent did not seek leave to file such opposition pursuant to section 2429.26 of the Authority's Rules and Regulations. Consequently, the Authority has not considered herein the Respondent's opposition to the Charging Party's cross-exceptions to the Judge's Decision.

In agreement with the Judge, we conclude that "[o]nce the participation of an employee has been deemed necessary by the Authority in any phase of any proceeding before the Authority, . . . [t]here is no discretion in the agency to determine whether or not an employee should be on official time . . . ." Respondent's imposition of the condition that those employees whose participation had been deemed necessary either had to wear the appropriate military work uniform in order to receive official time or had to participate at the hearing in an annual leave status, interfered with the protected rights of those employees under the Statute in violation of section 7116(a)(1) of the Statute.[2] Contrary to the Respondent's contention, the Judge did not find that the Respondent violated section 7131(c). Rather, the record indicates that the Judge found a section 7116(a)(1) violation premised upon the requirements of section 7131(c) and the provisions of section 7132 concerning the issuance of subpenas. Such matters were fully litigated at the hearing with all parties having had the opportunity to present evidence and witnesses relevant to their positions.[3] Consequently, the Authority finds no merit in the Respondent's contention that it was denied due process in connection with this portion of the Judge's Decision.

ORDER

Pursuant to section 7118 of the Statute and section 2423.29 of the Authority's Rules and Regulations, the Authority hereby orders that the 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona shall:

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[2] We find it unnecessary to pass upon the Judge's discussion regarding the duty status of employees participating in Authority proceedings in these circumstances.

[3] A violation of section 7116(a)(8) was not alleged.

1. Cease and desist from:

(a) Requiring its employees to wear the military work uniform in order to be granted official time for participation in hearings before the Federal Labor Relations Authority when such participation has been deemed necessary by a designated agent of the Authority.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide official time to those employees whose participation in hearings before the Federal Labor Relations Authority on June 23 and 24, 1983 and March 9, 1984 had been deemed necessary by a designated agent of the Authority and make them whole for any annual leave utilized for that purpose.

(b) Post at its Tucson, Arizona facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require our employees to wear the military work uniform in order to be granted official time for participation in hearings before the Federal Labor Relations Authority when such participation has been deemed necessary by a designated agent of the Authority.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide official time to those employees whose participation in hearings before the Federal Labor Relations Authority on June 23 and 24, 1983 and March 9, 1984 had been deemed necessary by a designated agent of the Authority and make them whole for any annual leave utilized for that purpose.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

162ND TACTICAL FIGHTER GROUP,
ARIZONA AIR NATIONAL GUARD
TUCSON, ARIZONA

Respondent

and

Case No. 8-CA-30429

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

. . . .

Victor R. Schwanbeck, Esquire
For the Respondent

Kevin M. Grile, Esquire
Mr. Richard Webster
For the Charging Party

Jonathan S. Levine, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an amended unfair labor practice complaint issued by the Regional Director, Region Eight, Federal Labor Relations Authority, Los Angeles, California against the 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona (Respondent), based on a charge filed by the American Federation of Government Employees, Local 2924, AFL-CIO (Charging Party or Union). The amended complaint alleged, in substance, that Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by instructing those employees who had been subpenaed by the Authority to testify in pending unfair labor practice hearings scheduled for June 24, 1983 and March 9, 1984 to wear the appropriate military work uniform if they would be participating while in an official duty status.

The complaint alleged that certain of the subpenaed employees attended the June 24, 1983 hearing in an annual leave status and civilian clothing rather than submit to the directive.

Respondent's answer denied any violation of the Statute.

A hearing was held in Tucson, Arizona. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material, Respondent has been, and is now, an agency within the meaning of section 7103(a)(3) of the Statute. Respondent is a Fighter Training Group located at the Tucson International Airport approximately eight miles from downtown Tucson. It has a full time military mission to provide combat air training for student pilots and military training for its air members. It is made up of approximately 1,112 military members of which approximately 410 are also Air National Guard technicians. The technicians' civilian employment status is conditioned on maintenance of military membership in the Air National Guard.

The Charging Party is a labor organization within the meaning of section 7103(a)(4) of the Statute. It has been certified as the exclusive representative of an appropriate bargaining unit at Davis-Monthan Air Force Base, has negotiated a collective bargaining agreement with Davis-Monthan, and provides representation for unit employees at Davis-Monthan.

The Charging Party sought to represent a unit of employees of Respondent. A representation election was held on December 15, 1982. Following the election, objections to the election and unfair labor practice charges were filed. A hearing involving Respondent and the Charging Party was scheduled for June 23, 1983 in Case Nos. 8-CA-30098, 8-CA-30099, and 8-RO-30002 before an Administrative Law Judge of the Authority. Respondent, through then Major Willie D. Kyzer, became aware of this hearing on or about March 1983 and assumed that some of the employees would be called to testify at the hearing.

Prior to the hearing, on or about June 7, 1983, some employees of Respondent, including Jon C. Webb, Ernesto Lopez, and Patrick McIntyre, were subpenaed for the hearing by the Regional Director, Region 8 at the request of Deborah S. Wagner, attorney for the General Counsel. The subpenas stated on the their face that "any witness who is employed by the Federal Government shall be granted official time. . . ." Respondent had knowledge of these subpenas and, in addition, received a letter from Wagner dated June 7, 1983 which stated, in part, as follows:

> As you know, an unfair labor practice hearing on the above-referenced matter will be held on June 23, 1983. The following individuals may be called by the General Counsel as witnesses in this matter:
>
> | | |
> |---|---|
> | Robert Herreras | Jimmie M. North |
> | Pat McIntyre | Joe Tyrone |
> | George Leflohic | Jon C. Webb |
> | Ernesto W. Lopez | Tom Pachos |
>
> In accordance with Section 2429.13 of the Rules and Regulations of the Federal Labor Relations Authority, an employee who participates as a witness in an unfair labor practice proceeding is entitled to official time to prepare for and participate in the hearing. Kindly notify the supervisor involved that these individuals are entitled to official time for such purposes.

Upon receipt of the June 7, 1983 letter, Respondent researched the matter to determine what the status and entitlements would be for employees participating in the hearing. The attire of National Guard technicians is governed by the National Guard Bureau's Technician Personnel Publications. The applicable regulation, TPR 300, 302.7-6, 17 March 1981, provided, in part, as follows:

> 7-6 WEARING OF THE MILITARY UNIFORM
>
> Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties and while attending courses of instruction at military service schools and at the National Guard Professional Education Center, Camp Robinson, North Little Rock, Arkansas. They will comply with the standards contained in the appropriate regulations pertaining to grooming and wear of the military uniform (AF 600-20, AR 670-5, AR 670-30, AFR 35-10). Official time will not be used for changing to or from the military uniform at the work site. When an Adjutant General determines that the uniform is inappropriate for certain positions or situations, he will forward his determination to the Chief, National Guard Bureau for review. If warranted, the CNGB will authorize other appropriate attire. These provisions apply to all technicians

required to be members of the National Guard as a condition of employment, unless otherwise specifically excluded by a negotiated labor agreement. The following situations have been determined to be inappropriate for wear of the military uniform and do not require prior approval:

a. Travel by commercial or private transportation while in an official travel status.

b. While attending courses of instruction in a technician status at locations other than military institutions.

c. Labor organization representatives engaged in labor agreement negotiations.

d. Participation as data collectors during the conduct of Federal Wage System surveys.

e. While serving as hearing examiners.

f. During pregnancy.

No request was made to the Chief, National Guard Bureau by the Union, General Counsel, or Respondent for a waiver from compliance with TPR 300, 302.7-6. Securing a waiver through the procedure outlined in the regulation takes a considerable amount of time.

On June 21, 1983, supervisor Ernie Pain called employees Pat McIntyre, Ernie Lopez, and George Leflohic together and informed them that they must wear the blue uniform to the FLRA hearing. On June 22, 1983, Respondent, by Major Willie D. Kyzer, sent a letter to all of Respondent's employees who were participating in the hearing, including those noted above who had been the subject of FLRA Attorney Wagner's letter and subpenaed by the Authority at the request of the General Counsel to appear on behalf of the General Counsel and the Charging Party. The letter provided, in part, as follows:

> Individuals are authorized official duty status while participating in the hearing plus reasonable travel time. Individuals in an official duty status will be required to wear the appropriate military work uniform. Time cards will reflect individual personnel present for duty.

Some of the employees subpenaed by the Authority objected to the wearing of the uniform to the hearing as unfair, insulting, and on the basis that technicians called for jury duty in the past were not required to wear uniforms. They complained to Respondent and to an attorney for the General Counsel, FLRA. Respondent was aware as early as February 1983 that some of its employees objected to the wearing of the military uniform. Col. John M. Harnett, Respondent's Air Commander, responded to a request that employees be allowed to attend the hearing in civilian clothing. He stated that he was required to comply with the regulations and could not authorize employees to attend the hearing in civilian clothing. However, in recognition of some of the deep-seated feelings, he stated that he had no objection to employees taking annual leave for the hearing and wearing clothing of their choice. He stated that if they did so, they would not be entitled to receive any entitlements. Employees, including those deemed necessary by the General Counsel and subpenaed to appear on behalf of the General Counsel and the Charging Party, were required to appear in uniform in order to receive official time.

On June 23 and 24, 1983, the following individuals appeared and/or testified as witnesses for the General Counsel on behalf of the Charging Party concerning alleged unfair labor practices by Respondent: Roberto Herreras, George Leflohic, Ernesto W. Lopez, Jimmie M. North, Jon C. Webb, Pat McIntyre, Tom Pachos, and Joe Tyrone. On June 23, Herreras, Lopez and Webb appeared in civilian attire while the remainder wore military uniform. On June 24, Herreras, Lopez, North, Webb, and Tyrone wore civilian clothing and the rest wore their uniforms.

On June 23 and 24, 1983, Webb, while under subpena for the hearing, took annual leave rather than appear in military attire. Webb testified for the General Counsel.

On June 23, 1983, Lopez, while under subpena for the hearing, reported to work at 6:15 a.m. At 9:00 a.m. he was put on annual leave status because he changed to civilian clothes for the hearing. Lopez drove to the hearing and remained at the hearing all day, but was not called to testify.

On June 24, 1983, Lopez reported directly to the hearing in civilian clothing. He remained at the hearing all day, as instructed, but was not called to testify. Lopez was also in annual leave status on June 24.

On June 23, 1983, McIntyre, while under subpena for the hearing, also reported to work at 6:15 and worked up until 9:00 a.m. At this time, he changed from his fatigues to dress blues and reported to the courthouse. McIntyre wished to wear civilian clothing, but did not have any annual leave at the time. McIntyre did not return to work as the hearing lasted until 5:00 or 5:30 p.m. On June 24, 1983, McIntyre reported directly to the hearing, as instructed, where he remained for the remainder of the day. McIntyre testified for the General Counsel.

On March 8, 1984, Respondent, by supervisor Pain and Lt. Col. Kyzer, told McIntyre and Lopez that they would have to adhere to the June 22, 1983 Kyzer letter for the March 9, 1984 hearing; that is, that the witnesses would have to wear military clothing in order to be paid official time, or they would have to take annual leave if they appeared in civilian clothes. At the March 9, 1984 hearing, Webb appeared in civilian attire, while McIntyre and Lopez appeared in uniform. Webb, Lopez, and McIntyre were all under subpena by the General Counsel of the Authority for the March 9, 1984 hearing.

As noted, Respondent's employees are required to wear their uniforms when performing day-to-day technicians duties. They are not authorized to wear their uniforms off-base unless they are going to work, coming home from work, or in emergency situations. They are also not authorized to wear their uniforms after duty hours for non-Guard functions at off-base bars or restaurants. Employees have served on jury duty in civilian attire while in a paid leave status. They can also attend women conferences and Hispanic conferences in civilian attire and have done so with the knowledge of Respondent. According to Respondent, employees can attend women and Hispanic conferences in civilian attire because they are attending courses of instruction while in a military technician status pursuant to the above noted provision of TPR 300.

Discussion, Conclusions, and Recommendations

The General Counsel and the Charging Party contend that Respondent's requirement that those employees subpenaed by the Authority to testify in a hearing wear the military uniform in order to receive official time interfered with, restrained, and coerced employees in the exercise of their statutory rights in violation of section 7116(a)(1) of the Statute. The General Counsel and Charging Party maintain that the requirement was designed to stress to the employees that management exercised control over them even to the extent of telling them what they could and could not wear to an off-base hearing before the Authority where employees sought vindication of their rights. The General Counsel relies upon the timing of the issuance of the uniform instructions to employees, the alleged absence of a legitimate work-related purpose for the military uniform requirement, Respondent's alleged discriminatory application of its uniform regulation, and the reaction of the employee-witnesses to the military work uniform orders.

Respondent defends on the basis, inter alia, that technicians are required by National Guard Bureau regulations to wear the uniform while performing technician duties; testifying at an Authority hearing does not fall within one of the enumerated exceptions; the failure to request a uniform waiver pursuant to TPR 302.7-6 estoppes the claim; it would have been impossible to interfere with the employees' ability to unionize because of pending litigation; and the General Counsel failed to prove that the directives interfered with employee rights.

Section 7131(c) of the Statute[1] empowers the Authority to make determinations as to whether employees participating in proceedings before it shall be authorized official time. Section 7132 of the Statute also authorizes the Authority and its designees to issue subpenas requiring the attendance and testimony of witnesses.[2] This language in the Statute has been implemented by the Authority in sections 2429.13 and 2429.14 of the Rules and Regulations.[3]

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[1] Section 7131(c) provides:

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

[2] Section 7132 provides, in relevant part:

(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may--

(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States[.]

. . . .

(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

[3] Sections 2429.13 and section 2429.14 provides:

§ 2429.13 Official time.

If the participation of any employee in any phase of any proceeding before the Authority, including the investigation of unfair labor practice charges and representation petitions and the participation in hearings and representation elections, is deemed necessary by the Authority, the General Counsel, any Administrative Law Judge, Regional Director, Hearing Officer, or other agent of the Authority designated by the Authority, such employee shall be granted official time for such participation, including necessary travel time,

(continued)

Once the participation of an employee has been deemed necessary by the Authority in any phase of any proceeding before the Authority, as here, that "employee shall be granted official time for such participation." There is no discretion in the agency to determine whether or not an employee should be on official time once that employee participation has been deemed necessary. Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA 510, 512 (1982).

Respondent's position that all technicians participating in the hearing were performing technician duties and, therefore, were required to wear the military uniform in order to receive official time is mistaken. The record reflects that those technicians subpenaed by the Authority on behalf of the General Counsel participated for, or on behalf of, the Charging Party. They testified or appeared in support of allegations raised by the Charging Party concerning election objections and unfair labor practice charges. Section 7131 of the Statute was designed to authorize official time (paid time) for employees to engage in certain activities concerning labor-management relations. H.R. Rep. No. 95-1403, p. 58 (1978). As noted, Section 7131(c) empowers the Authority to make determinations as to whether employees participating for, or on behalf of, a labor organization in proceedings before the Authority shall be authorized official time for such purpose "during the time the employee otherwise would be in a duty status." This qualifying language strongly suggests that employees participating for, or on behalf of, a labor organization during such proceedings are not considered in a duty status. Nor is the conclusion warranted that employees so participating are acting in their "official capacity," "on the job," or on "official business" of the government. See Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439 (1983).

3/ (continued)

as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

§ 2429.14 Witness fees.

(a) Witnesses (whether appearing voluntarily, or under a subpena) shall be paid the fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States: Provided, That any witness who is employed by the Federal Government shall not be entitled to receive witness fees in addition to compensation received pursuant to § 2429.13.

Respondent could not require the subpensed employees to take leave. An employee on official time is on paid time, entitled to his or her usual compensation, and is not in a leave status.

Respondent's imposition of the condition that those employees whose participation had been deemed necessary by the Authority either had to wear the uniform in order to receive official time or had to participate in the hearing in an annual leave status, interfered with the right of these employees to receive official time when their participation had been determined to be necessary by the Authority. Accordingly, Respondent's conduct violated section 7116(a)(1) of the Statute[4] as alleged. Department of the Treasury, Internal Revenue Service, 15 FLRA No. 108 (1984); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 13 FLRA No. 94 (1983); U.S. Department of Justice, Federal Prison System, 10 FLRA No. 109, 10 FLRA 662 (1982); Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA No. 90, 10 FLRA No. 510 (1982); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 10 FLRA No. 3, 10 FLRA 10 (1982); Department of the Air Force, Space Division, Los Angeles, California, 6 FLRA No. 78, 6 FLRA 439 at 451 (1980).[5]

Based on the foregoing findings and conclusions, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona shall:

1. Cease and desist from:

(a) Requiring its employees to wear the military work uniform in order to be granted official time for participation in hearings before the Federal Labor Relations Authority when such participation has been deemed necessary by a designated agent of the Authority.

---

[4] Section 7116(a)(1) of the Statute provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[.]

[5] In view of this disposition and the per se nature of the violation, it is unnecessary to consider the other contentions raised by the parties.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to affectuate the purposes and policies of the Statute.

(a) Provide official time to those employees whose participation in hearings before the Federal Labor Relations Authority on June 23 and 24, 1983 and March 9, 1984 had been deemed necessary by a designated agent of the Authority and make them whole for any annual leave utilized for that purpose.

(b) Post at its Tucson, Arizona facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region 8, Federal Labor Relations Authority, Los Angeles, California, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: September 6, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require our employees to wear the military work uniform in order to be granted official time for participation in hearings before the Federal Relations Authority when such participation has been deemed necessary by a designated agent of the Authority.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide official time to those employees whose participation in hearings before the Federal Labor Relations Authority on June 23 and 24, 1983 and March 9, 1984 had been deemed necessary by a designated agent of the Authority and make them whole for any annual leave utilized for that purpose.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number number is: (213) 688-3805.

21 FLRA No. 91 [21 FLRA No. 91]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and Case No. O-NG-1124

INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The issue presented concerns the negotiability of the following provision contained in local agreements disapproved during review of those agreements by the Agency head under section 7114(c) of the Statute:[1]

Article 13, Section 15 (NORD)

Article 13, Section 17 (NCA)

> Once the deadline for filing a grievance or other complaint has passed an employee who has not filed a grievance or complaint or had one filed in their behalf may only be given priority consideration pursuant to an order issued by a higher level authority.

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[1] The Agency withdrew its objections and the Union withdrew its appeal concerning the negotiability of one additional provision concerning placement of personnel. The Union also withdrew its appeal as to four additional provisions concerning performance evaluations, promotion ranking panels, and sick leave. These provisions will not be considered further here.

II. Positions of the Parties

The Agency contends that the provision would prohibit it from granting priority consideration to employees adversely affected by an improper promotion action. It therefore concludes that the provision conflicts with the merit system principle set forth at 5 U.S.C. § 2301(b)(1) which provides that selection and advancement should be determined on the basis of "relative ability, knowledge, and skills, after fair and open competition", and the implementing OPM regulation set forth at 5 CFR 335.103. The Agency also argues that the provision would prevent it from applying the necessary corrective remedy for an improper promotion action as required by Federal Personnel Manual (FPM) chapter 335, Appendix A, section A-4(c).

The Union states that its intent with respect to the provision is to prevent the Agency from giving priority consideration for promotion to an employee unless that employee filed a grievance or complaint, or priority consideration was ordered by a higher authority such as OPM, EEOC, or FLRA. Union Reply Brief at 4-5. The Union contends that the provision is not inconsistent with either merit system principles or the FPM. The Union also argues that under Authority precedent the Agency should be prohibited from granting remedies to employees who have not filed timely claims.

III. Analysis

The Authority has held, on the basis of the legislative history of the Civil Service Reform Act of 1978,[2] that a merit system principle such as section 2301(b)(1) may not be the basis for finding a proposal nonnegotiable unless the proposal is contrary to a law, rule or regulation implementing or directly concerning the principle. See American Federation of Government Employees, AFL-CIO,

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[2] The Joint Explanatory Statement of the Conference Committee for the Civil Service Reform Act stated:

> Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or an agency.

S. Rep. No. 95-1272, 95th Cong., 2d Sess. 128 (1978).

Local 987 and Headquarters, Warner Robins Air Force Logistics Command, Robins Air Force Base, Georgia, 8 FLRA 667, 676-77 (1982) (Union Proposal IV); Association of Civilian Technicians, Inc., Pennsylvania State Council and Adjutant General, Department of Military Affairs, Pennsylvania, 4 FLRA 77, 80-81 (1980). The implementing regulation cited by the Agency, 5 CFR 335.103, requires an agency to make selections for promotion "according to merit." However, contrary to the Agency's contentions, the provision would not interfere with the Agency's exercise of its discretion to make promotions on the basis of merit. In American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 6 FLRA 314 (1981), the Authority held that a proposal which would have required the agency to repromote employees who were involuntarily downgraded without personal cause at the first opportunity "except for good cause" was within the duty to bargain. The Authority found that the proposal merely required the agency to consider but not necessarily select the repromotion eligible employee. Thus, the proposal in that case by requiring the agency to give priority consideration to certain employees did not prevent the agency from considering or selecting candidates for promotion from other sources. See also National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275 (1981) (Union Proposals 2-4). Similarly, simply because the provision in dispute here would prohibit the Agency from granting priority consideration to certain employees in the unit of exclusive recognition represented by the Union herein, the provision would not prevent the Agency from considering those employees as candidates for promotion and, consequently, making selections for promotion "according to merit."

Additionally, we find that the disputed provision is not in conflict with Federal Personnel Manual (FPM) chapter 335, Appendix A, section A-4(c).3/ We therefore need not

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3/ Federal Personnel Manual chapter 335, Appendix A, section A-4(c) provides:

A-4. Corrective Actions

. . . .

c. Action involving nonselected employees. (1) If the action taken to correct the erroneous promotion was

(Continued)

decide whether that section of the FPM is a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute which would bar negotiation on a conflicting union proposal. That FPM section provides that an affected employee "*may* be given priority consideration" and that agencies "may make the final determination" regarding corrective action. [Emphasis added]. Thus, under the FPM provision, an agency is given discretion concerning whether to grant priority consideration. To the extent that an agency has discretion with respect to a matter affecting the conditions of employment of employees represented by a union in a bargaining unit, that matter is within the agency's duty to bargain. *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 FLRA 747, 759-60 (1980). Just as an agency has discretion to grant priority consideration, see *Department of Commerce, Bureau of the Census, supra*, the Authority finds that an agency also has discretion *not* to grant priority consideration as a remedy for a flawed promotion action. However, contrary to the Union's assertion, nothing in our precedent *prohibits* an agency from granting a remedy to an employee who has not filed a timely claim.

IV. Conclusion

For the reasons set forth above, the Authority finds the provision to be within the duty to bargain.4/

(Continued)

to require that the position be vacated, an employee who was not promoted or given proper consideration because of the violation (that is, an employee in the best qualified group who was not selected or an employee who should have been in this group but was not) may be considered for promotion to the vacated position before candidates are considered under a new promotion or other placement action.

(2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation may be given priority consideration under a new promotion or other placement action. Agencies may make the final determination on how they will handle actions involving nonselected employees, except when actions are mandated by law or regulation.

4/ In finding the disputed provision to be within the duty to bargain, the Authority makes no judgment as to its merits.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of the disputed provision, which was bargained on and agreed to by the parties at the local level.

Issued, Washington, D.C., May 12, 1986.

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

Case No. 7-CA-40172

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. The General Counsel filed exceptions to the Judge's Decision and a brief in support thereof.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.*/

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*/ In agreement with the Judge, and for the reasons set forth in his Decision, the Authority finds that the proposal at issue was outside the duty to bargain. In view of this disposition, the Authority finds it unnecessary to consider whether the Respondent would have violated the Statute in the circumstances of this case if such proposal had been found negotiable.

[21 FLRA No. 92]

ORDER

IT IS ORDERED that the complaint in Case No. 7-CA-40172 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 12, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[21 FLRA No. 92]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE,
MARYLAND

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

. . . .

Case No.: 7-CA-40172

Mr. Carl J. Clayton
For the Respondent

Mr. Reginald T. Huey
For the Charging Party

Nicholas J. LoBurgio, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an amended unfair labor practice complaint issued by the Regional Director, Region Seven, Federal Labor Relations Authority, Denver, Colorado against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (Respondent), based on a charge filed by the American Federation of Government Employees, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), on or about January 9, 1984 at its Mid-America Program Service Center, Kansas City, Missouri, by unilaterally changing the terms and conditions of unit employment. The complaint alleges that Respondent implemented "You and the Program Service Center," No. 83-56, regarding the use of unit employee preferences for the selection of work locations, without first reaching agreement or impasse with the union.

Respondent's answer admitted the jurisdictional allegations relating to the Respondent, Charging Party, and the charge, but denied any violation of the Statute. Respondent contends that it implemented the change after discharging its obligation to bargain as provided by the Statute and the parties' collective bargaining agreement.

A hearing was held in Kansas City, Missouri. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

In 1975, after notice to and concurrence by the Union, the Mid-America Program Service Center (MAMPSC), an integral part and agent of Respondent, issued a circular, "You and the Program Service Center," No. 75-11, dated, May 5, 1975, which established a policy and implementation procedures to be used by selecting officials in granting employee preferences for work location assignment when filling identical positions simultaneously at the two work locations in use at that time, i.e., the Federal Office Building (FOB) and Crown Center. A few years later the Crown Center facility was abandoned and the functions previously performed there were moved to the Mid-Town Office Building (MTOB). Notwithstanding this transfer, the Circular No. 75-11 policy and procedures remained in force. The MTOB facility, housing about 600 of MAMPSC's 2800 employees, is seperate from the FOB and requires a shuttle bus trip of 15 to 20 minutes to reach. Unlike the FOB, the MTOB facility does not have cafeteria facilities, a credit union, nor close-in all-day parking.

The procedure, which was implemented in 1975, established that when multiple employees are promoted to identical positions at the two work locations, which were to be filled simultaneously, the selecting official would rank the selectees by grade level and time-in-grade. Thereafter, using the employees' service computation date at the tie-breaker, if necessary, higher graded employees would be "given work location preference" first and thereafter other employees would receive their preference based upon their grade level and time-in-grade, if there were vacancies available at the work location selected by the employee. If an employee in this latter category declined the only available work location, the employee did not receive the promotion. (G.C. Ex. 3). Variations from this policy, for individual situations, were handled by agreement on a case-by-case basis by the Union and MAMPSC. The work location assignment procedure was used from 5 to 10 times per year between 1975 and 1984.

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[1] The General Counsel's unopposed motion to correct the transcript is granted. The transcript is hereby corrected as set forth therein.

MAMPSC is divided into branches, then sections, and then modules, with each module responsible for a particular section of the workload. It is necessary to maintain a balanced staff within each module in order to handle the assigned work.

In early to mid-1983, the MAMPSC decided that it wanted to redistribute the workload in the 42 modules where unit employees worked and modify staffing and employee racial and sexual imbalances that had developed over a period of several years. Donald Mings, director of MAMPSC, appointed Betty Cantrell, MAMPSC deputy director of operations, and Suzy Schmidt, MAMPSC assistant labor relations specialist, as his agents to notify the Union that he wanted to change the past practice and to bargain with the Union. By letter dated July 21, 1983 MAMPSC advised the Union that effective July 27, 1983 it would "implement a modified method of work location assignments." Respondent's letter contained a proposed MAMPSC circular delineating the change in past practice, stating, inter alia, "Future building location assignments will be made on the basis of organizational needs, taking into consideration the preference and needs of individual employees." This proposed procedure would have eliminated the use of employee preference as the primary work location assignment criteria. Respondent requested that Union counterproposals be submitted by July 22, 1983. (G.C. Ex. 4).

On July 22, 1983, the Union responded to MAMPSC's proposal and requested bargaining over "the procedures you will follow in carrying out the changes and the arrangements you will make for bargaining unit employees adversely affected." In addition, the Union proposed that no change be made in the current procedure and designated Reginald T. Huey, union executive vice-president, as the Union point of contact. (G.C. Ex. 5).

Huey met with Schmidt and Cantrell on five dates (July 28, August 3, 4, 9 and 12, 1983), covering 12 workdays. Proposals were exchanged on August 3, 4, and 12, and a mediator from the Federal Mediation and Conciliation Service (FMCS) participated on August 9 and 12, 1983, at the Union's request. During bargaining it was MAMPSC's position that the Union proposals were nonnegotiable and interfered with management rights concerning the assignment of employees. (Tr. 28-29, 88, 102). Huey expressed the Union's position that, notwithstanding MAMPSC's management rights, the Union had a right to bargain pursuant to Section 7106(b) of the Statute. At the August 12, 1983 bargaining session, the mediator advised the parties that they were at impasse.

At no time during the bargaining, from July 28, 1983 through August 12, 1983, did the management representatives tell the Union that, pursuant to the collective bargaining agreement, after ten bargaining sessions or ten workdays they would no longer bargain with the Union. It was normal procedure to extend bargaining beyond ten days to accommodate the mediator if he was not immediately available.

Respondent advised the Union that it was going to implement, but before that was done it received a copy of the Union's request of August 24, 1983 for the assistance of the Federal Services Impasses Panel (FSIP). (G.C. Ex. 6). FSIP acknowledged receipt of the request on September 1, 1983. (G.C. Ex. 7). Respondent provided a position paper to FSIP on October 17, 1983. Respondent asserted that the Union proposals, submitted in August 1983, were nonnegotiable as inconsistent with the agency's authority to assign employees or to assign work under sections 7106(a)(2)(A) and (B) of the Statute. Respondent asked the Panel to decline the Union's request.

As a result of Respondent's nonnegotiability declaration, Huey submitted a new proposal directly to the MAMPSC, with a copy to FSIP, on October 24, 1983. The letter provided, in part, as follows:

> We are herein submitting the following proposal in order to resolve our current impasse. This proposal constitutes Union Proposal No. 6:
>
> > When simultaneously filling identical positions, at more than one building location, the following procedure will be used:
> >
> > (1) Each employee selected for promotion to one of the identical positions, will indicate his/her preference of building locations to be assigned.
> >
> > (2) Should the above procedure fail to produce the desired staffing need at each location, selected employees with the earliest service computation dates will be afforded a choice of available building locations.

Huey followed up the letter with a telephone call to Schmidt in which he requested her opinion as to whether the proposal was negotiable. Schmidt replied that she couldn't tell as she didn't understand the proposal. Huey explained what he had in mind. On November 8, 1983, Huey requested a written response. On November 9, 1983, Respondent replied by memorandum as follows:

> On the afternoon of November 8, 1983, you asked to be furnished with a written response to the proposal you had submitted on October 24, 1983, and identified as Union Proposal No. 6. This proposal in actuality is the seventh proposal the union has submitted on this issue.
>
> Article 4, Section 1 of the National Agreement specifies:
>
> > "The union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasse Panel for resolution under its rules."
>
> You were notified of the change in method of making building location assignments on July 21, 1983. You requested negotiations on July 22, 1983, and the parties began bargaining on July 28, 1983. Proposals continued to be submitted by both parties throughout the bargaining and mediation sessions which ended on August 12, 1983.
>
> This matter is now before the Impasse Panel, and any correspondence concerning this case should be directed to the Panel. It is inappropriate, and contrary to the contractual provision, to be submitting a written proposal to management while the issue is currently under the jurisdiction of the Panel.

Respondent mailed a copy to the FSIP. At the same time, Schmidt read the memorandum to the Union and the FSIP over the telephone.

By letter dated November 10, 1983, the Union requested the FSIP to find its final proposal negotiable and in accordance with the Statute. (G.C. Ex. 11). On November 28, 1983 the FSIP declined jurisdiction. The FSIP stated, in part, as follows:

> Because there are threshold questions concerning the Employer's obligation to bargain over the Union's proposals, the Panel declines to assert jurisdiction

> until the questions have been resolved in an appropriate forum. (G.C. Ex. 12).

On December 27, 1983, Respondent notified the Union, inter alia, that it had fulfilled its bargaining obligation on the issue and would implement its last best offer made in August 1983 on January 9, 1984. (G.C. Ex. 13).

In response to this announcement, Huey sent MAMPSC a letter dated January 5, 1984, but received January 6, 1984, stating that the October 24, 1983 proposal was still on the table and requesting that MAMPSC either negotiate or submit the matter to arbitration. (Tr. 113; G.C. Ex. 14).

On January 9, 1984, MAMPSC distributed 3000 copies of a new "You and the PSC" circular implementing the new procedure. Initial printing arrangements for the circular had been made in mid-December. The new policy changed the existing past practice by making organizational needs rather than employee preferences the primary consideration in work location assignments. Respondent stated, "Although every reasonable effort will be made to accommodate individual needs and preferences, employees should realize when applying for a position which has vacancies in both buildings that there is a possibility that they may not be assigned to the building of their preference." (G.C. Ex. 15).

BACKGROUND OF ARTICLE IV OF THE NATIONAL AGREEMENT[2]

Article IV, Section 1, as applicable to the present case, states:

> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.

Bargaining over the national agreement, of which Article IV is a part, encompassed an 18 month period from June 10, 1980 through and including December 21, 1981. The bargaining process encompassed both general sessions between all team members from both sides and "side-bar" meetings between selected representatives of the teams. The Union negotiators in the side-bar meetings were not authorized to enter into agreement during these meetings and, in fact, brought back all Respondent proposals to the team as a whole for discussion. This procedure was also used regarding Article IV. It was the articulated position of the Union throughout the bargaining sessions, that it would not waive any of its statutory rights in the agreement.

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[2] In view of the disposition of this matter on other grounds, it is unnecessary to resolve the conflict between Respondent and the Union as to the negotiations leading to this provision, the practice of the parties in implementing the provision, and the interpretation of the provision.

Arthur Johnson, AFGE, Local 1336 president, treasurer of the National Council of Social Security Payment Center Locals, and chief spokesperson for the consolidated AFGE unit was a negotiator (side-bar and general sessions) and signatory on the agreement. He testified on behalf of the Union regarding bargaining history. As to the quoted provision of the Article, supra, Respondent initially asked that there be no unreasonable delay in mid-term bargaining. This was based upon the mediator/arbitrator's insistence that the parties shorten their bargaining process. In response to Respondent's position, the Union in February or early March 1981, first proposed that mid-term bargaining not exceed 60 days. Subsequent bargaining occurred over Article IV, Section 1, as applicable herein, and the Union proposed the present "10 working day" language.

The cited portion of the agreement does not qualify the word "working day" with the adjective "consecutive" or other modifier. The cited agreement article does not explain nor discuss what procedures the parties would use should FSIP fail or refuse to assert jurisdiction. There have been no agreements or arbitration decisions clarifying the meaning and intent of the cited section of the Article. The cited provision of the Article is silent as to what would happen after ten days of bargaining occurred if a request to FSIP were not made.

Donald M. Mings, director of the MAMPSC, was deputy chief negotiator for the management team. He testified that Article IV was one of the last articles upon which agreement was reached. Mings testified that the language of Article IV, Section 1 was worked out at a side-bar meeting between two representatives of management, Mings being one of them, and two representatives of the Union. According to Mings, the intent of the parties at the side-bar meeting was that bargaining would be concluded within 10 days unless the parties mutually agreed to extend the time. After 10 days, according to Mings, the parties were free to select other courses of action beyond negotiations. The Article drafted at the side-bar meeting was agreed to by the whole bargaining team, but there was no discussion before the whole team of the meaning of "10 working days."

Reginald T. Huey, executive vice president of Local 1336, testified that in past negotiations the "10 working days" language has not been interpreted to be 10 consecutive days, but to encompass 10 working days of bargaining over a period of time. In contrast to Huey, Susy Schmidt, Respondent's assistant labor relations specialist, testified that in past negotiations the 10 day provision has started running at the first meeting between the parties and the 10 day time frame has been adhered to in the absence of mutual agreement to extend the time.

Discussion, Conclusion, and Recommendations

The General Counsel contends that Respondent violated section 7116(a) (1) and (5) of the Statute by unilaterally terminating the past practice of using employee preference for work location assignments when there existed a viable union bargaining proposal of October 24, 1983 which Respondent had not addressed either through bargaining, a declaration of non-negotiability, or impasse procedure. The General Counsel asserts that the proposal was clearly negotiable, and the union did not waive its right to bargain through Article IV, Section 1 of the agreement or otherwise.

Respondent defends on the basis that it implemented the change only after discharging its duty to bargain as expressed in the Statute and the parties' agreement. Respondent contends, inter alia, that the Union's initial action shows surface bargaining and dilatory tactics; that after August 12, 1983 the parties were outside the 10 days provided for bargaining in Article 4, Section 1 of the agreement; that the Union's October 24, 1983 proposal is non-negotiable; that the Union's inaction after the FSIP decision justified Respondents' notice to implement; and the Union's response to that notice was untimely.

The threshold question is whether the Union's October 24, 1983 proposal was negotiable under section 7106 of the Statute since if the proposal was not negotiable Respondent was privileged to refuse to bargain with the Union. Internal Revenue Service (District, Region, National Office Units) and National Treasury Employees Union, 16 FLRA No. 124, 16 FLRA 904 (1984). As noted, the Union proposal provided:

> We are herein submitting the following proposal in order to resolve our current impasse. This proposal constitutes Union Proposal No. 6:
>
> > When simultaneously filling identical positions, at more than one building location, the following procedure will be used:
> >
> > (1) Each employee selected for promotion to one of the identical positions, will indicate his/her preference of building locations to be assigned.
> >
> > (2) Should the above procedure fail to produce the desired staffing need at each location, selected employees with the earliest service computation dates will be afforded a choice of available building locations.

Paragraph (2) is the only portion in dispute. Mr. Reginald T. Huey, Union executive vice president, explained that under the proposal if management had staffing needs for identical positions at two building locations, it would first consider individual preferences in trying to fill the positions. If this procedure failed to produce the desired staffing at each location, assignment would be made based on seniority with employees with seniority receiving their building preference. Those with less seniority could be assigned to the remaining positions. Mr. Huey acknowledged that if management had a particular need for the skills of an employee at one building location, but based on seniority the employee was entitled to go to another building, management would have to assign the employee based on his seniority and could not assign the employee where it considered his services to be needed the most.

Respondent contends that the proposal violates 7106(a) of the Statute.[3] Respondent claims that identical positions do not equate with equal performance, and it must be able to place personnel in the locations where the respective abilities of the individual can be best utilized in order to have a balanced staff and equalize service to beneficiaries among the modules assigned to the different buildings.

The right to assign employees which is reserved to management under section 7106(a)(2)(A) of the Statute encompasses management's discretion to establish the qualifications and skills necessary to perform the duties generally assigned to the position as well as such job-related individual characteristics as judgment and reliability and to determine whether an employee meets those qualifications. American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77, 2 FLRA 604 (1980), enforced sub. nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140,

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[3] Section 7106(a)(2)(A) provides in relevant part:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency —
>
> . . . .
>
> (2) in accordance with applicable laws —
>
> (A) to . . . assign . . . employees in the agency . . .;
>
> (B) to assign work . . . [.]

1148-49 (D.C. Cir. 1981), *cert. denied sub. nom. AFGE v. FLRA*, 455 U.S. 945, 102 S. Ct. 1443 (1982). In *Wright-Patterson* the Authority found various proposals (IV-VII and XIII) outside the duty to bargain. These proposals, which compelled the selection of a particular individual for assignment to a position based on either employee seniority, lack of seniority, or by employee preference, directly interfered with the agency's discretion to determine which employee to assign and, thus, were inconsistent with section 7106(a)(2)(A).

The proposal in issue does not strictly involve a change of position, as in *Wright-Patterson*, but rather the procedure for assigning employees when several identical positions are available at more than one building location. However, management's discretion under section 7106(a)(2)(A) to determine whether an employee has the requisite individual characteristics, such as judgment and reliability, to do the work in a particular location also comes into consideration in this instance. In *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 5 FLRA No. 15, 5 FLRA 83 (1981) the Authority found a proposal whereby "qualified and available employees with requisite skills" would be offered temporary duty assignments in the same position on the basis of seniority within the duty to bargain. The Authority noted that the terms "qualified" and "requisite skills" would serve as a limitation on the operation of the seniority criterion and would permit the agency to decide that it would not select the most senior or least senior employee where it determined that the employee was not qualified or did not possess the needed skills. Similarly, in *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 6 FLRA No. 97, 6 FLRA 508 (1981) a union proposal required that volunteers and seniority status be used by management "among the qualified employees" when necessary to reassign employees due to a staffing imbalance. The Authority noted the "qualified employees" restriction and accepted the union's explanation that an employee, to be included within the operation of this proposal, "could be transplanted and be expected to perform in a substantially similar manner." A similar union proposal in *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 14 FLRA No. 45, 14 FLRA 243 (1984), (provision 6), was also held to be within the duty to bargain where management retained the discretion to limit the selection to *qualified* employees. In that case the Authority also held negotiable a proposal that required prime shift vacancies to be filled by second shift personnel who had one year seniority on the other shifts. However, this proposal also was restricted to "qualified" employees. As noted above, it is apparent that "qualified" meant qualified in the judgment of management. It is not equated with merely meeting the qualification standards for a position.

Since the Union's proposal places no such limitation on the operation of the seniority criterion but would compel management to meet staffing needs in the various modules by assigning employees to building locations based strictly on their preference and seniority, it directly interferes with the agency's discretion to determine which employees to assign and is inconsistent with section 7106(a)(2)(A) of the Statute. The proposal is not within the duty to bargain. Thus, it is concluded that Respondent did not violate section 7116(a)(1) and (5) by refusing to bargain on the proposal and by implementing its last best offer a reasonable time after the decision of the FSIP.

In view of this disposition it is unnecessary to reach the other contentions of the parties. Based upon the foregoing findings of fact and conclusions of law, it is recommended that the Authority adopt the following Order.

ORDER

It is hereby Ordered that the complaint in Case No. 7-CA-40172 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: February 6, 1985
Washington, DC

21 FLRA No. 93

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
SOUTHEASTERN PROGRAM SERVICE CENTER
Respondent

and

Case No. 4-CA-20273

BARRY NELSON, An Individual

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent, the General Counsel and the Charging Party, Barry Nelson.

The complaint alleges that the Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by promulgating and maintaining a rule or directive that unlawfully interfered with the rights of its employees, protected by section 7102 of the Statute,[1] to engage in campaigning on behalf of candidates in an internal union election during non-work time in non-work areas.

---

[1] Section 7102 provides:

§ 7102. Employees' rights

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or

(Continued)

II. The Facts

The American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) (the Union), has been the exclusive representative of a unit of Social Security Administration employees appropriate for the purposes of collective bargaining, including employees of the Respondent Southeastern Program Service Center. On or about January 20, 1982, the Union's Election Committee Chairman met with the Respondent's Labor Relations Officer for the purpose of arriving at rules and policies governing the conduct of nominees, campaign workers and other employees who were to be actively involved in campaigning in an upcoming election for selection of the Union's convention delegates. A written agreement was entered into by the Respondent and the Union and a copy was given to various officers and members of the Union in the form of an "Office Memorandum" on January 21, 1982. Some of the electioneering rules contained in the agreement were as follows:

> Candidates may personally campaign in the cafeteria providing they are on their lunch break or approved leave.

(Continued)

> reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

> No campaigning is permitted in the main lobby or the pod entrance and exit areas.
>
> No posters, display or campaign literature of any type is permitted in the main lobby, pod areas or cafeteria.
>
> No campaign literature is to be attached to vehicles parked in program service center premises.
>
> On election day, February 1, 1982, employees must vote only during nonduty hours. Morning and afternoon breaks are considered duty hours.
>
> Any candidate or employee violating any of the above rules may have his/her campaign and/or distribution privileges revoked and may be subject to appropriate disciplinary action.

III. The Issues

A. The first issue is whether employees campaigning on behalf of candidates in an internal union election should have the same right to campaign, that is, to solicit support of candidates and to distribute campaign literature, during non-work time in non-work areas at their place of employment, as do employees during elections to determine questions concerning representation.

B. The second issue is whether, even if the employees have such a right, the Respondent should not be found in violation of that right by promulgating and maintaining a restrictive campaigning rule or directive, because the Union here had signed an agreement with regard to restrictions placed on employees by the Respondent.

IV. Positions of the Parties

The Charging Party and the General Counsel argue that employees have the statutory right to campaign and solicit support for candidates in internal union matters without interference of any sort from management, so long as that activity is on non-work time in non-work areas. Further, they argue that this right may not be waived by any labor organization, even one t[illegible] represents them at the work place. Thus, they argue that the restrictions placed on employees by management were unlawful. The Respondent argues that the entire matter is an internal union matter that is not in the nature of an unfair labor practice, and that the restrictions in any event were agreed to by the employees' exclusive representative and the agreement should be honored by the Authority.

V. Analysis

A. The right to campaign

The Authority has previously held that the right guaranteed employees under section 7102 of the Statute to ". . . form, join, or assist any labor organization . . ." encompasses the right of employees to distribute literature "in non-work areas during non-work time." General Services Administration, 9 FLRA 213 (1982); Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, 7 FLRA 596 (1982). The Authority has also determined that the right of employees to engage in solicitation on behalf of a labor organization during non-work time is similarly protected by the Statute, Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981), and that such right may even extend to solicitation in work areas (not here involved) absent any disruption of the Activity's operations or other unusual circumstances. Social Security Administration, 13 FLRA 409 (1983).

In the Authority's view, section 7102 of the Statute affords employees the same right to engage in solicitation and distribution of literature on behalf of candidates for union office as they would have if they were acting on behalf of or in opposition to representation by a labor organization generally. In this regard, the identity of the officers and representatives of a labor organization substantially influences the character and nature of the labor organization as a collective bargaining agent, and the right to solicit or distribute literature on behalf of candidates for union office is interwoven with the right to campaign for or against an exclusive representative. An employer violates the protected rights of employees under section 7102, and therefore also section 7116(a)(1) of the Statute, when in the course of an intra-union election it enforces overly broad no-solicitation/no-distribution rules, absent a showing of disruption of agency operations or unusual circumstances.[2] There is no evidence in this case that the rules imposed by management were necessary to protect against disruption of the agency's operations and no evidence of any unusual circumstances. Further, for the reasons stated above, the Respondent's argument that this matter is not in the nature of an unfair labor practice must be rejected.

B. The effect of the Respondent/Union's agreement

The fact that the restrictions placed upon employees by management were embodied in a bilateral agreement is no defense.[3] The right to solicit and to distribute literature on subjects of statutorily protected interests at proper times and places is one guaranteed to employees by the Statute, which the bargaining representative has no authority to waive.[4]

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[2] In interpreting virtually identical language contained in section 7 of the National Labor Relations Act, the NLRB has determined, with court approval, that the right of private sector employees to engage in solicitation or distribution of literature on behalf of candidates in an internal union election is protected by the Act, and that an employer violates section 8(a)(1) when, in the course of an intra-union election campaign, it enforces overly broad no-solicitation/no-distribution rules. *See General Motors Corporation*, 211 NLRB 986 (1974), *enf'd.* 512 F.2d 447 (6th Cir. 1975); *Arkansas Best Freight*, 257 NLRB 420 (1981), *enf'd*. 673 F.2d 228 (8th Cir. 1982).

[3] *See General Motors Corp., Frigidaire Division*, 240 NLRB 168, 170 (1979).

[4] *See General Motors Corp.*, 211 NLRB 986, 988 (1974), *enf'd.* 512 F.2d 447 (6th Cir. 1975). *See also National Labor Relations Board v. Magnavox Company of Tennessee*, 415 U.S. 322, 94 S. Ct. 1099 (1974), where the Court was called upon to interpret virtually identical language contained in section 7 of the National Labor Relations Act, in circumstances where the collective bargaining agent had agreed to certain restrictions upon the rights of employees to solicit or to distribute literature in the context of a union organizing campaign. Articulating a concept applicable here, the Court stated that:

(Continued)

VI. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties. The Authority concludes that the Respondent's actions in promulgating and maintaining a rule or directive enforcing the specific campaign rules set forth above violated its employees' rights under section 7102 of the Statute, and therefore section 7116(a)(1) of the Statute, and the Respondent shall be ordered to revoke and rescind such electioneering rules in order to make it clear that such rules will not be enforced in the future.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Authority and section 7118 of the Statute, the Authority hereby orders that the Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in section 7102 of the Statute by promulgating or maintaining any rule or directive prohibiting employees from soliciting, during non-work time, on behalf of candidates in an internal union election, or from distributing literature on behalf of any such candidates in non-work areas, during non-work time, providing there is no disruption of the work of the Agency.

(Continued)

> The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of any right assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind and revoke the election campaigning rules issued on January 21, 1982, to the extent such rules prohibit employees from soliciting, during non-work time, on behalf of candidates in an internal union election, or from distributing literature on behalf of any such candidates in non-work areas, during non-work time, and there is no disruption of the work of the Agency.

(b) Post at its Southeastern Program Service Center, Birmingham, Alabama, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Center Director, or a designee, and shall be posted in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., May 12, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT promulgate or maintain any rule or directive prohibiting employees from soliciting, during non-work time, on behalf of candidates in an internal union election, or from distributing literature on behalf of any such candidates in non-work areas, during non-work time, providing there is no disruption of the work of the Agency.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and revoke the election campaigning rules issued on January 21, 1982, to the extent such rules prohibit employees from soliciting, during non-work time, on behalf of candidates in an internal union election, or from distributing literature on behalf of any such candidates in non-work areas, during non-work time, and there is no disruption of the work of the Agency.

____
(Activity)

Dated: ______________ By: ___________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority whose address is: Suite 736, 1371 Peachtree Street, N.E., Atlanta, GA 30367 and whose telephone number is: (404) 347-2324.

[illegible] 364

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 364 REPORT OF CASE DECISIONS May 20, 1986

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NEGOTIABILITY CASE

21 FLRA No. 95 (May 12, 1986)

National Treasury Employees Union and [illegible]evenue Service, Case No. 0-NG-1111

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 96 (May 12, 1986)

U.S. Nuclear Regulatory Commission and National Treasury Employees Union, Case No. 3-CA-40346

21 FLRA No. 98 (May 13, 1986)

Environmental Protection Agency and American Federation of Government Employees, AFL-CIO, Case Nos. 3-CA-2767, 3-CA-2803 and 3-CA-2825

21 FLRA No. 99 (May 14, 1986)

U.S. Naval Supply Center, San Diego, California and American Federation of Government Employees, Local 1399, AFL-CIO, Case Nos. 8-CA-50008 and 8-CA-50064

21 FLRA No. 100 (May 14, 1986)

Aberdeen Proving Ground, Department of the Army and International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, Case No. 3-CA-20077

ARBITRATION CASES

21 FLRA No. 94 (May 12, 1986)

Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region (Carey, Arbitrator), Case No. 0-AR-1005

21 FLRA No. 97 (May 12, 1986)

American Federation of Government Employees, Local 1568 and U.S. Department of Housing and Urban Development (Dallas, Arbitrator), Case No. 0-AR-919

Y 3.F 31/21-3:

Federal Labor Relations Authority

21 FLRA No. 94

Overseas Federation of Teachers and Department of Defense Dependents Schools, Mediterranean Region (Carey, Arbitrator), Case No. 0-AR-1005 (Decided May 12, 1986), 1986)

DIGEST HEADINGS

	STATUTE
1000 ARBITRATION	
1600 Grounds for Review	7102
1601 Award Conflicts with Applicable Law	7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Modified
    Contrary to § 7102 of the Statute
    Contrary to 5 U.S.C. § 7211
  Grievance
    Activity Filed
Employees's Reserved Rights
    Right to Form, Join or Assist Any Labor Organization (§ 7102)
      Right to Communicate Information about Working Conditions
    Right to Petition Congress [5 U.S.C. § 7211]
Exceptions Asserted in Appeal
    Award Contrary to the First Amendment of the U.S. Constitution
    Award Contrary to the Statute (§ 7102)
    Award Contrary to 5 U.S.C. §§ 2302(b), 7211
Remedy
    Use Grievance Procedure instead of Appealing to Congress
      and Others

DIGEST NOTES

The issue before the arbitrator was whether the union violated the parties' collective bargaining agreement when it used and encouraged unit members to use other than the contractual grievance procedure to seek redress from the activity in matters covered by the grievance procedure. The grievance concerned management's decision to place a teacher on enforced leave without pay instead of reassigning her to another teaching location following the Spanish government barring her from her teaching

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location on a naval base in Spain. The union had written several letters to the Director of Department of Defense Dependents Schools, the President of the United States and members of Congress seeking assistance on management's decision not to reassign a teacher. Also the union urged unit employees to send similar appeals to such persons. The arbitrator found that the union violated the spirit and the intent of the parties' agreement by not resolving the matter through the grievance procedure and ordered the Union to cease and desist from such conduct.

In its exception, the union argued that the award was contrary to the First Amendment of the U.S Constitution, 5 U.S.C. § 2302(b), § 7211 and § 7102 of the Statute. Under 5 U.S.C. § 7211 provides that the right of Federal employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee thereof, may not be interfered with or denied. Similarly, § 7102 provides for the protection of certain rights of Federal employees, including the right "to present the views of the labor organization to ". . . officials of the executive branch of the Government, and the Congress . . ."

The Authority held that the conduct of the union found by the arbitrator to have violated the spirit and intent of the parties' agreement was conduct protected by both § 7102 and 5 U.S.C. § 7211. Consequently, the Authority found that portion of the award deficient as contrary to section 7102 and 5 U.S.C. § 7211 and modified the award.

21 FLRA No. 95

NTEU and IRS. Case No. 0-NG-1111 (Decided May 12, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS

2000 NEGOTIABILITY
    2011 Conditions of Employment

STATUTE

7103(a)(14)
7105(a)(2)(E)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
      Labor Relations Activity May Qualify as "Official Business"
  Conditions for Review
    Proposal Alleged to be Inconsistent with Federal Law
      5 U.S.C. §§ 5701 *et seq*. [Travel Expense Act]
    Proposal Alleged to be Inconsistent with Government-wide Regulation
      41 C.F.R. Part 101-7 [Federal Travel Regulations]

DIGEST NOTES

Proposals are negotiable that seek payment of travel and per diem expenses incurred while on official time. The proposals concern conditions of employment which is within the agency's administrative discretion, and are not inconsistent with the Travel Expense Act, 5 U.S.C. §§ 5701 *et seq*. or Federal Travel Regulations.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

21 FLRA No. 95

NFFE and IRS, Case No. 0-NG-1119 (Decided May 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS

2000 NEGOTIABILITY
2011 Conditions of Employment

SECTIONS

7103(a)(14)
7105(a)(2)(E)

SUBJECT MATTER INDEX ENTRIES

Negotiability
Conditions of Employment
Travel and Per Diem
Labor Relations Activity may Qualify as "Official Business"
Conditions [illegible]
Proposal Alleged to be Inconsistent with Federal Law
5 U.S.C. §§ 5701 et seq. (Travel Expense Act)
Proposal Alleged to be Inconsistent with Government-wide Regulation
41 C.F.R. Part 101-7 (Federal Travel Regulations)

DIGEST NOTES

Proposals are negotiable that seek payment of travel and per diem expenses incurred while on official time. The proposals concern conditions of employment which is within the agency's administrative discretion, and are not inconsistent with the Travel Expense Act, 5 U.S.C. §§ 5701 et seq. or Federal Travel Regulations.

Federal
Labor Relations
Authority

21 FLRA No. 96

U.S. Nuclear Regulatory Commission and NTEU, Case No. 3-CA-40346 (Decided April 22, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7114(a)(2)(A)
4500 Refusal to Negotiate	7116(a)(1), (5) and (8)
4800 Otherwise Refuse to Comply with Statute	7118

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - § 7114(a)(2)(A) not a basis for obligation for bargaining
    - Otherwise Refuse to Comply with the Statute
      - § 7114(a)(2)(A)
  - Formal Discussions
    - Union's Representation Rights
    - Waiver of Union's Representation Right

DIGEST NOTES

A union's right under section 7114(a)(2)(A) to be represented at formal discussions means more than merely to be present; it also means the right to comment, speak and to make statements. Of course, this does not entitle a union representative to take charge of, usurp, or disrupt the meeting. Comments by a union representative must be governed by a rule of reasonableness, which requires that there be respect for orderly procedures and that the comments be related to the subject matter addressed by the agency representative(s) at the meeting. In applying such rule in the future, the Authority will consider the purpose of the meeting conducted by the agency representative(s) and all of the surrounding circumstances in determining the extent of a union representative's right to participate in any formal discussion.

When the agency prevented the union representative from speaking at the formal discussion, the Respondent violated § 7116 (a)(1) and (8). The agency conducted a meeting, conceded by the

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parties to be a formal discussion under section 7114(a)(2)(A), concerning a planned reorganization of one of its offices which involved bargaining unit employees. During the meeting, a union representative was interrupted by agency management when he attempted to comment on why certain employees had zeros place beside their names in a staffing plan. He was also interrupted when he attempted to explain to employees at the meeting how they should route their comments and suggestions to the union.

The Authority found that the union had not waived it's right to have an opportunity to be represented at formal discussions due when it negotiated a provision in the parties' collective bargaining agreement concerning formal discussions. Such a statutory right must be consciously yielded before the Authority will defer to the parties' agreement.

The agency did not violate § 7116(a)(1) and (8) by conducting a formal discussion with unit employees at which the union was not represented. The exclusive representative had been notified of the meeting but chose not to attend

A violation of § 7114(a)(2)(A) concerning formal discussions does not itself give rise to an obligation to negotiate and cannot, therefore, form the basis of a § 7116(a)(5) violation. (footnote 1)

Federal
Labor Relations
Authority

21 FLRA No. 97

AFGE, Local 1568 and HUD (Dallas, Arbitrator), Case No. 0-AR-919 (Decided May 12, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION	7122(a)
1600 Grounds for Review	
1601 Award Conflicts with Applicable Law	
1604 Grounds Applied in Private Sector	

SUBJECT MATTER INDEX ENTRIES

Arbitration
- Exceptions Asserted in Appeal
  - Arbitrator Exceeded his Authority
    - By Disregarding OPM Interpretation of FPM Letter 351-14
  - Award Contrary to 5 U.S.C. § 5262(c)(2)
- FPM and FPM Letters
  - OPM Oral and Written Interpretations Not Binding on Agencies
- No Basis for Review
  - Disagreement with Arbitrator's Reasoning and Conclusions
- Reduction-in-Force
  - Lateral Retreat Rights
- Remedy
  - Backpay
  - RIF Separation Reversed

5 C.F.R. 351.703 (1983)

DIGEST NOTES

The arbitrator considered whether the grievant had lateral retreat rights in a RIF to a position he had previously held before being promoted and subsequently reduced in grade. He concluded that the interpretation of an OPM official that retreat was always to a lower grade was wrong. Rather, the arbitrator found that under the plain language of FPM letter 351-14, the grievant had lateral retreat rights. As his award, the arbitrator reversed the grievant's RIF separation by ordering that the grievant be placed in the position to which he sought to retreat laterally and to be made whole.

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In its first exception, the agency contended that the arbitrator exceeded his authority in disregarding OPM's interpretation of FPM letter 351-14. The Authority concluded that OPM guidance set forth in interpretations of FPM letters is entitled to consideration but is not binding on agencies. Furthermore, 5 CFR part 351, the controlling regulation, does not prohibit reassignments to positions at the same grade level. Moreover FPM letter 351-14 indicates that lateral retreat is permissible in circumstances where the employee previously held the position and was promoted from it to a higher-graded position from which he was later reduced in grade.

In its second exception, the agency contended that the arbitrator's award was contrary to 5 U.S.C. § 5362(c)(2) which prohibits the use of an employee's retained grade for purposes of applying RIF procedures. The agency alleged that the arbitrator improperly considered the grievant's retained grade of GS-13 in applying the RIF procedures to him as a GS-12. The Authority held that the agency's argument constitutes nothing more than disagreement with the arbitrator's reasoning and conclusions which does not provide a basis for finding the award deficient.

Federal
Labor Relations
Authority

21 FLRA No. 98

EPA and AFGE, Case Nos.
3-CA-2767, 3-CA-2803 and
3-CA-2825 (Decided May 13,
1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (5)
6810 Remedies for Agency Violations	7118(a)(7)(B)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Remedies for Agency Violations
    Prospective Bargaining Order
      Could Result in Retroactive Remedial Action
      Flexibility of Parties
      Mandatory Retroactive Application of Agreed Upon Terms

DIGEST NOTES

A prospective bargaining order is neither inadequate nor inherently restrictive of the parties' rights to address the adverse effects on unit employees caused by the agency's refusal to negotiate procedures to be followed in implementing new performance standards and critical elements. The agency's refusal to negotiate had been found to be a violation of § 7116(a)(1) and (5) by the Authority in a previous case; the case was appealed; the U.S. Court of Appeals for the District of Columbia remanded the case to the Authority for a fuller explanation of its remedy. At the time of the violation, the agency was acting under a Congressional mandate requiring the issuance of revised performance standards by a specific date. It was conceded that a status quo ante remedy was unwarranted and the Authority found that by ordering retroactive effect to any bargain reached could disrupt the agency's operations. However, a prospective bargaining order allows the parties the flexibility to bargain freely with regard to how past actions may have affected any given employee. Bargaining which explores such effects may itself reveal situations that call for retroactive remedial action, about which the parties are free to agree. The parties might be less reluctant and more expeditious in reaching an overall agreement if they retain the flexibility to determine

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which provisions will be given retroactive effect. Finally, where a remedy requires the parties to bargain, it is entirely possible that an impasse may occur during bargaining and the matter will be sent to FSIP. In that event, the FSIP, when considering impassed proposals, would properly consider a proposal for retroactive application.

Federal
Labor Relations
Authority

21 FLRA No. 99

U.S. Naval Supply Center, San Diego, Cal. and AFGE, Local 1399. Case Nos. 8-CA-50008 and 8-CA-50064 (Decided May 14, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (2)
4100 Interference, Restraint Coercion	7118(a)(7)
4200 Discrimination as to Conditions of Employment	

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Interference, restraint, Coercion
      Campaign of Harassment of Steward for his Protected Activity
    Discrimination as to Conditions of Employment
      Refusal to Remove Unjust AWOL Charge and Pay Backpay

DIGEST NOTES

The activity violated § 7116(a)(1) when it engaged in a campaign of harassment of the chief steward for participating in protected activity, the Judge held in a decision adopted by the Authority. The chief steward's second line supervisor threatened him by making statements to the effect that previously filed unfair labor practice charges were worthless and that there would be repercussions for filing such charges. Also a supervisor told the steward, at the direction of the second line supervisor, that the activity did not want him to transact union business.

The activity violated § 7116(a)(1) and (2) by refusing to remove an AWOL charge against the chief steward and to pay him for the time charged AWOL, the Judge held in a decision adopted by the Authority. The activity engaged in a campaign of harassment of the chief steward for his protected activity. In the incident that gave rise to this violation, the steward called his supervisor to request leave because a family member was ill who he had take to the doctor. His supervisor responded ". . . I don't want to hear it . . . . I'm giving you one hour to get here at work." His supervisor further stated that if the chief

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

steward did not like those instructions, to call the second line supervisor. The chief steward telephoned the second line supervisor, but he could not be reached. Then the steward called the commander of the naval supply center where he worked, whose statements the steward understood to be approval of the request for leave. Later the commander denied granting approval, although he admitted he could have been misunderstood. The activity charged the chief steward with three hours AWOL; then agreed to rescind the AWOL; never rescinded the AWOL; and refused to do so.

Federal Labor Relations Authority

21 FLRA No. 100

Aberdeen Proving Ground, Dep't of the Army and IAM, Local Lodge 2424, Case No. 3-CA-2077 (Decided May 14, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4500 Refusal to Negotiate	7116(a)(1), (2), (3), (5) and (8) 7117(a)(2) and (3) 7117(b) and (c) 7118

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Administrative Leave During Temporary Curtailment of Agency Operations
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Administrative Leave During Temporary Curtailment of Agency Operations
  - Procedure
    - Forums
      - Compelling Need Determinations
  - Remedy
    - Bargaining Order
      - Administrative Leave in Lieu of Forced Annual Leave

DIGEST NOTES

Compelling need determinations may be made in unfair labor practice proceedings when the agency raises compelling need as an affirmative defense. There is a substantial public benefit from unified processing of a "compelling need" allegation as part of the unfair labor practice case involving unilateral change. This procedure effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings. Moreover, whether an agency's change is found to be nonnegotiable because there is a compelling need for the agency regulation or negotiable because there is no compelling need for the regulation which prompted the change, the agency is not improperly adversely affected. Even if the Authority determines that the purposes and policies of the Statute are best effectuated by an order rescinding a unilateral change over which there was a duty to bargain, such a result would only deprive the agency of results of a unilateral change it should not have made without first bargaining.

The activity failed to sustain its burden of establishing a compelling need for its regulation barring negotiations over the granting of administrative leave in lieu of forced annual leave on the day following Thanksgiving when its operations would be curtailed. The granting of administrative leave to unit employees in connection with the temporary curtailment of agency operations is a negotiable matter affecting working conditions of unit employees. The compelling need for the regulation, the agency argued, was that it was essential to meet its objective in curtailing operations, which was to conserve energy. But the agency did not demonstrate how the granting of administrative leave to unit employees, rather than annual leave, in any way affects the activity's stated goal of energy conservation. Thus the Authority held that the activity violated § 7116(a)(1) and (5) when it refused to bargain concerning the union's proposal to grant employees administrative leave on the day after Thanksgiving, submitted in response to the activity's notice that operations would be curtailed on that date.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OVERSEAS FEDERATION
OF TEACHERS

Union

and

Case No. 0-AR-1005

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS,
MEDITERRANEAN REGION

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Thomas F. Carey filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed by the Activity and submitted to arbitration where the Arbitrator stated the issue as whether the Union violated the parties' collective bargaining agreement when it used and encouraged unit members to use other than the contractual grievance procedure to seek redress from the Activity in matters covered by the grievance procedure. In resolving the grievance, the Arbitrator in particular addressed an incident cited by the Activity as supporting its grievance. This incident involved the barring by the Spanish government of an overseas teacher from her teaching location on a naval base in Spain, and management's decision to place her on enforced leave without pay instead of reassigning her to another teaching location. The Arbitrator specifically noted evidence of several letters on union stationery from the local union president to the Director of Department of Defense Dependents Schools, to the President of the United States, and to several members of Congress seeking assistance on the decision of the Spanish government to bar the teacher from her place of employment and the decision of the Activity not to reassign her. The Arbitrator further noted evidence that the local union president in his representative capacity also urged unit members to send similar appeals to such persons. On the basis of this evidence, the Arbitrator determined that these actions of the Union in seeking assistance on management's decision not to reassign the teacher violated the spirit and intent of the collective bargaining agreement and to this extent he accordingly sustained the grievance. As a remedy the Arbitrator directed as follows:

> The Union is directed to inform its local Union leaders, in writing, of their contractual obligation to utilize the contractual grievance procedure for those contractual "matters relating to their employment which are within the control of the Employer" as specified and distinguished in the body of this Decision, and to further advise them to cease and desist from taking such identifiable contractual matters, which are grievable under the Agreement, to other forums before exhausting the various levels of these prescribed, agreed upon contractual procedures.

III. EXCEPTION

In its exception the Union contends that to the extent the award has sustained the grievance and has directed the Union to cease and desist from the actions found violative of the collective bargaining agreement, the award is contrary to the First Amendment of the U.S. Constitution, 5 U.S.C. SS 2302(b), 7211 and section 7102 of the Statute.

IV. ANALYSIS AND CONCLUSIONS

In 5 U.S.C. § 7211, the right of Federal employees to petition Congress is unequivocally protected. That section provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." Section 7102 of the Statute similarly provides for the protection of certain rights of Federal employees. Specifically, section 7102 pertinently provides:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities[.]

Moreover, the Authority has expressly ruled under section 7102 that the legitimate conduct of an employee, acting in a representative capacity, to publicize and communicate information on issues having a direct bearing on the working conditions of unit employees enjoys the protections of the Statute. Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut, 17 FLRA 696 (1985); compare United States Forces Korea/Eighth United States Army, 17 FLRA 718 (1985) (actions found to have exceeded the bounds of protected activity).

In this case the Authority finds that the conduct of the local union president found by the Arbitrator to have violated the spirit and intent of the parties' collective bargaining agreement was conduct protected by both section 7102 of the Statute and 5 U.S.C. § 7211. Thus, the Arbitrator's award by sustaining the grievance on the basis of such conduct and enforcing the parties' agreement to effectively direct that the Union cease and desist from such conduct constitutes restraint of and interference with protected employee rights.

Consequently, the Authority finds that this portion of the award is deficient as contrary to section 7102 of the Statute and 5 U.S.C. § 7211.*/

V. DECISION

Accordingly, for these reasons, the award is modified to strike that portion of the award sustaining the grievance and directing a remedy.

Issued, Washington, D.C., May 12, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary or appropriate for the Authority to address the Union's First Amendment contentions. Although the Union also contends that the award is contrary to 5 U.S.C. § 2302(b)(8), the exception provides no basis for finding the award deficient in this respect. The Union fails to establish in what manner the Arbitrator's award is contrary to section 2302(b)(8) which prohibits certain agency officials from taking specified actions against any employee as a reprisal for the disclosure of information under certain conditions.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and Case No. 0-NG-1111

INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of the following two proposals.

II. Proposals

Union Proposal 1

Article X Mid-Term Agreements, Section 3-A5 - Those receiving official time pursuant to (d) above will receive reasonable travel and per diem expenses to attend those negotiations.

Union Proposal 2

Article 6 Stewards, Section 2H - When a grievant, appellant or employee is authorized official time and expenses to travel to any of the above, one union representative will also receive time and expenses to travel as long as he/she is the designated representative in the matter.

(Only the underlined portion of the proposal is in dispute.)

III. Positions of the Parties

As explained by the Union, the proposals are not intended to conflict with any applicable law or regulation. The Union's position is that the proposal's "reasonable" standard allows for all relevant factors--case law, regulations and other appropriate factors--to be considered in determining what is or is not reasonable. Indeed, the Union states that the Agency could deny payment of travel expenses where reimbursement for a particular event is barred by law or regulation, where there is no nexus to government interests or when it is not in the best interest of the government.

The Agency contends that the proposal is not within the duty to bargain for the following reasons:

a. They do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law; and

b. they are inconsistent with Federal law or Government-wide regulation.

IV. Analysis

A. "Conditions of Employment"

The Agency involved in this case makes essentially the same "conditions of employment" argument made by the agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The Authority rejected that argument in Customs Service and it is rejected here for the same reasons set forth in that case.

Representation of employees in matters concerning their employment affects the working conditions of those employees. A proposal seeking payment of travel expenses incurred because of such representational activity clearly involves a condition of employment not excepted from the definition thereof.

The Travel Expense Act governs the general subject of payment of travel expenses for employees traveling on "official business"; it does not specifically address payment for travel engaged in while conducting labor-management activity. Thus, a proposal concerning such payment is not precluded as involving a matter specifically provided for by Federal statute so as to be excepted from the definition of conditions of employment.

B. Inconsistent with Federal law or Government-wide rules or regulations

The Agency contends, in essence, that under the Travel Expense Act, 5 U.S.C. §§ 5701, et seq. and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, a determination as to whether an employee is on "official business" is dependent on the particular facts involved in each individual situation. Consequently, such a determination is not a matter of unlimited discretion on the part of the Agency.

For reasons set forth in its decision in Customs Service, the Authority has found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether, and under what circumstances, travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business and, hence, to pay for resulting appropriate expenses from Federal funds. The exercise of that discretion is subject to the negotiation process. The Agency here makes no specific argument that the proposals do not meet the statutory and regulatory standards discussed in Customs Service. Moreover, as noted in the Union's Position, the proposals envision case by case determinations as to appropriateness of specific travel and expenses which are necessary and proper under law and governing regulation. Given these circumstances, and for the reasons expressed in Customs Service, the Agency's contention that the proposals are inconsistent with law and Government-wide regulations must be rejected.

V. Conclusion

Based on the foregoing analysis, the Authority finds that the proposals concern a condition of employment which is within the Agency's administrative discretion, and they are not inconsistent with law or Government-wide regulation. Therefore, they are within the duty to bargain.*/

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*/ In finding these proposals within the duty to bargain, the Authority makes no judgment as to their merits.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 1 and 2.

Issued, Washington, D.C., May 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NUCLEAR REGULATORY COMMISSION

Respondent

and Case No. 3-CA-40346

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the Respondent. The exceptions are limited to the Judge's finding that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by holding a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute on April 6, 1984, without permitting the Charging Party's designated representative an opportunity to participate in the discussion.[1] No exceptions were filed to the Judge's additional finding that the Respondent did not also violate the Statute by conducting a formal discussion with unit employees on April 5, 1984, because the Charging Party had been notified of the meeting but chose not to attend. In the absence of exceptions to this finding, the Authority adopts it without comment.

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[1] The Judge dismissed the section 7116(a)(5) aspect of this allegation, citing Department of Defense National Guard Bureau, Texas Adjutant Guard's Department, 149th TAC Fighter Group (ANG)(TAC), Kelly Air Force Base, 15 FLRA 529, 533 (1984), in which the Authority concluded that section 7114(a)(2)(A) of the Statute does not itself give rise to an obligation to negotiate and cannot, therefore, form the basis of a section 7116(a)(5) violation.

II. Background Facts

On April 6, 1984, representatives of the Respondent conducted what all parties concede was a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. The meeting was conducted by the Director of the Administration and Resource Control Staff, Francis P. Gillespie, and involved the employees of the Accident Evaluation Division. The subject matter of the meeting concerned a planned reorganization of the Office of Nuclear Research, of which the Accident Evaluation Division is a component. In addition to all of the employees in the Accident Evaluation Division, including the Division and Branch Chiefs, Labor Relations Specialist Theresa Spearman was in attendance on behalf of management and Martin Levy was in attendance as the designated union representative. Upon completing his prepared remarks, which included comments regarding why a zero was placed next to certain employees' names on the staffing plan previously supplied to employees in attendance, Gillespie asked for questions. None were forthcoming. Gillespie then advised the employees that any comments or suggestions they had should be routed through the National Treasury Employees Union (NTEU), the exclusive representative of the employees in attendance. Levy then rose, identified himself by name and NTEU position, and began to discuss the zeroes in the staffing plan. After being interrupted by Spearman several times while attempting to comment about the zeroes, Levy dropped the matter and attempted to explain to employees how they should route their comments and suggestions to the NTEU. He was again interrupted by Spearman who prevented him from explaining anything further to the employees other than that they should see their union steward.

III. Judge's Decision

In finding that the Respondent violated section 7116(a)(1) and (8) of the Statute when it effectively prevented Levy from speaking, thereby interfering with the Union's right to be represented at a formal discussion under section 7114(a)(2)(A) of the Statute, the Judge concluded that the statutory phrase "right to be represented" means the right to comment, speak and to make statements. He noted, however, that this right does not entitle a union to take charge of the proceedings. In this respect, the Judge found that Levy's comments were related to matters discussed either directly or indirectly by Director Gillespie.

IV. Positions of the Parties

The Respondent took the position in its exceptions that the NTEU representative had no right under section 7114(a)(2)(A) of the Statute to discuss how bargaining unit employees should communicate with the NTEU because such discussion constitutes internal union business. With respect to the Judge's finding that the NTEU representative was prevented from discussing the staffing plan, the Respondent contends that Spearman was merely attempting to prevent Levy from discussing matters beyond the scope of what had been addressed by Gillespie at the meeting. The Respondent also argued that its agent's conduct in preventing the NTEU representative from continuing was based on a legitimate interpretation of the parties' collective bargaining agreement, which includes language addressing NTEU's rights at a "formal discussion," and therefore involves only differing and arguable interpretations of their agreement with regard to formal discussions rather than an unfair labor practice.

In its opposition to the Respondent's exceptions, NTEU contends that the first two exceptions constitute mere disagreement with the Judge's findings that both matters which the NTEU representative was prevented from addressing at the meeting were related to matters commented on directly or indirectly by Gillespie. With respect to the Respondent's final exception, the NTEU contends that the applicability of the collective bargaining agreement was not at issue and is beyond the scope of the exceptions. Further, the NTEU argues that the cases relied on by the Respondent are not applicable because they involve management changes in working conditions alleged to be covered by a collective bargaining agreement rather than a violation of a specific statutory right.

V. Analysis

The Authority specifically adopts the Judge's conclusion and supporting rationale that the Respondent violated section 7116(a)(1) and (8) of the Statute by effectively preventing the NTEU representative, Martin Levy, from speaking at a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. Thus, as concluded by the Judge, the language in section 7114(a)(2)(A) of the Statute that the "exclusive representative . . . shall be given the opportunity to be represented" at a formal discussion means more than merely a right to be present. It also means that a union representative has a right to comment, speak and make statements. Of course, as noted by the Judge, this does not entitle a union representative to take charge of, usurp, or disrupt the meeting. Comments by a union representative must be governed by a rule of reasonableness, which requires that there be respect for orderly procedures and that the comments be related to the subject matter addressed by the agency representative(s) at the meeting. Further, in applying such a rule in future cases, the Authority will consider the purpose of the meeting conducted by the agency representative(s) and all of the surrounding circumstances in determining the extent of a union representative's right to participate in any formal discussion.

As noted above, the Respondent essentially contends in its first two exceptions that the subject matter of the NTEU representative's comments went beyond what should be permissible, while the NTEU argues in opposition to those exceptions that they constitute mere disagreement with the Judge's factual analysis. The Authority agrees with the NTEU that these two exceptions present no issue that the Judge did not consider and address in his Decision. In the Authority's view, such exceptions are without merit.

The Authority also concludes that the Respondent's final exception is without merit. Thus, the language contained in the parties' collective bargaining agreement concerning "formal discussions" does not constitute a clear and unmistakable waiver of the NTEU's section 7114(a)(2)(A) right to have an opportunity to be represented at a formal discussion. Such a statutory right must be consciously yielded before the Authority will defer to the parties' collective bargaining agreement.2/

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms these rulings. The Authority has considered the Judge's Decision, the Respondent's exceptions to the Judge's finding of violation, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions,

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2/ See, e.g., U.S. Customs Service, Region VIII, San Francisco, California, 18 FLRA No. 51 (1985).

and recommended Order. We therefore conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute by preventing the Charging Party's representative from speaking at the April 6, 1984 formal discussion, within the meaning of section 7114(a)(2)(A), thus failing to comply with its obligations under that provision. Noting that no exceptions were filed, we also conclude that the Respondent did not fail to comply with section 7114(a)(2)(A) of the Statute in violation of section 7116(a)(1), (5) and (8) with respect to the April 5, 1984 meeting conducted by the Respondent. Finally, we conclude that the Respondent did not violate section 7116(a)(5) with respect to the April 6, 1984 formal discussion. Accordingly, these aspects of the complaint shall be dismissed.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is ordered that the U.S. Nuclear Regulatory Commission shall:

1. Cease and desist from:

(a) Holding or conducting formal discussions within the meaning of section 7114(a)(2)(A) of the Statute with bargaining unit employees without permitting the exclusive bargaining representative, the National Treasury Employees Union, an opportunity to be represented at such formal discussions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an authorized official and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that the remaining allegations of the complaint in Case No. 3-CA-40346 be, and they hereby are, dismissed.

Issued, Washington, D.C., May 12, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT hold or conduct formal discussions within the meaning of section 7114(a)(2)(A) of the Statute with bargaining unit employees without permitting the exclusive bargaining representative, National Treasury Employees Union, an opportunity to be represented at such formal discussions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ______________ By: ________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111-18th Street, N.W., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[21 FLRA No. 96]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. NUCLEAR REGULATORY COMMISSION
Respondent

and — Case No. 3-CA-40346

NATIONAL TREASURY EMPLOYEES UNION
Charging Party

. . . .

Marvin L. Itzkowitz, Esquire
Dennis C. Dambly, Esquire
For the Respondent

Jim Thomas
For the Charging Party

Philip Boyer, Esquire
Bruce D. Rosenstein, Esquire
For the General Counsel
Federal Labor Relations Authority

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et seq.*, 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 *et seq.*

An unfair labor practice charge was filed on April 24, 1984 by National Treasury Employees Union (hereinafter called NTEU and the Union) alleging that the United States Nuclear Regulatory Commission (hereinafter called NRC and the Respondent) violated the Statute. Based upon the foregoing the General Counsel of the FLRA, by the Regional Director of Region 3, issued a Complaint and Notice of Hearing on July 27, 1984 alleging that NRC violated Sections 7116(a)(1), (5) and (8) of the Statute by holding two formal discussions within the meaning of Section 7114(a)(2)(A) of the Statute without, in one case, notifying the NTEU of the discussion and, in the other, without permitting the Union to participate in the discussion. Respondent filed a timely Answer denying it had violated the Statute.

A hearing was conducted before the undersigned in Washington, D.C. NRC, NTEU and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, to argue orally and to file post-hearing briefs. NRC and General Counsel of the FLRA argued orally and NRC filed a post hearing brief, which has been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein NTEU was the collective bargaining representative for a nationwide unit of NRC's professional and non-professional employees and WG employees, with certain exclusions, not here relevant. The employees that are the subject of this case are within the unit described above.

Prior to a reorganization that took place in April of 1984 the NRC Office of Nuclear Research was divided into six divisions, one of which was the Administration and Resource Control Staff,[1] headed by Director Francis P. Gillespie. Each division was in turn subdivided into branches. Gillespie was the chief administrative officer for the Office of Nuclear Research and his division included personnel, resource allocation and space allocation responsibilities.

At all times material NRC and NTEU were parties to a collective bargaining agreement covering the employees in the nationwide unit. Section 4.2 of the contract states that notice of formal discussions will be given to the NTEU chapter president or his designee. At NRC the Union has designated stewards in the various facilities to receive notices of formal discussions and, in the past, the practice had been to notify the stewards in each facility of formal discussions.[2]

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[1] After the reorganization the Administration and Resource Control Staff had its name changed to the Policy, Planning and Control Staff.

[2] In a communication to "NRC Office Directors and Regional Administrators" in March 1982, NTEU Chapter 208 President Jim Thomas advised, with respect to formal discussions, ". . . In most cases, verbal notice to the steward assigned to your area will be sufficient toward meeting this [Section 7114(a)(2) of the Statute] requirement."

In the Spring of 1984 Gillespie and his division were in the process of planning and coordinating a reorganization of the Office of Nuclear Research. Early in April, before meetings held on April 5 and 6, 1984, Gillespie sent notifications and detailed information to the affected employees and to the Union, concerning the reorganization of the Office of Nuclear Research.

All the employees in all the divisions, except the Administration and Resources Control Staff, were notified in writing that at scheduled times on April 6, 1984 each division would meet separately and Gillespie would explain the reorganization. The notice stated that "all personnel are requested to attend." Also Union Steward and Chapter Vice-President Rene Audette received reorganization charts and a list of all employees, their grades, if the employees would be "impacted" by the reorganization and, if a "0" is next to an employee's name, that the employee's position would not be filed if the position became vacant.

Gillespie, by the memoranda dated April 5, 1984 described above, advised 5 divisions within the Research Office of the April 6, 1984 meetings to discuss the reorganization. He had neglected to schedule such a meeting for his own Administration and Resource Control Staff because it had been intimately involved with the reorganization. Gillespie became aware of the oversight during the morning of April 5, 1984 and decided to have a meeting with his staff that morning to explain the organization. He told his secretary Betty Cianci and his two branch chiefs about the meeting and told Cianci to talk to Union Steward Rene Audette to see if he had any objection to such a meeting.

At about 9:45 AM, Cianci went to Audette's place of work with a package containing the staffing plan and related papers and advised him of Gillespie's oversight to notify his own staff and that Gillespie wanted to have a meeting with his staff at about 11:00 AM. Audette indicated that such a meeting was no problem and it could proceed.[3] Audette is not, professionally, assigned to Administration and Resource Control Staff.[4] Cianci then advised Gillespie that Audette had no objection to the meeting. Gillespie instructed Cianci to call the secretaries in the Administration and Resource Control Staff and have them tell the employees that there was to be a meeting at 11:00 AM in room 1133 of the Willstee Building concerning the reorganization and the material about the reorganization that had already been distributed. Some of the employees in the Administration and Resource Control Staff were located in the Willstee Building in Silver Spring, where the meeting was to be held, and others were located in other buildings somewhat nearby.

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[3] Audette's recollection is less clear and reliable than Cianci's. He does not recall being advised of their April 5 meeting, but does recall another April 5 meeting that was apparently held on April 6. Generally, I credit Cianci's recollection of the events in so far as notifying Audette of the April 5 meeting.

[4] The practice had been that at meetings the Union representative should not be assigned to the group involved in the meeting.

The meeting of the Administration and Resource Control Staff was held at about 11:00 AM in room 1133 of the Willstee Building. Present at the meeting was Gillespie, who chaired it, the two branch chiefs, and the section chiefs. About 20 of the approximately 22 employees in the staff attended. No NTEU representative was present at the meeting.

Although Respondent's witnesses testified that the meeting was "voluntary," there is no indication that the employees were told that it was voluntary and that they need not attend, rather, the record establishes that they were informed that there would be a meeting over which Gillespie would preside.

Gillespie chaired the April 5 meeting. He described the reorganization and stated that nobody on his staff would lose his job, although a couple would be physically moved from one nearby building to the Willstee Building. He also stated that the technical divisions would be reduced in number from five to four. Gillespie referred to the reorganization description that had been distributed to employees. Gillespie then asked if there were any questions. No questions were asked. Gillespie instructed the employees to transmit comments through the Union. The meeting took about 10 minutes.

One of the meetings held on April 6, 1984 involved the Accident Evaluation Division. Martin Levy attended this meeting at the NTEU representative. The meeting was held in room 1133, a conference room, of the Willstee Building. The employees were notified of this meeting by the memorandum to employees described above. The meeting started at about 12:45 PM. Present at the meeting were Gillespie, Accident Evaluation Division Chief Bassett, Labor Relations Specialist Theresa Spearman and two or three branch chiefs. About 30 or 40 employees in the bargaining unit were also present. There were virtually all the employees of the division. NTEU representative Martin Levy also attended. Prior to the meeting Levy had received from NRC a copy of the staffing plan for the reorganized office.

Gillespie chaired the meeting. He did not introduce Levy. Gillespie informed the employees of the reorganization and stated that there would be no adverse actions or any adverse effect upon employees, their grades or promotion potential. Gillespie, in referring to the staffing plan, a copy of which had been previously supplied to the employees, stated that a zero next to an employee's name didn't mean anything. He stated it was simply a bookkeeping method of providing that a position would not be filled once it was vacated. Gillespie finished his statement and then asked for questions. None were forthcoming.

Gillespie advised the employees that if they had any comments or suggestions they should route them through NTEU. Levy rose and identified himself by name and NTEU position. Levy began to discuss the zeros in the staffing plan. As soon as he began to speak, Levy was interrupted by Spearman who stated that full-time allotment was not a subject of the reorganization and Levy would not be permitted to speak about it. Levy stated that it was the first time NTEU and the employees had learned about it and Gillespie brought it up so it was a matter of the reorganization. Levy again tried to address this matter and was interrupted again by Spearman. She interrupted Levy five or six times as he attempted to address the zeros in the staffing pattern. Gillespie and the other management officials sat there and said nothing. Levy then dropped that matter and told the employees that there were quality groups in each division and they advised the Union as to bargaining positions. Again Spearman interrupted Levy about three times saying this was not something covered by the reorganization and prevented Levy from explaining the quality groups. Levy, because he was not permitted to discuss the two matters described above, finally just told the employees that those who have a problem should see the Union steward.[5]

Discussion and Conclusions of Law

Section 7114(a)(2)(A) of the Statute provides as follows:

> § 7114. Representation rights and duties
>
> . . . .
>
> (a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practice or other general condition of employment[.]

In the instant case it is clear that the April 5 and 6, 1984 meetings dealt with the reorganization of the Nuclear Research Office which involved the physical reassignment of employees from one facility to another. The reorganization involved and affected a "personnel policy or practice or other general condition of employment" within the meaning of Section 7114(a)(2)(A) of the Statute. Also, despite NRC's contention of the contrary, the two meetings were "discussions" within the meaning of Section 7114(a)(2)(A) of the Statute. Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group, Kelly Air Force Base, 15 FLRA No. 111 (1984). In this regard, it is further noted that at the conclusion of each meeting Gillespie invited questions from the employees present.

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[5] In setting forth this description of the April 6, 1984 meeting I credit the versions of Levy and the other employees who testified and I do not credit Spearman, Gillespie and the other NRC witnesses. I find Levy's recollections were precise and consistent with the surrounding circumstances. I find the NRC witnesses testimony was less reliable and precise.

It is concluded that both the April 5 and 6, 1984 discussions were "formal" within the meaning of Section 7114(a)(2)(A) of the Statute. The April 5, 1984 meeting was held in a conference room and two or three levels of supervisors were present, including Gillespie the Director of the staff, two branch chiefs and section chiefs. Further, although the employees did not receive advance written notification of the meeting, this was admittedly an oversight on NRC's part; Respondent had intended to hold a series of meetings to discuss the reorganization in each of the divisions and the April 5 meeting was to be one of this series of meetings. Although there was no "agenda" as such, when notified of the meeting the employees were told it was to discuss the reorganization. Thus there was in fact an agenda. This is especially so because, in advance of the meeting, the employees had received copies of the reorganization plan. Finally, although the meeting was supposedly voluntary, the employees when told about the meeting, were not told it was voluntary and that they need not attend. In the circumstances here present, when employees were told that there would be a meeting of the Administration and Resource Control Staff concerning the reorganization and chaired by the Director of the staff, such a meeting can hardly be deemed voluntary, unless the employees were specifically so informed, which was not the case herein. Further, substantially all the employees on the staff attended the meeting. In light of the foregoing, I conclude that the April 5 meeting was a formal discussion within the meaning of Section 7114(a)(2)(A) of the Statute. See United States Customs Service, Region VIII, San Francisco California, 18 FLRA No. 27 (1985), and the cases cited therein.

It is further concluded that the April 6, 1984, meeting was "formal" within Section 7114(a)(2)(A) of the Statute. In addition to the presence of all of the indicia present in the April 5 meeting discussed above, the employees of the Accident Evaluation Division were notified in advance, in writing, of the meeting and that it would concern the reorganization. Again the written announcement of the meeting did not state it was a voluntary meeting. Further in addition to Gillespie, present was Director of the Division of Accident Evaluation Sam Bassett, Labor Relations Specialist Spearman and two or three branch chiefs. In light of the foregoing it is concluded the April 6, 1984 meeting of the Accident Evaluation Division was a formal discussion within the meaning of Section 7114(a)(2)(A) of the Statute. See, United States Customs Service, Region VIII, San Francisco, California, supra, and the cases cited therein.

With respect to the April 5 meeting NRC notified Union Steward Audette of the meeting and NTEU chose not to attend. NRC fulfilled its obligations under Section 7114(a)(2)(A) of the Statute when it notified a Union representative of the meeting. General Counsel of the FLRA's argument that notice to Audette was not sufficient is rejected. Section 4.2 of the collective bargaining agreement provides that the Union can designate those to receive notice of formal meetings. The record establishes that, in writing and under past practice NTEU stewards were the appropriate persons to receive such notice of meetings. Accordingly, I find with respect to the April 5 meeting NRC did meet all its obligations under Section 7114(a)(2)(A) of the Statute and therefore it did not violate the Statute with respect to the April 5, 1984 meeting.

At the conclusion of the April 6 meeting of the Division of Accident Evaluation the NTEU Representative, Levy, who had received notice of the meeting, was effectively prevented by Spearman from speaking to the employees and commenting on the meaning and effect of the staffing plan and about the quality groups. These were both matters discussed, directly or in directly by Gillespie. Gillespie discussed the meaning of the "O" next to employees names on the staffing plan, one of the matters Levy attempted to address. Further Gillespie stated that employees should channel their comments to management through the NTEU. The quality groups are the means for the employees to communicate with NTEU about the local working conditions.

Insofar as Section 7114(a)(2)(A) of the Statute provides that a union should be represented at formal discussions, it means more than merely to be present, it also means the right to comment, speak and to make statements. I adopt the discussion and reasoning set forth in Department of the Treasury, Internal Revenue Service, Cleveland, Ohio District Office, OALJ 83-60 (1983). The FLRA has held that such union participation does not, however, entitle the Union to take charge of the proceedings. Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA 371 (1981). It is concluded, in light of the foregoing, NRC interfered with NTEU's rights to be represented at a formal discussion conducted on April 6, 1984 in the Division Accident Evaluation, when it effectively prevented Levy from speaking. In so doing NRC interfered with NTEU's rights under Section 7114(a)(2)(A) of the Statute "to be represented at a formal discussion." Accordingly, I conclude that Respondent violated Section 7116(a)(1) and (8) of the Statute,[6] and recommend that the Authority issue the following:

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[6] I conclude there was no violation of Section 7116(a)(5) of the Statute. Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANG)(TAC), Kelly Air Force Base, supra.

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, the Authority hereby orders that U.S. Nuclear Regulatory Commission shall:

1. Cease and desist from:

   (a) Holding or conducting formal discussions with bargaining unit employees without permitting the exclusive bargaining representative, the National Treasury Employees Union, to be represented at such formal discussions.

   (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Post as its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an authorized official and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

   (c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region 3, Federal Labor Relations Authority, 1111 18th Street, N.W., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order as to what steps have been taken to comply with this Order.

Samuel A Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: June 26, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT hold or conduct formal discussions with bargaining unit employees without permitting the exclusive bargaining representative, National Treasury Employees Union, to be represented at such formal discussions.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 3, whose address is: 1111-18th Street, N.W., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[21 FLRA No. 97]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1568

Union

and

Case No. 0-AR-919

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Sherman Dallas filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance before the Arbitrator involved the question of whether the grievant had lateral retreat rights in a reduction-in-force (RIF) situation to a position he had previously held. The grievant had been a GS-12 Community Planning and Development Specialist and had been promoted to Chief of Program Support, GS-13. The Agency conducted a RIF and the grievant was reassigned from the GS-13 position to a GS-12 Realty Specialist position. The Agency subsequently conducted a second RIF in which the grievant was separated from the Federal service. In the course of the second RIF, the grievant sought to retreat laterally from the GS-12

Realty Specialist position to his previous GS-12 position of Community Planning and Development Specialist. The Agency determined that retreat rights were only to lower-graded positions and that the grievant was not entitled to retreat laterally to his former GS-12 position. The Agency based its determination on a letter from an official in the Office of Personnel Management (OPM) to an Agency official in response to the Agency's request for an interpretation of Federal Personnel Manual (FPM) letter 351-14.[1] The Agency therefore denied the grievant's request.

The Arbitrator found that under the plain language of FPM letter 351-14 the grievant had lateral retreat rights. Expressing respect and "great deference" for OPM's role in the matter, the Arbitrator concluded that the interpretation of the OPM official that retreat was always to a lower grade was wrong. Accordingly, as his award, the Arbitrator sustained the grievance and ordered that the grievant be placed in the GS-12 position he sought and be made whole.

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[1] FPM letter 351-14 provides, in pertinent part:

> When an agency is unable to offer an employee who has been released from his or her competitive level a position at the same grade or rate through reassignment or bumping rights, the agency then determines whether the employee has RETREAT rights to a better offer of assignment.
>
> An employee has retreat rights ONLY to positions that are identical or essentially the same as positions he or she actually held in the past, and from which or through which the employee was subsequently promoted. An employee does not acquire retreat rights by merely being qualified for a position held by an employee in the same subgroup.
>
> * * * * * * *
>
> Retreat rights are almost always to positions at a lower grade. In order for an employee to have retreat rights to a position at his or her present grade, the employee must have formerly held a position at the present grade and have been promoted out of it to another position. In short, the employee must have held a position with a grade which is higher than his or her present grade.

III. FIRST EXCEPTION

A. Contentions

As its first exception, the Agency contends that the Arbitrator exceeded his authority in disregarding OPM's interpretation of FPM letter 351-14. In support of its contention, the Agency argues that the Merit Systems Protection Board has determined that OPM's interpretation of its RIF regulations is entitled to great deference[2] and that the Arbitrator erred in rejecting OPM's interpretation of FPM letter 351-14 and in giving greater weight to his own interpretation of that issuance.

B. Analysis and Conclusions

The question raised by the Agency's exception is whether the Arbitrator was obligated to accept the letter from the OPM official to the Agency as controlling the disposition of the case. The Authority has previously noted that OPM guidance set forth in FPM letters is merely that and not binding on Federal agencies. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2, slip op. at 4 n.3 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986). Similarly, the U.S. Court of Appeals for the District of Columbia Circuit has ruled that OPM advice and guidance is precisely that and not binding on agencies. Federal/Postal/Retiree Coalition v. Devine, 751 F.2d 1424, 1431 (D.C. Cir. 1985). Additionally, the Merit Systems Protection Board has indicated that OPM guidance set forth in the FPM may not serve to contravene requirements set forth in its published regulations and that oral instructions transmitted by OPM personnel to an agency do not constitute "regulations" governing agency actions in disposing of employee rights under 5 CFR part 351. Mallory v. Department of the Army, 3 MSPB 100, 103 (1980). The Authority therefore concludes that the OPM letter to the Agency in this case was an advisory opinion and that while it was entitled to consideration, it was without controlling effect in this matter.

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[2] McMahon v. Department of the Army, MSPB Docket No. SL03518210290 (June 7, 1984).

Furthermore, the regulations which appear to be controlling in the RIF involved in this case, 5 CFR part 351 (1983), do not prohibit lateral reassignments to positions at the same grade level. In that regard, 5 CFR § 351.703 (1983) provided for the reassignment of an employee to a position from or through which the employee had been promoted, or to an essentially identical position.3/ Moreover, although it is essentially interpretive guidance, FPM letter 351-14 expressly provides that "retreat rights are almost always to positions at a lower grade," i.e., not always to lower-graded positions; and further clearly indicates that retreat to a position at the same grade level is permissible in some limited circumstances, i.e., where the employee previously held the position and was promoted from it to a higher-graded position. Thus, while the letter from the OPM official relied upon by the Agency in denying the grievant lateral retreat rights warrants consideration, the Agency fails to establish how the Arbitrator erred in rejecting the advisory opinion of the OPM official and interpreting FPM letter 351-14 in accordance with the plain language of the issuance. The Authority therefore concludes that the Agency has failed to establish that the Arbitrator exceeded his authority or erred in this matter as alleged.

3/ The Authority notes that the most recent final regulations governing RIFs, 5 CFR part 351 (1986), promulgated by OPM also do not prohibit lateral reassignments or restrict retreat rights only to positions at lower grades. In that regard, the Authority further notes that the supplementary information published by OPM concerning these most recent regulations clearly indicates that an employee has retreat rights to positions at the same grade level which were previously held by the employee. 51 Fed. Reg. 318 (Jan. 3, 1986).

IV. SECOND EXCEPTION

A. Contention

In its second exception, the Agency essentially contends that the Arbitrator's award is contrary to 5 U.S.C. § 5362(c)(2), which prohibits the use of an employee's retained grade for purposes of applying RIF procedures. In support of this contention, the Agency argues that the Arbitrator improperly considered the grievant's retained grade of GS-13 in applying the RIF procedures.

B. Analysis and Conclusions

The Authority finds that the Agency has failed to establish that the Arbitrator improperly considered the grievant's retained grade in determining his entitlement to retreat to the GS-12 Community Planning and Development Specialist position. Rather, the Arbitrator's award is specifically founded on his interpretation of the express language of FPM letter 351-14 and his conclusion that the grievant was entitled to lateral reassignment to the position he had previously held and from which he had been promoted. It is clear that the thrust of the Agency's argument constitutes nothing more than disagreement with the Arbitrator's reasoning and conclusions based on the evidence before him. Consequently, the exception does not provide a basis for finding the award deficient. *See, e.g.*, *Federal Correctional Institution, Petersburg, Virginia and American Federation of Government Employees, Local 2052, Petersburg, Virginia*, 13 FLRA 108 (1983).

V. DECISION

Accordingly, for the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., May 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 98

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ENVIRONMENTAL PROTECTION AGENCY

Respondent

and

Case Nos. 3-CA-2767
3-CA-2303
3-CA-2825
(16 FLRA 602)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit "for a fuller explanation of its choice of remedy or for reconsideration of its decision."

II. History of the Case

A. The Authority's Decision

On November 30, 1984, the Authority issued its Decision and Order in Environmental Protection Agency, 16 FLRA 602, adopting the decision of its Administrative Law Judge that the Respondent had violated section 7116(a)(1) and (5) of the Statute by implementing procedures for the establishment of performance standards and critical elements of unit employee positions without notifying and bargaining in good faith with the Charging Party (the Union) over such procedures, and by failing and refusing to negotiate over ground rules for such negotiations or conditioning any meeting or negotiations on the submission by the Union of specific, substantive, written proposals concerning the performance standard-setting process.

To remedy the unfair labor practice found, the Judge had recommended that the Respondent be ordered to bargain over ground rules for negotiations and concerning procedures for the establishment of performance standards and critical elements of employee positions, and to give retroactive effect to any agreement reached. The Authority modified the Judge's recommended Order by deleting the requirement that retroactive effect be given to any agreement reached as a result of bargaining, stating that "it is the opinion of the Authority that a prospective bargaining order will fully remedy the violations found."

B. The Court's Opinion

On February 5, 1986, the Court issued its opinion in American Federation of Government Employees, AFL-CIO v. FLRA, No. 85-1057 (D.C. Cir. Feb. 5, 1986). The Court, acknowledging that the Authority has broad discretion to order remedies in unfair labor practice cases, and acknowledging that an explanation for its choice of remedy is not necessary in all cases, concluded that it could not discern from the Authority's decision in this case why the Judge's recommended remedial order had been modified. The Court thus remanded the case.

III. Reconsideration on Remand

A. The Judge's Decision

The Respondent pointed out in its brief to the Judge that it had taken the action here in question in response to a Congressional mandate contained in 5 U.S.C. § 4302, and implementing regulations published by the Office of Personnel Management, which required the agency to issue revised performance standards by a specific date. In view of this Congressional mandate, the General Counsel's brief to the Judge did not request a status quo ante remedy. The General Counsel also acknowledged that "overriding exigencies involved" would make a status quo ante remedy inappropriate. Nonetheless, the General Counsel urged that the Judge should order retroactive application of agreed upon terms, rather than a prospective bargaining order, because prospective bargaining orders are inadequate in general and a prospective bargaining order here would necessarily limit the Union's opportunity to bargain about the effects of any of the changes already made. The Judge did not have before him specific allegations with regard to the effect that retroactive application of agreed upon terms might have upon the operations of the agency. The Judge granted the remedy requested by the General Counsel, stating without supplying any rationale that he agreed such an order would best effectuate the purposes and policies of the Statute.

B. Positions of the Parties

In its exceptions to the Judge's decision, the Respondent argued that to make retroactive changes in already established performance standards would have the effect of negating a Congressional mandate; that such a remedy would seriously interfere with the effectiveness of the agency's operations; and that, in any event, none of the changed performance standards had been applied yet to any of the employees represented by the Union.

In its opposition to the Respondent's exceptions, the Union again argued as it did before the Judge that the nature of the Respondent's violation justified the granting of a status quo ante remedy. It also argued alternatively that the retroactive remedy ordered by the Judge was acceptable, and took issue with the factual and legal arguments of the Respondent.

IV. Analysis

The Authority notes that the Respondent was acting under a Congressional mandate requiring the issuance of revised performance standards by a specific date, and that the General Counsel conceded that a return to the status quo ante was unwarranted. The Authority finds convincing the Respondent's arguments with regard to the potential disruption that ordering retroactive effect to any bargain reached would have on the agency's operations. Taking all the circumstances of this case into consideration, we adhere to our original determination that a prospective bargaining order will best effectuate the purposes and policies of the Statute.

A prospective bargaining order is neither inadequate nor inherently restrictive of the parties' rights to address the effects on unit employees of changes already made, as argued by the General Counsel. Rather, it allows the parties the flexibility to bargain freely with regard to how past actions may have affected any given employee. Bargaining which explores such effects may itself reveal situations that call for retroactive remedial action, about which the parties are free to agree. Indeed, the parties might be less reluctant and more expeditious in reaching an overall agreement if they retain the flexibility to determine which provisions will be given retroactive effect. Further, since the issuance of our original Decision in this case, the Authority has had occasion to deal generally with the question of whether to grant remedies that require retroactive application of bargaining terms. In Federal Aviation Administration, Washington, D.C., 19 FLRA No. 59 (1985), the Authority adopted the Judge's recommendation to deny such a requested remedy, stating that:

> Where, as here, the basic remedy requires the parties to engage in negotiations, it is entirely possible that an impasse may occur during bargaining and the matter will ultimately be sent to the Federal Service Impasses Panel (FSIP) for resolution. In that event, the FSIP, when considering impassed proposals, would properly consider a proposal for retroactive application and imposing such a requirement at the present time would deprive the FSIP of that option and thereby impair the flexibility the FSIP requires to execute its statutory function.

Moreover, the remedy ordered in this case is similar to the type of remedy the Authority has ordered for similar violations of the Statute. For example, in Internal Revenue Service (District, Region, National Office Units), 16 FLRA 904 (1984), the Authority adopted its Judge's recommended order refusing to require retroactive application of the parties' negotiation because "[b]y ordering retroactivity as part of the remedy I would essentially be imposing a term of a proposal on [the agency], a matter I am not disposed to do"; in Internal Revenue Service, 16 FLRA 845 (1984), the Authority rejected its Judge's recommended order requiring the agency to give retroactive effect to any agreement reached with the union in circumstances where the agency had unlawfully failed to give the union adequate prior notice of the implementation of its Taxpayer Compliance Measurement Program and refused to bargain as requested on the procedures to be utilized in implementing the program or concerning appropriate arrangements for affected employees; in Department of Health and Human Services, Washington, D.C., 16 FLRA 288 (1984), the Authority refused to order that any agreement reached between the parties as a result of further bargaining over reduction-in-force (RIF) procedures be applied on a retroactive basis, concluding that an order requiring the agency to bargain concerning negotiable RIF procedures would best effectuate the purposes and policies of the Statute; and in Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 9 FLRA 606, 608 n.3 (1982), aff'd, 732 F.2d 703 (9th Cir. 1984), the Authority refused to adopt the ALJ's recommended order to the extent that it would have required giving retroactive effect to whatever final agreement the parties would reach concerning starting and quitting times and lunch hours of newly-established tours of duty because "[s]uch an order would be inconsistent with the Authority's conclusion that a status quo ante remedy is unwarranted in the circumstances of this case, and, further, would be speculative."

The circumstances of this case are different from circumstances in which the Authority has ordered parties to give retroactive effect to the provisions of a collective bargaining agreement, a remedy which the Authority may, but is not required, to order. 5 U.S.C. § 7118(a)(7)(B) (1982). In this regard, the Authority has ordered a retroactive application remedy in a case where the agency has refused to bargain on a specific proposal which was substantially identical to a proposal previously found by the Authority to be within the duty to bargain. Veterans Administration Regional Office (Buffalo, New York), 10 FLRA 167 (1982). The Authority has also ordered an agency to incorporate into the parties' collective bargaining agreement the specific terms of an interest-arbitration award retroactively to the date the award became final and binding. U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151 (1984), aff'd, 775 F.2d 727 (6th Cir. 1985), in which the agency had unlawfully refused to implement the arbitration award to which no timely exceptions had been filed and which therefore became final and binding; the refusal to comply with the award constituted a failure to cooperate in impasse procedures.

Thus, the Authority has ordered such a remedy in cases involving violations of the Statute by refusing to bargain over specific proposals which had previously been held by the Authority to be within the duty to bargain or by refusing to implement the specific terms of an interest-arbitration award to which timely exceptions were not filed, rather than cases where specific proposals were not at issue, and where the Authority issued a prospective bargaining order to remedy the violation, as it did in this case.

V. Conclusion

The Authority is of the view that the rationale of the Federal Aviation Administration and Internal Revenue Service cases cited above applies equally to the circumstances of this case. We also conclude that to grant the requested remedy and thus require retroactive application of the parties' bargaining terms may unnecessarily disrupt or impair the efficiency and effectiveness of the agency's operations. Accordingly, we reaffirm our Decision and Order in Environmental Protection Agency, 16 FLRA 602 (1984).

Issued, Washington, D.C., May 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier, III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 99

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL SUPPLY CENTER
SAN DIEGO, CALIFORNIA

Respondent

and

Case Nos. 8-CA-50008
8-CA-50064

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1399, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the U.S. Naval Supply Center, San Diego, California (Respondent), had engaged in certain of the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent had not engaged in other alleged unfair labor practices and recommended that the complaint be dismissed with respect to such allegations. Thereafter, the Respondent filed exceptions to the Judge's Decision and the General Counsel filed an opposition to the Respondent's exceptions.*/

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*/ The Respondent excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Naval Supply Center, San Diego, California shall:

1. Cease and desist from:

(a) Interfering with the protected rights of Chief Steward Larry Cooper, or any other employee, by making threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussions for filing such charges.

(b) Interfering with the right to engage in activity protected by the Statute by telling Chief Steward Larry Cooper, or any other employee, that union activities are not desired at this Activity.

(c) Engaging in a campaign of harassment against Chief Steward Larry Cooper, or any other employee, by, among other things, monitoring his activities and ridiculing him because of his involvement in union activities.

(d) Discriminating against Chief Steward Larry Cooper, or any other employee, because of his participation in protected activity, by charging him with AWOL.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Pay Chief Steward Larry Cooper for the time he was charged with AWOL on November 19, 1984, and remove the notation of the AWOL charge from his record.

(b) Post at its facilities copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that Paragraph 9 of the consolidated complaint pertaining to statements made during separate telephone incidents be, and it hereby is, dismissed.

Issued, Washington, D.C., May 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with the protected rights of Chief Steward Larry Cooper, or any other employee, by making threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussions for filing such charges.

WE WILL NOT interfere with the right to engage in activity protected by the Statute by telling Chief Steward Larry Cooper, or any other employee, that union activities are not desired at this Activity.

WE WILL NOT engage in a campaign of harassment against Chief Steward Larry Cooper, or any other employee, by, among other things, monitoring his activities and ridiculing him, because of his involvement in Union activities.

WE WILL NOT discriminate against Chief Steward, Larry Cooper, or any other employee, because of their participation in protected activity by charging them with AWOL.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL pay Chief Steward Larry Cooper for the time he was charged with AWOL on November 19, 1984, and remove the notation of the AWOL charge from his record.

____
(Agency or Activity)

Dated:______________ By:______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

[21 FLRA No. 99]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. NAVAL SUPPLY CENTER
SAN DIEGO, CALIFORNIA
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1399, AFL-CIO
Charging Party

. . . .

Case Nos. 8-CA-50008
8-CA-50064

Hans Von Nostitz, Esquire
Alfred M. Jackson, Esquire
For the Respondent

Jonathan S. Levine, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,1/ and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns the Chief Steward having been charged three hours AWOL, alleged to have been in violation of § 16(a)(2) of the Statute, and various acts of alleged harassment against the Chief Steward,

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(2) will be referred to, simply, as "§ 16(a)(2)".

asserted to have been in violation of § 16(a)(1) of the Statute. Case No. 8-CA-50008 was initiated by a charge filed on October 4, 1984 (G.C. Exh. 1(a)). A Complaint in Case No. 8-CA-50008 issued on December 31, 1984 (G.C. Exh. 1(b)) and hearing was set for February 11, 1985. By Order dated February 7, 1985 (G.C. Exh. 1(e)) the hearing in Case No. 8-CA-50008 was rescheduled for April 16, 1985. Case No. 8-CA-50064 was initiated by a charge filed on November 15, 1984 (G.C. Exh. 1(f)). On March 29, 1985, an Order Consolidating Case Nos. 8-CA-50008 and 8-CA-50064, the Consolidated Amended Complaint and Amended Notice of Hearing issued (G.C. Exh. 1(g)); hearing was set for June 10, 1985; and pursuant thereto a hearing was duly held on June 10, 1985, in San Diego, California, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, July 10, 1985, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of the General Counsel, to which the other parties did not object, for good cause shown, to August 8, 1985, and each party has timely mailed an excellent brief, received on, or before August 8, 1985, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. Larry Cooper has been employed as a warehouse worker at the Naval Supply Center since 1971 or 1972 (Tr. 14, 31). He has been Chief Steward for American Federation of Government Employees, Local 1399, AFL-CIO (hereinafter referred to as the "Union") for the last three years for a unit of about 1,500 employees (Tr. 14, 15) and prior to that had been a steward for about three and one-half years (Tr. 14). In his capacity as a Union official, Mr. Cooper has filed or been involved with over a hundred grievances, has filed or has been involved with the processing of unfair labor practice charges, and has attended labor-management meetings (Tr. 14-15, 17, 116, 156; G.C. Exhs. 2 and 3). Mr. Cooper has carried out his job duties in an exemplary manner, (G.C. Exhs. 4, 5, 6, 9).

2. In July, 1984, Mr. Cooper was reassigned from the Material Accuracy Team where his first line supervisor was a Mr. Mantonana to the first line supervision of Mr. Kenneth Adams (Tr. 20, 24-25, 139). At that time, Mr. Adams was responsible for Buildings 68, 69, 70 and 3322 and his office was in Building 3322 (Tr. 136). Prior to becoming a supervisor in about 1980 (Tr. 149), Mr. Adams had been an active member of the Union, served as 1st Vice-President, 2nd Vice-President, and had been a member of the Union's negotiating team when the still applicable Agreement was negotiated in 1977 (Tr. 149, Res. Exh. 2). Mr. Cooper's second line supervisor was Mr. Charles Lawson, General Foreman (Tr. 172).

3. In July, Mr. Cooper worked in Buildings 68 and 69. There was no telephone in Buildings 68, 69 or 70 but there was a telephone in Building 3322, in Mr. Adams' office, which was available to employees (Tr. 137, 138). In fact, there was extension on the dock outside Mr. Adams' office, to which, although locked, employees also had ready access as the key was readily available whether Mr. Adams was present or not (Tr. 137-138). During July, 1984, Mr. Adams testified that while in Building 70 he saw Mr. Cooper at Building 66, which is directly in front of building 70, sitting at a desk in Building 66 using the telephone (Tr. 140, 160). Mr. Adams stated that this was during working hours (Tr. 140); that Mr. Cooper was out of his work area and was supposed to be working in Building 68 (Tr. 160); and that Mr. Cooper had not requested permission to leave the work area before using the telephone (Tr. 140). Mr. Adams stated that he talked to Mr. Cooper and told him he must get permission to leave the work area to use the telephone (Tr. 140). Mr. Adams further stated that he had previously informed all of his employees, including Mr. Cooper, at daily stand-up safety meetings of the telephone policy, namely that if they were to leave their work site to use a telephone they must get prior approval from him to leave the work area (Tr. 138, 139, 140).

Mr. Cooper testified that he had gone to Buildings 64 and 65 to use the telephone (Tr. 26) and that Mr. Adams told him he had received information that he was in another area using the telephone; that he, Cooper, had responded that he had checked with people in the area and had permission to use their telephone and he had done so on his own time; that Adams said ". . . he didn't want me using no phone even on my own time." (Tr. 27). I do not credit Mr. Cooper's testimony in this regard and, instead, credit Mr. Adams' testimony which I found far more convincing. First, Mr. Cooper concedes that he had left his work area during working hours without either the knowledge or permission of Mr. Adams and, while he may have had permission from other people to use their telephone, his response, did not address Mr. Adams' concern, namely, leaving the work site without permission, and, although he asserted he was on his "own time", the record does not show that Mr. Cooper left his work site during any general break period, such as lunch break, when Mr. Adams would have known he was not on duty time. To the contrary, Mr. Adams credibly testified he saw Mr. Cooper using the telephone in Building 66 during working hours. Second, if Mr. Cooper, as Chief Steward, had in fact been denied permission to use the telephone at any time, including his "own time", it is unrealistic that he would have dropped the matter when, as he stated, Mr. Adams made no response as to what "am I supposed to do." (Tr. 27). Third, as the record shows, Mr. Cooper not only knew a telephone was available in Mr. Adams' office but he made use of it. Moreover, the record shows that Mr. Cooper continued to use telephones in other buildings (Tr. 47).

4. In October, 1984, Mr. Cooper was standing using the telephone in Mr. Adams' office when Mr. Adams came in. Mr. Cooper stated that Mr. Adams picked the telephone up from his desk and ". . . slammed it down" on another desk that was adjacent (Tr. 100) and said, ". . . Cooper, get to work" (Tr. 101) and as he, Cooper, was getting ready to hang up said, "Don't -- don't stand over my desk." (Tr. 101).

Mr. Adams testified that when he came into his office Mr. Cooper was using the telephone facing the desk; that when he, Adams, came in Cooper turned his back to him; that he, Adams, asked Mr. Cooper to move the telephone and sit in the chair; that Cooper ignored his request and that he, Adams, got up and moved the telephone from the desk to the credenza and again asked Copper to sit down; that Cooper did not sit down but continued to talk for two to five minutes; and when Cooper hung up, he, Adams, told Cooper it was not courteous to stand with your posterior to someone else's face (Tr. 142). Again, I found Mr. Adams' testimony more convincing than Mr. Cooper's and, therefore, I credit Mr. Adams' testimony; but under neither version do I find any conduct that would be violative of the Statute.

5. In September, 1984, Mr. Cooper was temporarily detailed to work for Mr. Albert Taylor in Building 64 for not longer than 30 days; however, Mr. Adams continued to keep his time (Tr. 157-158) and Mr. Lawson remained his second line supervisor. Mr. Cooper testified that on September 24, he was in Building 64 on a forklift, looking for Mr. Taylor to let him know he was leaving for a previously scheduled labor-management meeting. Mr. Lawson entered the building from the opposite direction on his bicycle, rode up to Cooper's forklift and said "those ULPs don't mean s--t and we are going to put these size 13s up your ass" (Tr. 33, 77, 78, 79). Mr. Cooper said he hit the brake and asked, "What did you say?" but that Mr. Lawson just smiled and rode off (Tr. 33). Mr. Cooper stated that he proceeded and his former supervisor, Mr. Monty Mantonana, came around the corner and he asked him if he had been Mr. Taylor and Mr. Mantonana told him that Mr. Taylor was out in the yard. Mr. Cooper parked his forklift and started walking out of Building 64 towards Mr. Taylor, whom he now saw, when Mr. Lawson came up from behind him on his bicycle and said something he couldn't understand and continued past Mr. Cooper to Mr. Taylor; that he could see Taylor and Lawson talking but could not hear them. Mr. Lawson left and came back towards Mr. Cooper and repeated his earlier statement (those ULPs don't mean s--t and we are going to put these size 13s up your ass). When Mr. Cooper got to Mr. Taylor, Mr. Taylor told him that, ". .. Lawson had been at him again, after asking him questions . . . about my meetings and he he said he had told Mr. Lawson the fact that I was doing a good job and that I had previously had the meeting and so on scheduled, he knew about it, and there was no reason . . . that he shouldn't release me . . . ." (Tr. 35). Mr. Cooper said that he contacted the labor relations office and Commander Palanuk about what Mr. Lawson had said. (Tr. 35).

Mr. Lawson testified that he had never addressed Mr. Cooper while riding his bicycle (Tr. 179); never made any remark to Mr. Cooper (Tr. 179); and definitely did not say, "Your ULPs dont't mean s--t, and I'm going to put a size 13 brogan up your ass" (Tr. 180). Mr. Taylor is no longer working at the facility (Tr. 43) and did not testify.

6. Mr. Cooper testified that on September 26, 1984, he had gone to the garage but could not find his forklift and then went to Building 64, arriving at 7:00 or 7:02, to see if it were there. He met another

employee, Berwin Jackson, who was on a forklift, and they stopped and chatted briefly. Mr. Lawson was in front of Building 64 and was watching him. Lawson called Mr. Taylor out, "Taylor, Taylor, get out here" and when Mr. Taylor came out, Lawson said, "Aren't your people supposed to be working? Why isn't he working?" (Tr. 37) and Mr. Taylor looked at him and looked at his watch and said, "Man, they just started. He just got here" and then, "Look . . . you keep me out of this. I don't want to be involved in it", threw up his hands and went back into the building. (Tr. 37). Mr. Cooper stated that he went on to talk to Mr. Taylor about a meeting he had scheduled and Mr. Taylor told him that Mr. Lawson had directed him to cancel all of my meetings, that this was what Mr. Evans [Deputy Department Director] and the Command wanted (Tr. 37). Mr. Taylor told him that Mr. Lawson had said he was under a lot of pressure from Mr. Evans to keep Cooper on the job (Tr. 37-38). Mr. Cooper stated that he told Mr. Taylor, ". . . I work for you. I do my job . . . that's between you and me . . . why do they have to interfere?" and Mr. Taylor had said, "Well, they don't want you doing, you know, union business . . . They want you to do something wrong . . . And what the problem is you do good work." (Tr. 38). Mr. Cooper testified that on October 1, 1984, Mr. Taylor told him that Lieutenant Pemberton had told him he wanted Taylor to report to him every time Cooper had to go somewhere. (Tr. 40).

Mr. Cooper testified that on October 12, 1984, Mr. Taylor told him that Mr. Lawson had called Mr. Evans concerning a meeting Cooper had scheduled and Evans had told Lawson to have it cancelled, so Taylor said, "Larry, your meeting . . . is cancelled." (Tr. 42). Mr. Cooper further stated that Mr. Taylor told him that Mr. Lawson had called a meeting of all supervisors and that Cooper was the subject of the meeting; that Mr. Lawson had told the supervisors, ". . . Cooper is really f------ Mr. Evans and the Command" and when a supervisor asked what he meant, Mr. Lawson had replied, "You know what I mean with that, you know, dam (sic), dam (sic) union, and those damned people with those, you know, ULP's . . . ." (Tr. 43).

Mr. Lawson testified that he directed his foreman when ". . . we're in a backlog mode to hold people back sometime if you can't let then go because of the backlog. But if you can't let then go, be sure to let them - - set a time that they can go." (Tr. 184). Mr. Lawson did not recall any specific time he might have directed Mr. Taylor to cancel out a meeting Mr. Cooper had scheduled (Tr. 184-185). Mr. Lawson denied any instruction from upper level of management regarding Mr. Cooper (Tr. 194). Although Mr. Cooper testified that he was prevented from going off on official time on October 12 (Tr. 88), Respondent Exhibit 3, a Labor Distribution record kept by Mr. Adams, shows that on October 12, 1984, Mr. Cooper was on official time for union business for 6.5 hours (Res. Exh. 3, Tr. 144-145).

7. Later in October, Mr. Taylor told Mr. Cooper that he was being reassigned back to Mr. Adams (Tr. 46). Mr. Cooper had an EEO meeting already scheduled for that day and called Ms. Deborah Voss, EEO

Specialist, and told her that he had been reassigned to work for Mr. Adams and anticipated that there might be a problem and asked her to call Mr. Adams. Mr. Cooper said that she told him, "Larry, don't worry about it . . . you just tell him that you have your meeting and its already been scheduled and approved" (Tr. 146). Mr. Cooper then went to Mr. Adams' office to report for work and Mr. Adams told him to go to Building 68 (Tr. 46). Mr. Cooper then told Adams he had an EEO meeting scheduled and Adams told him he didn't want to talk about it and when Cooper asked when they could talk about it, Adams said, "I'll let you know." (Tr. 46-47). Mr. Cooper stated that he went to Mr. Taylor's office in Building 65 and called Ms. Voss again and she told him, ". . . go back and don't worry about it." (Tr. 47). Mr. Cooper said he then returned to Mr. Adams' office and heard him talking to someone on the telephone. Mr. Cooper stated that he heard Mr. Adams say, ". . . Yes, I know I'm supposed to keep Cooper on the job. I know, I know, I'm trying . . . ." . . . . (Tr. 47). Mr. Adams was not asked about this incident.

8. From July through October, 1984, Lawson and another foreman, Charles Richardson, who worked on the other side of the compound in Building 322 and who supervised no employees where Mr. Cooper was working, repeatedly approached Cooper at work. Lawson would stand, arms akimbo, and just stare (Tr. 28, 38), and occasionally made remarks such as "You'd better be working" or "We're going to put you in line (Tr. 28, 30, 45). Mr. Richardson, who did not testify, never said anything but would come to where Mr. Cooper was working, sometimes 3 or 4 times a day, and just stare at Mr. Cooper, look at his watch and smirk or laugh (Tr. 29, 30, 39, 44, 85, 86).

9. Mr. Cooper testified that in April, 1985, his previous supervisor, Mr. Yarborough, told him he should talk to Mr. Lawson, that Lawson was just doing what he was told and that he, Lawson, wanted to talk to Cooper (Tr. 57). Mr. Cooper at that time was working for Commander Palanuk and Mr. Lawson approached him in Building 322. Mr. Cooper stated that Tommie Williams and Deanna Kelly were present when Mr. Lawson came in and said he wanted to talk to him (Tr. 57); that Mr. Lawson said, I've got a truck" (Tr. 57) and we got in the truck and rode to the boat lock on the Naval Station; that, when they arrived at the boat lock, Mr. Lawson said, ". . . Larry . . . I want to let . . . I'd like to bury, you know, what happened between us . . . As far as I'm concerned . . . you can do your union business or whatever you need to do . . . I am not going to be the scapegoat no more . . . Mr. Evans can say anything they want, but I'm not going to do it no more." (Tr. 58). Mr. Cooper was too dumbfounded to respond (Tr. 58).

Respondent's attorney did not ask Mr. Lawson about this alleged conversation, or the unusual circumstances in which it occurred; but, at the conclusion of the examination of Mr. Lawson, I asked if, in April, 1985, he had had a conversation with Mr. Cooper which was preceded by his getting into Lawson's pick-up truck and driving to the boat lock and Mr. Lawson responded, "I can't recall that." (Tr. 196). Mr. Lawson further stated that he did not recall any conversation with Mr. Cooper in April, 1985, concerning his performance of union duties (Tr. 196). Mr. Yarborough did not testify nor did Mr. Williams or Ms. Kelly, and I do not find Mr. Lawson's, "I can't recall" a denial or refutation of the testimony of Mr. Cooper of an extraordinary statement by Mr. Lawson made under most unusual circumstances and, accordingly, I fully credit the testimony of Mr. Cooper. Mr. Lawson's statement to Mr. Cooper directly relates to the credibility of Mr. Lawson's testimony concerning all of his conduct and actions and, accordingly, I fully credit Mr. Cooper's testimony in all respects with regard to statements and actions of Mr. Lawson and Mr. Richardson.

10. At about 7:00 a.m. on Monday, November 19, 1984, Mr. Cooper called Mr. Adams to request leave. Mr. Cooper testified that his child had suddenly became ill and the doctor had told him to bring her in; that he had called Mr. Adams and told him he had an emergency whereby he had an illness in his immediate family and needed . . . to take them to . . . the doctor's"; but before he could explain further Mr. Adams said he ". . . didn't want to hear it . . . I'm giving you one hour to get here at work." (Tr. 48). Mr. Cooper said he stated, "Well did you just hear what I said? I said I've got an emergency . . ." and that Mr. Adams said loudly, "I'm giving you one hour to get at work . . . If you don't like it, you can call Mr. Lawson and check with him." (Tr. 48). Mr. Adams testified that Mr. Cooper initially told him that he had some personal business that had arisen over the weekend (Tr. 146, 164-165) and he, Adams, told Cooper that the work backlog would not permit him to grant him leave to take care of his business; that he needed him on the job; and that he would have one hour to report (Tr. 146). Mr. Adams admitted that Mr. Cooper then said it was an emergency, but Adams told him he still had an hour to report and if he wished to take the matter any further, he could call the general foreman [Lawson]. Mr. Adams said he told Cooper that anything after one hour would be charged to AWOL (Tr. 146). I found Mr. Cooper's testimony far more convincing and plausible than Mr. Adams' version and therefore credit Mr. Cooper's testimony. In any event, Mr. Adams admitted that Mr. Cooper told him it was an emergency.

After talking to Mr. Adams, Mr. Cooper testified that he did call Mr. Lawson but his secretary, Pat, said Lawson wasn't there (Tr. 48-49, 84). Mr. Cooper stated that he believed he also asked Pat if Lieutenant Pemberton was there and he thought she said that he wasn't (Tr. 84). Mr. Cooper then called Commander Palanuk. Mr. Cooper testified that he told Commander Palanuk what had happened with Adams and himself and that "He [Commander Palanuk] then, he asked me . . .'Well, Larry . . . Do you think you'll be off all day?'" and that he [Cooper] had responded, "No, Sir, I only take off whatever's necessary . . . I'm going to take them to the doctor and as soon as I . . . get that done . . . I'll be right in." (Tr. 49, 92). Mr. Cooper further testified that Commander Palanuk aid "Okay" (Tr. 92). Mr. Cooper reported in at 12:30 p.m.; filled out a leave slip and under "Remarks" wrote emergency leave "Approved by Commander Palanuk" (Tr. 49-50, 92). Mr. Cooper stated that he then called Ms. Candice Nutwell, in labor relations, and informed her what had happened (Tr. 50).

Commander Palanuk, Director of the Materials Department, testified that Mr. Cooper called him either before or shortly after 7:00 a.m.; that he appeared upset and when he asked what was the matter, Mr. Cooper told him ". . . he had asked his foreman for leave -- he had an emergency -- and his foreman had turned him down. And I asked him if he had tried to reach anyone else . . . He said he had tried and nobody was available, and that's why he had called me." (Tr. 113). Commander Palanuk said he thanked Mr. Cooper for the telephone call (Tr. 113) and after he had hung up, called Lieutenant Pemberton and asked if he was aware of the situation about Mr. Cooper and he said he was not and had not received any phone calls in his office and he had been there since early in the morning (Tr. 113). Commander Palanuk did not recall whether Mr. Cooper called him again when he reported in at 12:30 p.m., but conceded that he might have (Tr. 119). Later, Commander Palanuk said he learned that Mr. Cooper had submitted a leave request on which he indicated as approved by him (Palanuk) when Ms. Nutwell called and told him. Commander Palanuk testified,

> ". . . I was flabbergasted. I said . . . 'How could he construe his phone call to me as granting him leave?. . . .' She said, 'Well, did he call you?' and then I related the conversation . . . And then she said, 'Well, gee, maybe he did interpret that as --' I said, 'I'm not in the habit of granting leave, so I don't know how he did, but anything's possible.'" (Tr. 131).

Thereafter, on the next pay day, Mr. Cooper felt his paycheck was for less than he expected and called the payroll office and was told that he had got AWOL for November 19 (Tr. 51-52). Mr. Cooper immediately called Ms. Candice Nutwell in labor relations. Ms. Nutwell told Cooper she had talked with Mr. Adams about the AWOL and Mr. Cooper, testified that he said, "Candice, you knew that I was getting the AWOL. How come nobody didn't tell me?" (Tr. 52) and she responded, "It wasn't my responsibility to tell you, it was Adams, and if Adams didn't tell you . . . then he didn't do his responsibility . . . ." (Tr. 52). Mr. Cooper said he told Ms. Nutwell, "You know what happened . . . I even told you about it. I reported the incident to you the whole day of what happened . . . This is it . . . I have to do something . . . Things are just getting too reckless." (Tr. 52-53). Mr. Cooper stated that Ms. Nutwell asked him to ". . . just hold off . . ." and give her some time to see if she could get this squared away and he said he would. (Tr. 53).

Mr. Cooper stated that Ms. Nutwell called him back within the hour and told him she had just talked to Commander Palanuk who told her that he could perceive how Cooper believed he had approved his leave request (Tr. 53). Mr. Cooper said he replied, "Candice . . . what do you mean 'perceive'? . . . He approved my leave . . . Why would I come in . . . and thank him, and at the same time put in a leave slip . . . If he didn't approve my leave . . . I would have been talking to the XO (sic) or the

Captain. I could not come in." (Tr. 53). Mr. Cooper said that Ms. Nutwell again told him she would try to get the matter squared away (Tr. 53). Mr. Cooper stated that Ms. Nutwell called back a second time and told him, ". . . I talked to Commander Palanuk and we're going to go ahead and square it away" (Tr. 54). Mr. Cooper said he asked if he were going to get a check today and Ms. Nutwell said, "No, Larry, I'm sorry. You're going to have to wait for . . . the next pay period. That's the best we can do . . . ." (Tr. 54).

Nevertheless, the matter was never resolved (Tr. 54). Mr. Cooper testified that in December, 1984, Ms. Nutwell told him ". . . Larry, I really feel bad because . . . they told me they were going to go ahead and . . . get these things done and they haven't done anything yet." (Tr. 55). Mr. Cooper testified that in January or February, 1985, Ms. Nutwell called him and told him they wanted proof that he actually had an emergency when he requested leave on November 19, 1984 (Tr. 55). Mr. Cooper was upset and told Ms. Nutwell, ". . . What are you doing right now? Are you guys calling me a liar? . . . Now, first you say you are going to get it squared away. Then you tell me you were going to get it away. And now you're telling me (sic) want me to bring a document . . . This is wrong . . . Now, you're questioning the validity of me -- of my conversation I gave you concerning my emergency . . . That's enough" (Tr. 56). Mr. Cooper said Ms. Nutwell said, ". . . let me try one more time and see if I can get this thing squared away . . ." (Tr. 56). Mr. Cooper said Ms. Nutwell called back and said, "Larry . . . I'm sorry. I tried, but that's it." (Tr. 56).

Ms. Nutwell did not testify.

Mr. Adams testified that he asked Mr. Lawson if he had given Mr. Cooper leave for that day [November 19] and Lawson said that he had not. Therefore, "I charged Cooper with AWOL". (Tr.166, 167).

Conclusions

A. Asserted Campaign of Harassment of Chief Steward Cooper

For the most part, I found Mr. Cooper an entirely credible witness,2/ and I fully credit his testimony concerning Mr. Lawson's

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2/ As noted earlier, I did not credit Mr. Cooper's testimony that Mr. Adams told him he could not use the telephone at any time, including his own time; but, rather credited Mr. Adams' testimony. In addition, I did not credit Mr. Cooper's version of the October, 1984, telephone incident in Adams' office, but, instead, found Mr. Adams' version more convincing; however, as stated, under neither version did I find any conduct violative of the Statute.

statements and conduct. Mr. Lawson neither denied nor refuted Mr. Cooper's testimony concerning an extraordinary conversation in which he, in effect, admitted his campaign of harassment of Mr. Cooper at the direction of his superior, Mr. Evans. Moreover, I specifically take note of Respondent's failure to call witnesses, such as Messrs. Yarborough and Taylor, to refute Mr. Cooper's testimony of statements they had made to him. Finally, Mr. Richardson's conduct was so extreme that it plainly showed it was part of a campaign to harass Mr. Cooper. First, Mr. Richardson did not testify. Second, frequently with Mr. Lawson, when Mr. Lawson made comments to Mr. Cooper, and at other times alone, he came to a building where Cooper was working and stared, looked at his watch, smirked, or laughed. Third, for a foreman to leave his assigned area and come to buildings some distance away where he had no employees but where Mr. Cooper was working, sometimes three or four times a day, to stand and stare at Mr. Cooper was bizarre, to say the least, and continued over a three month period is explainable only as part of a campaign designed to harass Mr. Cooper. Accordingly, I conclude, that from July through October, 1984, Respondent, through Lawson and Richardson, engaged in a campaign of harassment of Mr. Cooper because of Mr. Cooper's protected activity; that on September 24, 1984, Respondent, through Lawson, threatened Mr. Cooper by making statements to the effect that previously filed unfair labor practice charges are worthless and that there would be repercussions for filing such charges; and that Respondent on October 12, 1984, through Taylor, at the direction of Lawson, told Mr. Cooper that it did not want him to transact union business, and that by such conduct Respondent violated § 16(a)(1) of the Statute. Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C., 12 FLRA No. 107, 12 FLRA 552 (1983); United States Air Force, Lowry Air Force Base, Denver, Colorado, 16 FLRA No. 128, 16 FLRA 952 (1984); Social Security Administration, Baltimore, Maryland, 14 FLRA No. 80, 14 FLRA 499 (1984).

B. Cooper Charged AWOL

At about 7:00 a.m. on November 19, 1984, Mr. Cooper called Mr. Adams and asked for emergency leave to take his child to the doctor. Mr. Adams refused to grant the leave and told Mr. Cooper he would give him one hour to get to work and if he didn't like it, he could call Mr. Lawson. Mr. Cooper called for Mr. Lawson but he was not in, nor was Lt. Pemberton. Mr. Cooper then called and talked to Commander Palanuk. Commander Palanuk stated that Cooper appeared upset and when he asked what was wrong, Mr. Cooper told him he had asked his foreman for leave - he had an emergency- and his foreman had turned him down and that he asked it he had tried to reach anyone else he said he had tried and nobody was available and that was why he called him (Commander Palanuk). The only significant point of difference in the testimony of Commander Palanuk and Mr. Cooper is whether Commander Palanuk approved the leave request. Mr. Cooper testified that Commander Palanuk asked, ". . . Do you think you'll be off all day?" and he had replied, "No . . . sir, I only take off whatever's necessary . . ." and that Commander Palanuk said "Okay". I have considered their testimony and credit Mr. Cooper's testimony. Not only was Mr. Cooper's testimony more convincing and plausible, but, under the circumstances, in view of Commander's Palanuk's conceded questions, I find it implausible that Commander Palanuk would not have asked whether Cooper was asking leave for the entire day. Mr. Cooper did not say that Commander Palanuk said "Your leave is approved", but only that he said "Okay". Perhaps Commander Palanuk did not intend to approve the leave request, but I find that he did say "Okay" from which Mr. Cooper reasonably believed that he had approved his request for leave. Indeed, even if Commander Palanuk's version were accepted, it reasonably appeared that he had approved Mr. Cooper's request, for will full knowledge that Mr. Cooper had called him: (a) because his foreman had denied his request; (b) because he had tried to reach others and nobody else was available; and (c) because he had an emergency and could not come in, Commander Palanuk did not tell Mr. Cooper that he did not approve such requests; did not tell Mr. Cooper to call anyone else; did not tell Mr. Cooper that his request was denied; or even tell Mr. Cooper he would look into it. Rather, according to Commander Palanuk, he thanked Mr. Cooper for the telephone call. When Mr. Cooper reported in at 12:30 p.m., he filled in a leave request and under "Remarks" wrote emergency leave "Approved by Commander Palanuk", which he left on Mr. Adams desk, and then called Commander Palanuk to thank him. In addition, Mr. Cooper testified that he called Ms. Nutwell, in labor relations, and told her what had happened.

Notwithstanding that he received a leave request which stated "Approved by Commander Palanuk", Mr. Adams checked only with Mr. Lawson who said he had not given Mr. Cooper leave that day and therefore, "I charged Cooper with AWOL". I would agree that at the point Mr. Adams denied Mr. Cooper's request for leave and gave him an hour to report, Mr. Cooper knew that he would be placed on AWOL after that grace period, unless, as Mr. Adams suggested, he talked to Mr. Lawson. Mr. Cooper did not, in fact, talk to Mr. Lawson, as he was not in, but, instead talked to Commander Palanuk who, as I have found, approved Mr. Cooper's request, and Mr. Cooper so stated on the leave request. Respondent's assertion that Cooper's ". . . own annotation 'approved by CDR Palanuk' in the Remarks Block of the leave slip (Tr. 30) was nothing more than a self-serving attempt to intimidate and force Adams' approval' (Respondent's Brief, p. 10), is pure sophistry. So far as I am aware, and nothing in the record is to the contrary (See, *e.g.*, Res. Exh. 2, Art. 10), leave requests are normally submitted to the immediate supervisor. Here, Mr. Cooper followed the procedure he would normally have followed and indicated "Approved by Commander Palanuk" which should have caused Mr. Adams, if he did not approve the request, to: (a) forward the request to Commander Palanuk; (b) return the request to Mr. Cooper for submission to Commander Palanuk; or (c) notify Mr. Cooper that his request was denied. But Mr. Adams did none of these things, but, rather, charged Mr. Cooper three hours AWOL without notice to Mr. Cooper. Respondent further asserts, "Cooper did not believe he had any responsibility or obligation to discuss the matter with his supervisor, Adams . . . ." (Respondent's Brief, p. 10). This is pure hogwash. By stating on the leave slip, "Approved by Commander Palanuk", Mr. Cooper had fully informed Mr. Adams all that he could have told him. If Mr. Adams had any possible doubt he could asked Mr. Cooper or Commander Palanuk.

But the saga became even stranger. When Mr. Cooper learned, after he received his next paycheck, that, despite Commander Palanuk's approval of his emergency leave, he had been charged AWOL, he called Ms. Nutwell and Mr. Cooper testified that she, after talking twice to Commander Palanuk, told him ". . .we're going to go ahead and square it away" and he would be paid for the time charged AWOL in the next pay period. As noted, Ms. Nutwell was not called as a witness and I fully credit Mr. Cooper's testimony that he was told by Respondent that he would be paid for the time charged AWOL on November 19, 1984. Despite the assurance of Ms. Nutwell that he would be paid for the AWOL time, Mr. Cooper was not paid. Mr. Cooper stated that, in January or February, 1985, Respondent, for the first time, demanded ". . . proof of emergency, of the emergency on the day" and Mr. Cooper, understandably angered, declined to provide any such document. Respondent asserts that ". . . Cooper . . . acted irresponsibly by refusing to provide a doctor's slip in support of his position, . . ." (Respondent's Brief, p. 11). I do not agree. Commander Palanuk accepted without question Mr. Cooper's representation that he had an emergency (Tr. 118) and Ms. Nutwell told Mr. Cooper that he would be paid for the time charged AWOL (three hours) without qualification. Mr. Adams, although he testified that he had counseled Mr. Cooper once for leaving to conduct union representation affairs without approval (Tr. 152), did not testify that he had ever otherwise counseled Mr. Cooper for abuse of leave. Article 10, Section 3, of the parties' agreement provides that, "Action to correct abuse of sick and/or annual leave privileges shall be equitably applied to all employees in the Unit" (Res. Exh. 2), but the record does not show when, or under what circumstances, a doctor's statement is required of "all employees" or, indeed, that any employee, other than Mr. Cooper, had ever been asked to submit a doctor's certificate. Although Mr. Adams did not indicate whether he referred to annual leave or sick leave or both, his testimony that he had approved leave for Mr. Cooper both before and after November 19, 1984, on the basis of a telephone call (Tr. 151-152), in the absence of evidence to the contrary, strongly suggests the absence of any such requirement. (Actually, I do not know, and the record does not show whether emergency leave for such purpose would be considered "annual" or "sick" leave).

Why, then, was Mr. Cooper charged AWOL for three hours on November 19, 1984? On the one hand, the record shows, and I have found, that Respondent, through General Foreman Lawson and Foreman Richardson, engaged in a campaign of harassment of Mr. Cooper because of Mr. Cooper's protected activity and, from Mr. Lawson's undenied admission to Mr. Cooper, ". . . Mr. Evans [Deputy Department Director] can say anything they want, but I'm not going to do it no more" (Tr. 58), I draw the inference that Mr. Lawson acted at the direction of Mr. Evans. General Counsel asserts that, ". . . the only conclusion that can be drawn is that

Cooper was charged AWOL solely because of his status as an employee who was an active Chief Steward on behalf of the Union . . . ." (General Counsel Brief, p. 26). On the other hand, although Respondent does not so assert, it could be argued that Adams' actions, for whatever reasons, are beside the point for the reason that Respondent agreed to pay Mr. Cooper for the three hours he had been charged AWOL and, although Respondent reneged, all Respondent is guilty of is a breach of contract. Nothing in Mr. Adams' initial refusal to grant Mr. Cooper leave on November 19 indicates that he did so out of union animus. Mr. Adams was a former active Union member and officer and, while Mr. Cooper testified that he overheard a portion of a telephone conversation in which Mr. Adams said, "Yes, I know I'm supposed to keep Cooper on the job . . . .", the record does not show that Mr. Adams ever did anything to interfere with Mr. Cooper's use of official time for Union activity, and on November 19, Mr. Adams charged Mr. Cooper only three hours AWOL when, in fact, he was five and one-half hours late in reporting, so Mr. Adams did give Mr. Cooper appreciable consideration. I find Mr. Adams' action after Mr. Cooper reported and left the leave request on his desk strange, indeed; but later events nullified Mr. Adams' conduct. Respondent agreed to pay Mr. Cooper for the three hours AWOL. Ms. Nutwell did not say who had agreed; however, the only person she indicated she had talked to was Commander Palanuk. Ms. Nutwell was not called as a witness and Commander Palanuk was never asked about Ms. Nutwell's statement, as Respondent's agent, that Respondent had agreed to pay Mr. Cooper for the three hours he had been charged AWOL. Respondent wholly ignores the Nutwell statement; advanced as defenses allegations, such as that Mr. Cooper attempted to intimidate Mr. Adams by submission of his leave request with the notation "Approved by Commander Palanuk", which I have found wholly without merit; and wholly ignored Mr. Lawson's "confession" which implicated Deputy Director Evans. General Counsel showed that Mr. Cooper engaged in protected activity and has shown that that conduct was a motivating factor in the campaign of harassment against Mr. Cooper. Respondent has failed to show by a preponderance of the evidence that it would have refused to pay Mr. Cooper for the three hours AWOL in the absence of his protected activity. Accordingly, in agreement with the General Counsel, I find that Respondent violated §§ 16(a)(1) and (2) of the Statute by refusing to remove the AWOL charge against Mr. Cooper and to pay him for the time charged AWOL. *Internal Revenue Service, Washington, D.C.*, 6 FLRA No. 23, 6 FLRA 96 (1981).

Having found that Respondent violated §§ 16(a)(1) and (2) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that U.S. Naval Supply Center, San Diego, California, shall:

1. Cease and desist from:

(a) Discriminating against Chief Steward Larry Cooper, or any other employee, by threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussions for filing such charges.

(b) Interfering with the right to engage in activity protected by the Statute by telling Chief Steward Larry Cooper, or any other employee, that Union activities are not desired at this Activity.

(c) Engaging in a campaign of harassment against Chief Steward Larry Cooper, or any other employee, by, among other things, monitoring his activities and ridiculing him, because of his involvement in Union activities.

(d) Discriminating against Chief Steward Larry Cooper, or any other employee, because of their participation in protected activity by charging them with AWOL.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Pay Chief Steward Larry Cooper for the time he was charged with AWOL on November 19, 1984, and remove the notation of the AWOL charge from his record.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region 8, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, in writing, within 30 days of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that Paragraph 9 of the Consolidated Complaint be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 6, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Chief Steward Larry Cooper, or any other employee, by threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussions for filing such charges.

WE WILL NOT interfere with the right of employees to engage in activity protected by the Statute by telling Chief Steward Larry Cooper, or any other employee, that Union activities are not desired at this Activity.

WE WILL NOT engage in a campaign of harassment against Chief Steward Larry Cooper, or any other employee, by among other things, monitoring his activities and ridiculing him because of his involvement in Union activities.

WE WILL NOT discriminate against Chief Steward Larry Cooper, or any other employee, because of their participation in protected activity by charging them with AWOL.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL pay Chief Steward Larry Cooper for the time he was charged with AWOL on November 19, 1984, and remove the notation of the AWOL charge from his record.

(Agency or Activity)

Dated: ________________ By: ________________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 688-3805.

21 FLRA No. 100

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ABERDEEN PROVING GROUND
DEPARTMENT OF THE ARMY

Respondent

and

Case No. 3-CA-20077

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
LOCAL LODGE 2424, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. The complaint in this case alleged a violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when the Respondent refused to negotiate on the Charging Party's proposal to grant administrative leave rather than "forced annual leave" on the day after Thanksgiving when Respondent's operations would be closed.

II. Background

Aberdeen Proving Ground, Department of the Army (Respondent), met on September 15, 1981, with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO (the Union), and informed the Union of its decision to curtail operations of the Aberdeen Proving Ground on the day after Thanksgiving, and that employees would be placed on "forced annual leave" for that day. The Union sought to negotiate concerning the impact of the Respondent's decision to curtail its operations and the procedures leading to its implementation.

During negotiations held in October, the Union presented, among other things, two proposals to grant administrative leave to all employees during the closure of the Respondent's operations on the day after Thanksgiving, rather than, as decided by the Respondent, to place employees on forced annual leave. The Respondent refused to bargain on these proposals, stating that Department of Defense (DOD) and Department of the Army (DA) regulations precluded a grant of administrative leave for an anticipated closure of operations. The negotiating session ended shortly thereafter. The following day, and again a few days before Thanksgiving, the Respondent offered to negotiate with the Union on procedures and appropriate arrangements concerning the upcoming closure but the Union declined.

III. Judge's Decision

The Judge concluded that the Respondent had no duty to bargain over the Union's proposal regarding the granting of administrative leave because the subject of the Union's proposal was inconsistent with Agency regulations which specifically barred administrative leave for an anticipated curtailment of operations and the Authority had not previously determined that there was no compelling need for the conflicting regulation.

The granting of administrative leave to unit employees in connection with the temporary curtailment of agency operations is a negotiable matter affecting working conditions of unit employees. See Long Beach Naval Shipyard, Long Beach, California and International Federation of Professional and Technical Engineers, Local 174, AFL-CIO, 7 FLRA 362 (1981). The Judge noted this decision, but dismissed the complaint because the Authority had not yet determined that no compelling need existed for the DOD and DA regulations upon which the Respondent specifically relied.

IV. Positions of the Parties

Exceptions to the Judge's findings and conclusions were filed by the General Counsel concerning the issue of compelling need for the DOD and DA regulations which were raised as a bar to negotiations on the Union's proposal for administrative leave. The General Counsel contended that the question of compelling need for an agency regulation may be raised as part of an unfair labor practice proceeding, and that when the Respondent in this case asserted a compelling need for its regulations it had the burden of establishing this assertion before the Judge. The General Counsel argued that the Respondent did not meet the burden of establishing compelling need for the regulations and as a consequence violated section 7116(a)(1) and (5) of the Statute. The General Counsel also excepted to certain credibility resolutions made by the Judge.

In its opposition to the General Counsel's exceptions, the Respondent contended that it had no duty to establish a compelling need for its regulations without the issue having been raised by the Union under the Authority's negotiability procedures. Moreover, although continuing to agree with the Judge that compelling need must be determined in a separate proceeding, the Respondent asserts that a compelling need existed for the regulations in question on the grounds that the regulations, which precluded a grant of administrative leave under the circumstances, are essential to the accomplishment of the stated objective of curtailing operations on the day in question in order to conserve energy. Further, the Respondent asserts in its opposition that compelling need was established at the hearing.

V. Analysis

Section 7117(b) of the Statute empowers the Authority to resolve compelling need issues where, during the course of collective bargaining, "an exclusive representative alleges that no compelling need exists for any rule or regulation . . . which is then in effect and which governs any matter at issue in such collective bargaining . . . ." Subsequent to the Judge's Decision, the Authority issued Defense Logistics Agency (Cameron Station, Virginia), 12 FLRA 412 (1983), affirmed sub nom. Defense Logistics Agency, et al. v. FLRA, 754 F.2d 1003 (D.C. Cir. 1985),[1] where it was concluded that issues relating to whether there exists a compelling need for an agency regulation so as to bar negotiations on inconsistent proposals appropriately may be raised and decided in an unfair labor practice proceeding when the agency raises compelling need as an affirmative defense in such an unfair labor practice proceeding.[2]

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[1] The court remanded the matter to the Authority for the sole purpose of permitting the petitioners to present evidence as to whether or not there existed a compelling need for the particular regulation at issue. On April 22, 1985, the Authority remanded the proceeding to the Chief Administrative Law Judge for disposition consistent with the direction of the court. Thereafter, on March 31, 1986, the complaint was withdrawn. In the instant case, by contrast, as the Respondent asserts that compelling need was established at the hearing as well as that compelling need must be determined in a separate proceeding, the Authority concludes that the Respondent was permitted to present evidence as to whether or not there existed a compelling need for the regulations at issue.

As indicated in Defense Logistics Agency, when an agency refuses to bargain over a union proposal during ongoing collective bargaining negotiations because the proposal is alleged to be inconsistent with an existing agency-wide regulation for which a compelling need exists, section 7117 of the Statute requires that the issue be resolved through the procedures in section 7117 of the Statute and Part 2424 of the Authority's Rules and Regulations. A different situation is presented in cases of disputes involving an agency's alleged unilateral changes in conditions of employment, where issues of negotiability--including, as in the instant case, assertions of compelling need for agency regulations--are raised as affirmative defenses. To resolve such disputes, the Authority has promulgated procedures (5 C.F.R. §§ 2423.5 and 2424.5) which recognize a union's right either: (1) to seek resolution of the entire dispute, including the negotiability issues, in the unfair labor practice forum; or (2) to seek initial and separate resolution of the negotiability issues in the negotiability appeal forum.

It is a well-established principle in both private sector and federal sector labor law that an employer's unilateral change in what subsequently can be shown to be a bargainable working condition violates the bargaining obligation and constitutes an unfair labor practice. See NLRB v. Katz, 369 U.S. 736 (1962) (private sector); FLRA v. United States Department of the Air Force, Tinker Air Force Base, 735 F.2d 1513 (D.C. Cir. 1984) (federal sector). In such cases, one

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[2] The Authority notes that the United States Court of Appeals for the Fourth Circuit recently reversed an Authority decision on this same issue, U.S. Army Engineer Center and Fort Belvoir, 13 FLRA 707 (1984), reversed sub nom. United States Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985), rehearing denied (July 26, 1985). In the Authority's Supplemental Decision and Order in that case, U.S. Army Engineer Center and Fort Belvoir, 19 FLRA No. 92 (1985), the

(Continued)

of the defenses available to management is that the substance of the change is nonnegotiable. In the Authority's view, allowing the resolution of compelling need issues in an unfair labor practice proceeding where the issue was raised as a defense to the unfair labor practice charge, is supported by the Statute, its legislative history, and public policy. It is not disputed that when such a defense of nonnegotiability concerns the kind of negotiability issue that is otherwise processed under the section 7117(c) procedure, that defense can be resolved as part of the unfair labor practice case.3/ Neither the Statute nor its legislative history suggests that Congress intended to make an exception in the federal sector to this principle when the defense of nonnegotiability involves the kind of negotiability issue that is otherwise processed under the section 7117(b) procedure.

Section 7117(b)(1) of the Statute states, in part, that "[i]n any case of *collective bargaining* in which an exclusive representative alleges that no compelling need exists for any rule . . . *which is then in effect* and which governs any matter at issue *in such collective bargaining*, the Authority shall determine . . . whether such a compelling need exists." (Emphasis added.) The underscored language reveals

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(Continued)

Authority stated it "accepts the Court's opinion as the law of the case and, consistent with that opinion, shall order that the complaint in Case No. 3-CA-20133 be dismissed." Slip op. at 2.

3/ Indeed, the Authority often has made negotiability determinations in unfair labor practice proceedings where necessary to resolve the allegations that unlawful unilateral changes in working conditions were made in violation of the duty to bargain in good faith. *See, e.g.*, *Department of Transportation*, 19 FLRA No. 1 (1985), *petition for review filed sub nom. American Federation of Government Employees, Local 2747 v. FLRA*, No. 85-1561 (D.C. Cir. September 9, 1985); *Immigration and Naturalization Service, Eastern Regional Office (Burlington, Vermont)*, 18 FLRA No. 103 (1985); *Department of Health and Human Services, Social Security Administration*, 10 FLRA 77 (1982); *Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma*, 8 FLRA 740 (1982), *enforced sub nom. FLRA v. United States Dept. of the Air Force*, 735 F.2d 1513 (D.C. Cir. 1984).

that the section 7117(b) procedure is tailored to apply to situations where, during ongoing negotiations, an agency asserts that a proposal is nonnegotiable because it is inconsistent with an existing agency regulation for which there is a compelling need. This language of the Statute does not preclude the Authority from resolving any necessary negotiability issues, including those related to the compelling need for an agency regulation, in a unilateral change unfair labor practice case.

An examination of the legislative history of the Statute supports the Authority's conclusion. Thus, the 1975 amendments to the pre-Statute labor-management relations program, Executive Order 11491, authorized precisely what the Authority's procedures, codified at 5 C.F.R. §§ 2423.5 and 2424.5, were promulgated to permit: unified processing of any compelling need negotiability issue in the unfair labor practice proceeding in which it arises.4/ The enactment of the Statute in 1978 did not indicate a congressional intent to reject the continuation of this well-established practice. Rather, as the United States Court of Appeals for the District of Columbia Circuit found, Congress did not intend to change the existing practice of allowing all issues to be resolved in one proceeding. *See* *Defense Logistics Agency v. FLRA*, 754 F.2d 1003, 1008-1011 (D.C. Cir. 1985).

In the Authority's view, there is substantial public policy benefit from unified processing of a "compelling need" allegation as part of the unfair labor practice case involving unilateral change, where such an allegation of nonnegotiability arises as an affirmative defense. This procedure effectuates Congress' goal to facilitate and promote the collective bargaining process by providing for the resolution of all relevant issues in one proceeding, thereby obviating the delay inherent in two separate and consecutive proceedings. Moreover, whether an agency's change is found to be nonnegotiable because there is a

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4/ *See* the 1975 "Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as Amended," *reprinted in* Subcom. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1304-1311, 1312-1314, 1323-1326.

compelling need for the agency regulation or negotiable because there is no compelling need for the regulation which prompted the change, the agency is not improperly adversely affected. Even if the Authority determines that the purposes and policies of the Statute are best effectuated by an order rescinding a unilateral change over which there was a duty to bargain, such a result would only deprive the agency of the results of a unilateral change it should not have made without first bargaining.

The D.C. Circuit has noted agreement with the Authority's practice of allowing negotiability issues--including, as in the instant case, assertions of compelling need for agency regulations--to be resolved in an unfair labor practice proceeding. It concluded a review of the Statute and its legislative history as well as the Authority's policy arguments by stating:

> . . . We think it is clear that the Authority's distinction between ongoing negotiations and unilateral changes reflects not only a permissible reading of the Statute, but also a reasonable one, in the truest sense--namely, that the Authority had good reasons for reading the Statute in that way. . . . We therefore hold that in ULP proceedings over alleged unilateral changes in employment conditions effected by agency-wide rule, the Authority may determine whether there was a compelling need for the rule, and thus whether the rule was negotiable without first having made such a determination pursuant to § 7117(b). Defense Logistics Agency, et al., 754 F.2d at 1014.

In sum, the Authority, consonant with the holding of the D.C. Circuit quoted above, reaffirms its finding that unified processing of a "compelling need" allegation as part of the unilateral change unfair labor practice case in which such an allegation of nonnegotiability arises as an affirmative defense is appropriate.

The Authority in this case concludes that the Respondent has failed to sustain its burden of establishing a compelling need for the DOD and DA regulations in accordance with criteria in section 2424.11 of the Authority's Rules and Regulations (5 C.F.R. § 2424.11 (1981)). As noted, the Respondent argues that there is a compelling need for the regulations because they are essential to meet its objective in curtailing operations, which was to conserve energy. However, the Respondent has failed to establish a nexus between its goal of conserving energy and the regulations in question.[5/] The record is barren of evidence which would demonstrate how the granting of administrative leave to unit employees, rather than annual leave, as the Union's proposal at issue here would require, in any way affects the Respondent's stated objective of conserving energy; operations would be curtailed to the same extent, and energy conserved to the same extent, whether the employees affected were on annual leave or administrative leave on the day in question. Therefore, the Respondent has failed to demonstrate how the regulations in question would be essential or even helpful to achieving the Agency's stated objective in curtailing operations.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and, contrary to the Judge, concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to bargain concerning the Union's proposal to grant employees administrative leave on the day after Thanksgiving, submitted in response to the Respondent's notice that operations would be curtailed on that

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[5/] *Compare National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 18 FLRA No. 38 (1985), *petition for review filed sub nom. National Association of Government Employees, Local R14-62 v. FLRA*, No. 85-2098 (10th Cir. July 23, 1985), *and National Association of Government Employees, Local R14-9 and U.S. Army Dugway Proving Ground, Dugway, Utah*, 18 FLRA No. 45 (1985), where the Authority found nonnegotiable a union proposal requiring that employees be placed on administrative leave without charge to annual leave during a partial closing. In those cases, unlike here, the agency demonstrated that its regulations prohibiting administrative leave during a partial closing were critical components of the agency's objective of saving money by curtailing operations so as to ensure the agency's performance of its mission in an effective and efficient manner.

date. Therefore, the Authority adopts the Judge's findings and conclusions only to the extent consistent with this decision.[6]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Aberdeen Proving Ground, Department of the Army shall:

1. Cease and desist from:

(a) Failing or refusing to negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of its employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for its unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of its employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for its unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

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[6] The General Counsel excepted to certain credibility findings made by the Judge. The demeanor of the witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all relevant evidence demonstrates that such resolution is incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

(b) Post at its facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Aberdeen Proving Ground, Department of the Army, or a designee, and shall be maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of our employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, negotiate with the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, the exclusive representative of a unit of our employees, concerning the Union's proposal to grant administrative leave in lieu of forced annual leave for unit employees in connection with the closure of the operations of the Aberdeen Proving Ground, Department of the Army, on November 27, 1981.

____
(Activity)

Dated:________________ By:______________________________
(Signature) Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[21 FLRA No. 100]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE ARMY
ABERDEEN PROVING GROUND

Respondent

and

Case No. 3-CA-20077

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL LODGE 2424, AFL-CIO

Charging Party

. . . .

Laura Rothenberg, Esquire
For the Respondent

Donna M. DiTullio, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*[1], and the Final Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, *et seq.*, which concerns the alleged refusal to bargain in good faith on the Union's proposal that administrative leave be granted for the Friday following Thanksgiving Day in response to Respondent's decision to close Aberdeen Proving Ground on Friday, November 27, 1981, was initiated by a charge filed on October 27, 1981 (G.C. Exh. 1(a)) which alleged violation of §§16(a)(1), (2), (3), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on February 26, 1982 (G.C. Exh. (c)) and the Complaint alleged violation only of §§16(a)(1) and (5) of the Statute. Pursuant to the Notice of Hearing, a hearing was duly held on April 6, 1982, at Aberdeen Proving Ground, Maryland, before the undersigned.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(5) will be referred to, simply, as "16(a)(5)".

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument, which right both parties waived. At the close of the hearing, May 6, 1982, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, for good cause shown, to May 13, 1982. Counsel for each party timely mailed a helpful brief, received on, or before May 12, 1982, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. Respondent, to conserve energy, on September 14, 1981, decided to close operations of the Aberdeen Proving Grounds on November 27, 28, and 29, 1981. As most employees work only Monday through Friday, as a practical matter, this meant that Aberdeen Proving Ground (hereinafter also referred to as "APG") would be closed on the Friday after Thanksgiving except for operation of utilities, security and essential activities. Mr. David R. Weppner, Labor Relations Specialist for Respondent, called all of the unions on September 14 and arranged a meeting for the following day, September 15. Mr. Weppner and his superior, Mr. Franklin M. Bradley, Chief of the Management Employee Relations Division, met with representatives of the various unions, including Messrs. Joseph McDeshen, Jr., President, and Harvey W. Mitchell, Vice President of the International Association of Machinists and Aerospace Workers, Local Lodge 2424, AFL-CIO, (hereinafter also referred to as "IAM"), and informed the Unions that the decision had been made to curtail operations. Respondent advised the Unions that APG employees would be placed on "forced annual leave" (Tr. 58). There are various tenant activities housed at APG, such as the Chemical Systems Laboratory and the Ballistic Research Laboratory, which are not under the command or direction of APG, and the different assurances given by their commanders were discussed. Respondent stated that it was aware that because of the nature of their missions, experiments and tests in progress, that the policy of certain tenant activities might differ (Tr. 59-60), but that Respondent had concluded that APG's tests could be held in abeyance without impairment of its mission (Tr. 60).

2. Following the meeting of September 15, at which the Unions, including IAM, were informed of the decision to close APG on Friday, November 27, 1981, Colonel William R. Watts, Commander of APG, by letter dated September 23, 1981, advised Mr. McDeshen in writing, in part, as follows:

> "1. I have decided, after due consideration, to close Aberdeen Proving Ground on Friday, 27 November 1981. Only essential post services will continue to function.
>
> . . .
>
> "4. Specific details and clarification concerning the policy of leave for civilian and military personnel will be published shortly" (G.C. Exh. 2).

3. On October 2, 1981, Colonel Watts issued guidelines on how leave would be used for the Thanksgiving curtailment of activities (G.C. Exh. 3) which was distributed, inter alia, to the unions, including IAM.

4. A special meeting of Area Energy Resources Conservation Officers was held on October 6, 1981, to discuss leave procedures to be used for the period of the closure. IAM was represented by five individuals, including Messrs. McDeshen and Mitchell (Res. Exh. 2, Tr. 64). Colonel Robert P. Jones, who chaired the meeting, reviewed the October 2 letter (G.C. Exh. 3) and pointed out that:

> ". . . civilian employees will take annual leave if they have it accrued. If not, and leave can be accrued by the end of the year, they may be given advanced leave. If they have compensatory time, this can be taken. They may also elect to take leave without pay. If an employee has no annual leave, the individual will be allowed to work" (Res. Exh. 2; see, also, G.C. Exh. 3).

One or more of the union representatives requested that administrative leave be granted and Mr. Weppner responded, in part, that,

> ". . . administrative leave cannot be authorized. Administrative dismissal without charge to leave is only appropriate for unanticipated situations, or for brief periods of time" (Res. Exh. 2, Tr. 65).

5. After the Energy Resources meeting, Mr. Weppner on October 6, 1981, prepared a memorandum, signed by Mr. William J. Foland, Civilian Personnel Officer, addressed to the various Union Presidents, including IAM, which referred to the Letters of September 23 and October 2, and also attached an additional copy of the October 2 letter, which stated, in part, as follows:

". . .

"2. This officially transmits Inclosure 1 [October 2, 1981, letter]. . . so that management can meet its obligation under Title VII of Public Law 95-454 to negotiate concerning the impact and implementation of this decision.

. . .

"4. To effect the post-wide curtailment of operations, all employees not required to work on Friday, 27 November 1981, the day after the Federal holiday, must be placed on annual leave. Because the closure is anticipated and entirely within the control of management, there is no basis to dismiss employees without charge to leave or loss of pay as could be done for an unforeseen event.

. . .

"6. Any union desiring to negotiate concerning impact and implementation of this decision is invited to do so. . . ." (Res. Exh. 1).

6. By letter dated October 6, 1981, IAM requested negotiations stating, in part, as follows:

"We have received your decision to close on 27 November 1981.

"We again request to negotiate the impact of your decision. . . ." (G.C. Exh. 4, Res. Exh. 3; Tr. 19).

7. Negotiations were held on October 19, 1981. Chief spokesman for Respondent was Mr. Weppner; and IAM was represented by its negotiating team consisting of Mr. McDeshen, Chief spokesman, Mr. Mitchell, Vice President, Mr. Arnold Hughes, Chief Steward, Mr. Bill Brooks, Mr. Sam Cannizzaro and Ms. Marvel Trusclair (Tr. 21, 72). Mr. Weppner outlined "where we were, why we were together" (Tr. 22, 72) and Mr. McDeshen "suggested to Mr. Weppner that in lieu of that, that all employees be put on administrative leave" (Tr. 22). Mr Weppner responded that "the rules and regulations . . . do not permit him to do this and that it verges on nonnegotiability in his opinion" (Tr. 23). Mr. McDeshen then suggested that "if he would not buy my proposal of eight hours of administrative leave, then we would split it with him" by which he meant that "if management would grant four hours administrative leave that we would take, we being the employees, would take four hours anual (sic) leave, split the difference, four and four, four hours annual leave, four hours administrative leave" (Tr. 23). Mr. McDeshen testified that Mr. Weppner's response,

> ". . . was the same as the first, that it was not permitted by rules, laws and regulations and that it was out of the question and out of hand. Also, that it would create a holiday for both proposals . . .
>
> . . .
>
> "A. An extra holiday. The FPM's state something to that effect that you will not grant a date off to create another holiday" (Tr. 23-24).

8. Mr. Weppner had no recollection of any proposal by IAM for four hours administrative leave (Tr. 85-86). Mr. Weppner testified that after the IAM made its proposal for administrative leave (Tr. 72), which was not a new idea but had been discussed on October 6 and again on October 15 when Mr. Weppner met with Messers. McDeshen and Mitchell (Tr. 45), and which he rejected for the same reasons he had previously stated (Tr. 74), IAM then made two further oral proposals. One that employees who had no annual leave be advanced leave; and the other was that those who had no annual leave at all be allowed to work; to which he had responded that that was what Respondent had proposed, namely "that people who had no leave as of the 27th of November would be advanced leave from a period to December . . . that anyone who had used their total leave accrual for the whole year . . . that we had at least 15 opportunities to work 15 persons. . . ." (Tr. 83).

9. Following a caucus, IAM presented a written proposal, prepared by Mr. Mitchell (Tr. 47), as follows:

> "To provide employees who desire to work be permitted to do so and that those who work be provided all the rights as per the negotiated agreement" (G.C. Exh. 5).

Mr. Weppner testified that he caucused with his team and when they reconvened he rejected the IAM proposal because it was too broadly written, "we would have no idea how many people would show up, when they would go to work. I was concerned about safety of those who might be working alone . . . about the buildings, which ones to open, which ones weren't going to be used . . . . And I started to give these reasons to Mr. McDeshen and he said . . . The commander has made his decision. There is no sense in talking anymore. We are leaving . . . I said I felt that was inappropriate. So the union walked out. . . ." (Tr. 87).

Mr. Weppner stated that he spoke further to Mr. McDeshen in the hallway and asked "Is there any need to get together this afternoon. He indicated no" (Tr. 88). After lunch Mr. Weppner called Mr. McDeshen and, again, Mr. McDeshen declined to come back on the afternoon" (Tr. 88). Finally, on the following day, October 20, Mr. Weppner called Mr.

McDeshen and "again he felt that there would be no further need to get together. . . ." (Tr. 88).

10. Mr. McDeshen substantially agreed with Mr. Weppner but his emphasis was somewhat different. Thus, he testified, in part, as follows:

"Q. What if anything was management's response to your written proposal?

"A. Their response was they rejected it totally out of hand, unacceptable.

"Q. Was a reason given?

"A. The reason given was that if they permitted employees to work it would defeat the whole purpose of the post closure for saving energy.

"Q. What if anything happened after management rejected the third proposal?

"A. After they rejected that proposal, it was getting close to lunch time and I reminded Dave Weppner of the time. He asked me was there any sense in my opinion for us to reconvene after lunch at one o'clock.

"Q. What did you respond?

"A. I asked him if he would come off of his position of the letter of October 2 guidelines where (sic) that he would close, he was not permitting anyone to work. He said no, he cannot change that decision. The decision has been made. And therefore he can not change it. So I said, well, I see no sense in us reconvening after lunch. He says he agrees and we broke at that time off negotiations" (Tr. 26).

Mr. McDeshen admitted that Mr. Weppner had said that if any employees had no leave, "they would find work for then somewhere and he said he was speaking of maybe 15 employees" (Tr. 42).

11. There is no dispute that at a negotiating session held on November 24, 1981, with respect to a similar closing of APG on December 24 and December 31, 1981, IAM refused to bargain about the November 27 closing of APG because "we had filed a ULP" (Tr. 41) and when asked if he would discuss the Thanksgiving closing at the November 24 meeting, Mr. McDeshen said, "No. I would not" (Tr. 41). Mr. Weppner testified that

Mr. William Layman, IAM Grand Lodge Representative, who attended the November 24 meeting, had stated "we refuse to negotiate because we have this unfair labor practice charge pending" (Tr. 98).

12. The December 24 and 31 closing of APG is not in issue; however, General Counsel does assert that Respondent agreed to IAM's October 19 written proposal (G.C. Exh. 5) in December. On November 4, 1981, Respondent issued notice of its decision to curtail operations on December 24 and 31, 1981 (Res. Exh 7) and the guidelines were substantially the same as those issue on October 2, 1981 (G.C. Exh. 3) for November 27, 1981 except as noted hereinafter; various proposals were submitted (G.C. Exhs. 7, 8, 9, and 10); but the ultimate agreement was as follows:

> "1. Liberal Leave Policy.
> "2. For those who work the terms of the agreement be upheld commensurate with the purpose of achieving energy savings." (G.C. Exh. 11).

CONCLUSIONS

There is no dispute that Respondent, on October 19, 1981, rejected IAM's proposal for administrative leave. Indeed, on October 6 Respondent had stated that under Army Regulations, etc., administrative leave could not be granted for the reason that closure of APG was an anticipated and planned closing. This was repeated at a meeting held on October 15 with Messrs. McDeshen and Mitchell at which time copies of various regulations and a Comptroller General's decision was given to them; and on October 19, 1981, Mr. Weppner once more stated that administrative leave could not be granted under Army Regulation CPR 990-2 (C14), 610.53 (Res. Exh. 6) and Department of Defense Regulation 1400.25-M, CPM 990-2, 610.3 (Res. Exh 4). CPR 990-2 provides, in part, as follows:

> "83-2. Relieving Daily, Hourly, or Piecework Employees from Duty
>
> . . .
>
> "c. Where advance notice can be given. The Authority to excuse employees administratively is not to be used in instances where the period of interrupted or suspened operations can be anticipated sufficiently in advance to permit arranging for assignment to other work or the scheduling of annual leave. Normally, where 24 hours' advance notice can be given, employees who cannot be assigned to other work must be placed on annual leave with or without their consent." (Res. Ex. 6).

DOD Regulation 1400.25-M provides, in part, as follows:

"S3-1 . . .
"d. *Limitation on Authority to Dismiss Employees Without Change to Leave*

. . .

"(2) When, because of planned management reasons, the closing of all or part of an activity is required for short periods of time, employees will be notified no less than one full work shift in advance and will be required to take annual leave unless leave without pay is requested.

"(3) Group dismissal authority will not be used to create a holiday.

Obviously, Respondent's reliance on the DOD and DA Regulations as the basis for its rejection of IAM's demand for administrative leave was in good faith; nevertheless, General Counsel asserts that because of the Authority's decision in *Long Beach Naval Shipyard, Long Beach, California*, 7 FLRA No. 53 (December 16, 1981), Respondent was wrong, IAM's proposal was negotiable, and, as Respondent failed and refused to bargain on IAM's proposal, it violated §§16(a)(1) and (5) of the Statute. I have given careful consideration to the Authority's decision in *Long Beach Naval Shipyard*, *supra*, but, while it is certainly dispositive of the negotiability of IAM's proposal under the Federal Personnel Manual, upon which Respondent also relied (Res. Exh. 5), I find nothing therein that addresses the more specific provisions of the DOD or DA Regulations upon which Respondent principally relied. General Counsel's response to the DOD and DA Regulations was, simply, to ignore them. FPM Supplement 990-2, specifically provided:

> "(6) 'Supplemental regulation. Each department and agency is authorized to issue supplemental regulations not inconsistent with this subpart'" (S3-2 c. (6); Res. Exh. 5).

Neither the DOD nor DA Regulations are inconsistent with the provisions of the FPM, *cf.*, *Defense Contract Administration Services Region, Boston, Massachusetts*, *et al.*, Case Nos. 1-CA-212, 1-CA-298, 1-CA-299, and 1-CA-300 (OALJ-81-024, December 22, 1980); *Harry Diamond Laboratories*, *et al.*, Case Nos. 3-CA-719, 3-CA-889, and 3-CA-970 (OALJ-81-104, May 18, 1981). Certainly, the DOD Regulations were "agency" regulations within the meaning of §17(a)(2) and (3) of the Statute and the DA Regulations were issued by a "primary national subdivision of said agency" within the meaning of §17(a)(3) of the Statute; IAM is not the exclusive representative of the majority of employees of either the DOD or DA; and, pursuant to §17(a)(2), "matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection" are subject to the duty to bargain "only if the Authority has determined under subsection (b) of this section that no compelling need . . . exists for the rule or regulation." The Authority has made no such determination that no compelling need exists for either the DOD or the DA Regulation, nor do I infer such a determination from the Authority's *Long Beach Naval Shipyard*, *supra*, negotiability decision. To the contrary, in the absence of any reference whatever by the Authority to DOD or Department of the Navy Regulations in its *Long Beach Naval Shipyard* decision, *supra*, I must assume that the question of agency regulation, if applicable to the closure there involved, was not raised. In the absence of a determination by the Authority, pursuant to §17(b) of the Statute,[2] that no compelling need exists for the rule or regulation, Respondent was under no duty to bargain as to the grant of administrative leave for November 27, 1981, as the controlling DOD and DA Regulations specifically provided, *inter alia* that administrative leave for such period "is not to be used" for anticipated closures planned in advance.

Respondent further asserts that IAM, in effect, "dropped" its demand for administrative leave when it presented its written proposal, which did not include it, nor did IAM thereafter renew its oral demand for administrative leave. IAM asserts it did not "drop" its demand for administrative leave. In view of my conclusion that Respondent was not, in any event, obligated to bargain on the matter of administrative leave, it is unnecessary to resolve this further assertion.

Although not alleged in the Complaint, General Counsel further asserts that Respondent bargained in bad faith on October 19, 1981, by rejecting "a Union proposal which would have allowed a liberal leave policy" which it granted on December 16, 1981, as to the December 24 and 31, 1981, closure. For reasons set forth hereinafter, I do not agree.

IAM's written proposal of October 19 was that:

> ". . . employees *who desire* to work be permitted to do so and that those who work be provided all the rights as per the negotiated agreement" (G.C. Ex. 5).

The agreement of December 16, 1981, was:

"1. Liberal Leave Policy

---

[2] *Boston District Recruiting Command, Boston, Massachusetts*, Case No. 1-CA-206, *et al.*, OALJ-81-023 (December 22, 1980); *Defense Logistics Agency (Cameron Station, Virginia)*, *et al.*, Case No. 1-CA-213, OALJ-81-131 (July 7, 1981); *Headquarters, Defense Logistics Agency*, *et al.*, Case No. 3-CA-664, *et al.*, OALJ-81-133 (July 10, 1981); *Harry Diamond Laboratories*, *et al.*, Case No. 3-CA-719, *et al.*, OALJ-81-104 (May 18, 1981).

> "2. For those who work the terms of the agreement be upheld commensurate with the purpose of achieving energy savings" (G.C. Exh. 6).

General Counsel uses the phrase "Liberal Leave Policy" to mean something quite different than the words would indicate, namely, that Respondent would operate, i.e., APG would not be closed. Of course, there was no question that Respondent had proposed to grant leave liberally. If it were assumed that "liberal leave policy" meant that APG would be open, then IAM's October 19 proposal that "employees who desire to work be permitted to do so" may have implied the same meaning; but more significant is that Paragraphs 6 and 7 of Respondent's November 4, 1981, notice provided, in part, as follows:

> "6. I realize that some employees will desire to come to work rather than choose the leave/compensatory options available to them as listed in paragraphs 4 and 5 above. Employees choosing to work will, in most cases, be required to work in minimally heated facilities. Installation-wide support is needed in curtailing operations during this period . . .
>
> "7. Guidance previously disseminated in DF, STEP-CP-M, 2 October 1981, subject: Thanksgiving Day Holiday Period, regarding the curtailment of operations during that period remains as stated therein. Individual latitude regarding work during the Christmas period is being granted since sufficient time may not remain for some employees to accrue leave to cover absences during this time frame" (Res. Exh. 7).

Consequently, Respondent's decision to curtail operations on December 24 and 31, 1981, was significantly different than its decision as to November 27, 1981, in that, because it recognized that some employees would be unable, in the time remaining in the leave year, to accrue leave to cover the December dates, Respondent proposed to grant "individual latitude regarding work during the Christmas period". Accordingly, there was no question that the bargaining which took place was foursquare within the bounds of impact and implementation of Respondent's curtailment decision.

I have grave reservations that IAM's written proposal of October 19 was within Respondent's obligation to bargain on impact and implementation. That is, where management exercises a reserved right in deciding to close a facility, bargaining on impact and implementation does not extend to negating that decision. Nevertheless, I do not reach this question. Rather, I conclude that IAM terminated negotiations on October 19 without bargaining fully. In this regard, I fully credit the testimony of Mr. Weppner that when he started to give his reasons for rejecting IAM's proposal because it was too broadly written, "we would have no idea how many people would show up, where they would go to work. I was concerned about safety . . . about the buildings, which ones to open, which ones weren't going to be used . . .", Mr. McDeshen said "There is no sense in talking anymore. We are leaving . . . I said I felt that was inappropriate. So the Union walked out. . . ." (Tr. 87). There is no dispute that Respondent rejected IAM's written proposal; but from the testimony of Mr. Weppner, which is fully supported by the testimony of Ms. Marguerite Zealor, Labor Relations Specialist (Tr. 108), Mr. Kersey Alexander Jones, Jr., Material Testing Director (Tr. 113), and Mr. Thomas S. Swarts, Facilities Engineering Director (Tr. 117-119), members of Respondent's negotiating committee, the record does not show any refusal of Respondent to bargain on October 19. To the contrary the record shows that Respondent indicated it would still like to discuss impact (Tr. 119) and, although Respondent stated that it was unacceptable to have no control, the record does not show that Respondent in any way foreclosed consideration of IAM's proposal that employees be permitted to work. Indeed, the record shows that further negotiations were foreclosed only by IAM's precipitous termination of negotiations. If, as might appear from Mr. McDeshen's testimony (Tr. 26) and from the testimony of Mr. Mitchell (Tr. 48), that IAM was, in fact, seeking to change the decision to close the APG on November 27, which was a reserved right of management, then Respondent's refusal to bargain would not, in any event, have violated §§16(a)(1) or (5) as Respondent was obligated to bargain only as to impact and implementation, *i.e.*, as the Statute states, "procedures which management . . . will observe" or "appropriate arrangements for employees adversely affected by the exercise of any authority under this section. . . ." (§6(b)(2) and (3)), not the decision itself, *Department of the Air Force, 47th Air Base Group*, 4 FLRA No. 65 (1980). Nor, of course, was either Mr. McDeshen or Mr. Mitchell correct that under the October 2 guidelines "there would be no one working", as Paragraph 4 of the October 2 notice specifically provided, in part, as follows:

> "4. Even though their services are not required on 27 November 1981, the following employees must, at their discretion, be allowed to work or use leave without pay requested by SF 71:
>
> "a. Employees who have used all available leave (accrued and advanced). . . ." (G. C. Exh. 3).

The record is further clear that on October 19 Mr. Weppner had stated that "we had at least 15 opportunities to work 15 persons" (Tr. 83, see, also, Tr. 42).

The record further shows, as Mr. Weppner testified, that IAM declined both on the afternoon of October 19 and on October 20, 1981, to negotiate further and, finally, on November 24, 1981, refused to negotiate concerning the November 27 closure because IAM "had filed a ULP. Therefore the issue was closed. . . ." (Tr. 41). Of course, IAM is not charged with a refusal to bargain at any time. The obligation to bargain is a continuing obligation and a charge that a refusal to bargain occurred on a prior occasion neither excuses a subsequent refusal to bargain nor is its pendency a defense to an appropriate subsequent demand to bargain, cf. Kentucky National Guard, 4 FLRA No. 73 (1980); but that is not the situation here. Nevertheless, Respondent, on November 24, 1981, invited further negotiations on the impact and implementation of the November 27, 1981, closure as part of the negotiations with respect to the December 24 and 31 closure, which IAM declined. Legally, a refusal to bargain on one occasion is not "cured" by an offer to bargain at a later date, Vandenberg AFB, 4392d Aerospace Support Group, Vandenberg AFB, California, A/SLMR No. 435, 4 A/SLMR 626 (1974) (Compare decision of the Administrative Law Judge, 4 A/SLMR at 633, and the decision of the Assistant Secretary, 4 A/SLMR at 627) although the Council, on appeal, held that where, as in Vandenberg, a brief interruption of negotiations has a de minimis effect a finding of a violation is not warranted, FLRC No. 74A-77, 3 FLRC 491 (1975), 5 A/SLMR No. 554, 5 A/SLMR 574 (1975). Had Respondent refused to bargain in good faith on October 19, 1981, it would not have been "cured" by Respondent's offer to bargain on November 24, 1981. I have found, however, that Respondent did not refuse to bargain in good faith on October 19, 1981, notwithstanding that Respondent rejected IAM's proposal as written, for the reason that IAM terminated negotiations without bargaining fully on matters of impact and implementation within the scope of Respondent's obligation to bargain, and, accordingly, Respondent's offer to bargain on November 24, 1981, with respect to the November 27, 1981, closing of APG reaffirmed Respondent's offer to continue negotiations made both on October 19 and 20 and, to this extent, shows that Respondent did not refuse to bargain as to the impact and implementation of its decision to close APG on November 27, 1981. Indeed, because IAM declined to negotiate the November 27 closure on November 24, it cannot be known whether negotiations as to the December 24 and 31 curtailment, which resulted in an agreement, would have affected the November 27 closure.

Having found that Respondent did not violate §§16(a)(5) or (1) of the Statute, as alleged in the Complaint, by refusing to negotiate on the grant of administrative leave for November 27, 1981, as the grant of administrative leave was precluded by controlling DOD and DA Regulations, and that Respondent did not otherwise fail or refuse to bargain in good faith on the impact and implementation of its decision to close APG on November 27, 1981, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-20077 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 15, 1982
Washington, D.C.

9/[illegible] 365

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 365 REPORT OF CASE DECISIONS May 21, 1986

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NEGOTIABILITY CASE

21 FLRA No. 102 (May 15, 1986)

National Treasury Employees Union, Chapter 153 and Department of the Treasury, U.S. Customs Service, Region II, Case No. 0-NG-620

21 FLRA No. 104 (May 19, 1986)

American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, Case No. 0-NG-655

21 FLRA No. 105 (May 20, 1986)

National Association of Government Employees, Local R14-87 and Department of the Army, Kansas Army National Guard, Case No. 0-NG-879

UNFAIR LABOR PRACTICE CASE

21 FLRA No. 103 (May 15, 1986)

Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy), Case Nos. 1-CA-40036 and 1-CA-40076

ARBITRATION CASE

21 FLRA No. 101 (May 15, 1986)

Local Lodge 39, International Association of Machinists and Aerospace Workers and Naval Air Rework Facility (Fishgold, Arbitrator), Case No. 0-AR-1135

Y3.F 31/21-3:

*Case No. 0-AR-727 (Order Dismissing Request for Reconsideration and Related Requests of 21 FLRA No. 24) (May 8, 1986)

General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

May 8, 1986

0-AR-1107 0-AR-1116

May 15, 1986

0-AR-1118

21 FLRA No. 101

Federal Labor Relations Authority

Local Lodge 39, IAM and
Naval Air Rework Facility
(Fishgold, Arbitrator),
Case No. 0-AR-1135 (Decided
May 15, 1986)

DIGEST HEADINGS

	STATUTE
1000 ARBITRATION	7122(a) and (b)
1550 Procedure	
1552 Time Limits for Filing Exceptions	

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely because they failed to comply with §§ 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

21 FLRA No. 102

NTEU, Chapter 153 and Dep't of the Treasury, U.S. Customs Service, Region II.
Case No. 0-NG-620 (Decided May 15, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2150 Management Rights
    2151.20 Internal Security Practices
    2152.35 Discipline Employees
  2200 Subjects of Bargaining
    2210 Mandatory Subjects
      2210.01 Appropriate Arrangements

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A)
7106(b)(3)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Alleged to be Inconsistent with Federal Law
      Privacy Act
  Management Rights
    Discipline Employees
    Internal Security Practices
      Telephone Hotline for Public to Report Wrongdoing
    Remove Employees
  Mandatory Subjects of Bargaining
    Appropriate Arrangements
      Notification of Accusations of Wrongdoing
  Telephone Hotline for Public to Report Wrongdoing
    Criminal Conduct vs. Employee Non-criminal Wrongdoing

DIGEST NOTES

Proposals are nonnegotiable that limit the agency's use of a telephone "hotline" established as a vehicle for the public to report criminal conduct, to exclude employee misconduct that is not criminal. The agency, the Customs Service, has a particular need to maintain an honest and reliable work force. The telephone hotline is part of the agency's internal security plan. The proposals would prevent management from employing every possible means, including investigating non-criminal

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conduct, to guard against any dishonest or prohibited conduct, whether criminal or not, among its employees. Such a limitation is inconsistent with management's right to determine its internal security practices under § 7106(a)(1) and to take disciplinary actions and remove employees under § 7106(a)(2)(A). Moreover, the proposals are not appropriate arrangements within the meaning of § 7106(b)(3). The negative impact of the proposals on management's ability to enhance the integrity of agency operations by investigating all improper conduct, criminal or non-criminal, and take appropriate disciplinary action far outweighs any arguable benefit the proposals may provide employees. (proposals 1 and 2)

A proposal is within the duty to bargain that requires the agency to provide the union with a summarization of each allegation of improper action which involves non-criminal matters that the agency obtains from a telephone "hotline" established as a vehicle for the public to report criminal conduct. The summarizations of allegations of improper action would not identify the employees concerned. Under the proposal, the agency retains the discretion to determine the timing of the release and the nature of the information that will be disclosed as well as the right to take any action necessary to protect confidential sources of information. The proposal does not interfere with the agency's right under § 7106(a)(1) to determine its internal security practices and it was not shown that the proposal violates the Privacy Act.

Federal Labor Relations Authority

21 FLRA No. 103

DOD Dependents Schools,
Mediterranean Region,
Naples American High School
(Naples, Italy) and Will
Schussel, Case Nos.
1-CA-40036 and 1-CA-40076
(Decided May 15, 1986)

DIGEST HEADINGS

4000 UNFAIR LABOR PRACTICE: AGENCY
- 4100 Interference, Restraint, Coercion
- 6810 Remedies for Agency Violations

STATUTE

7116(a)(1)
7118(a)(7)
7131(c)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Interference, Restraint, Coercion
      - Prohibition on the Posting of Union Literature
      - Forbidding Collecting Information to Support a ULP Charge
  - Building Access
    - By an Individual in Non-work Areas During Non-work hours
  - Information
    - Employee's Right to Gather Information to Support a ULP Charge
  - Procedure
    - Charge Is Not a Pleading
  - Remedies
    - Remedial Notice
      - Holiday and Vacation Periods Excluded from Posting Period
  - Union Rights
    - Equivalent Status Rule of a Competing Labor Organization

DIGEST NOTES

The activity violated § 7116(a)(1) when it prohibited an individual from posting union literature on his locker in the teachers lounge. There had been a past practice of permitting teachers to post a wide variety of material on their lockers. The individual posted a rival union's insignia and several memoranda and bulletins by the rival union concerning its accomplishments. Management forbid the posting of union literature in response to a threat by the exclusive representative to file an unfair labor practice charge if the practice continued. Apparently, management misunderstood the "equivalent status" rule which was designed to deal with demands of competing labor organizations for equal access by non-employee agents to an agency's premisses and for use by those organizations of an agency's services and facilities during organizational campaigns. Here, the individual was neither acting as a labor organization nor seeking to rival the incumbent by his actions.

The protected right to file a ULP charge encompasses the right to gather information in support of the charge. The activity violated § 7116(a)(1) when it directed a teacher to stop distributing a questionnaire to other teachers that was an investigatory effort to collect information in support of a ULP charge.

The Judge dismissed the activity's procedural allegation that the since charge was defective, all that follows in the subsequent investigation and trial is likewise defective. The Judge stated that a charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued. A charge is sufficient in administrative proceedings if it informs the activity of the general nature of the violation charged against it in order to preserve the evidence relating to the matter. In order for a procedural defect to exist concerning a charge, a respondent must be prejudiced by the alleged defect.

21 FLRA No. 104

Federal Labor Relations Authority

AFGE, Local 3804 and FDIC, Madison Region, Case No. 0-NG-655 (Decided May 19, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compensation [Government Corp.]
    - Waiting Periods
      - for Within-Grade Increases
  - Compelling Need
    - Agency Regulation Precluding
      - Alternate Work Schedules
    - Contract Reopener for Changes in Travel Regulations
    - Generalized and Conclusionary Reasoning
    - Uniform Pay Practices [Government Corporation]
      - Waiting Periods for Within-Grade Increases
  - Conditions of Employment [7103(a)(14)]
    - Matters Specifically Provided for by Federal Statute
      - Medical Expenses
  - Conditions for Review
    - Proposal Inconsistent with Government-wide Regulation
      - FPM Supplement 990-2, ch. 630, subch. S11-5
  - "Employee" [5 U.S.C. § 8901(1)(A)]
    - Appointed by Head of Government Controlled Corp. [5 U.S.C. § 2105(a)(1)(E)]
  - Government Corporations
    - "Government Controlled Corporation" [5 U.S.C. § 103(2)]
    - "Mixed Ownership Corporation" [31 U.S.C. § 9101]
      - Federal Deposit Insurance Corporation
  - Government-wide "Rule or Regulation" Defined [§ 7117(a)(1)]
  - Hours of Work
    - Flexitime
      - Adverse Agency Impact Disputes
        - FSIP's Role Under 5 § U.S.C. § 6131
      - Federal Employees Flexible and Compressed Work Schedules Act of 1982 [Pub L. 97-221, 96 Stat. 227]
      - 5-4-9 Work Schedule
    - Part Time Status - Unlimited Duration
    - Travel Time [5 U.S.C. § 6101(b)(2)]
  - Leave
    - Administrative Leave - 8 Days/Year for Personal Business
    - Maternity Leave [FPM Sup. 990-2, ch. 630, subch. S 13-2 & 3]

STATUTE

7103(a)(14)(C)
7105(a)(2)(D) and (E)
7106(a)(1)
7106(a)(2)(A) and (B)
7106(b)(1) and (3)
7117 and 7117(a)(1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

- Management Rights
  - Assign Employees
    - Employee Option to Determine Whether to be Reassigned
    - Limiting Duration of Duty Assignments
  - Assign Work
    - Internal Management Deliberations
      - Notification of Employee
    - Limiting Duration of Work Assignments
    - Maternity Leave
    - Part Time Status - Unlimited Duration
    - Unlimited Travel Time as Duty Time
- Procedure
  - Moot Proposal
    - Another Union Certified as Exclusive Representative
- Subjects of Bargaining
  - At Election of the Agency
    - Methods and Means of Performing Work
      - Automobiles - Provide for Business Use
      - Compressed Work Schedules
    - Technology of Performing Work
      - Contract Reopener for Changes in Travel Regulations
- Travel and Per Diem
  - Assignments Causing Absence from Residences in Excess of 10 Hours
  - Contract Reopener for Changes in Travel Regulations
- Comptroller General
  - 54 Comp. Gen. 706 (1975)
  - 55 Comp. Gen. 510 (1975)
  - 56 Comp. Gen. 865 (1977)
  - 61 Comp. Gen. 652 (1982)
  - B-156287 (Feb. 5, 1975)
  - B-185128 (Dec. 3, 1975)
  - B-192258 (Sept. 25, 1978)
- FPM, Ch. 532, subch. 4, paragraph 4-7
- 5 C.F.R. § 531.405
- 5 U.S.C. §§ 553, 2105, 5102(a)(1)(i), 5331(a), 5335(a), 5701
- 5 U.S.C. §§ 6121(2), 6127(a)

DIGEST NOTES

A proposal is nonnegotiable that would require the agency to pay all costs of annual eye examinations, physical examinations and certain other medical expenses. The agency is a mixed government corporation [31 U.S.C. § 9101] whose employees are "employees" within the meaning of 5 U.S.C. § 8901(1)(A) and are covered by the health insurance provisions of chapter 89 of title 5 of the U.S. Code. Thus the proposal concerns a matter that is specifically provided for Federal statute and is excluded by § 7103(a)(14)(C) from those "conditions of employment" over which an agency can be required to bargain under the Statute. (proposal 1)

A proposal is nonnegotiable that requires the agency to grant an employee's request for up to six months of leave without pay for maternity reasons after the employee has used all available sick and annual leave. Federal personnel laws and regulations contain no provision for maternity leave as a separate type of leave. Absence from duty for maternity reasons is a combination of sick leave, annual leave, and leave without pay [FPM, Supplement 990-2, ch. 630, subch. S13-2 and 3]. However, under the proposal, the agency would be precluded from requiring the employee to return to work at any point during the period covered by the request even if the employee is able to do so and the agency determines it has need of the employee's services. Therefore, the proposal directly interferes with management's right to assign work. (proposal 2)

A proposal is nonnegotiable that requires that an employee be notified by the field office supervisor whenever higher level management makes an inquiry regarding the assignment of work to a particular employee. The proposal would provide an employee with information as to internal management discussions and deliberations concerning its work assignments. Internal management discussions are part of management's substantive decision-making process in its exercise of its rights under § 7106. Thus the proposal would interfere with the exercise of management's right to assign work under § 7106(a)(2)(B) and is not, as the union argued, a negotiable procedure under 7106(b)(2). (proposal 3)

A proposal is nonnegotiable that provides employees with the right to determine whether or not they will be transferred. The proposal directly interferes with management's right to assign employees under § 7106(a)(2)(A) and is not a negotiable procedure under § 7106(b)(2). (proposal 4)

A proposal is nonnegotiable that would grant employees an unlimited amount of time, normally spent performing work, for purposes of travel. Under 5 U.S.C. § 6101(b)(2), agencies are required to schedule, to the maximum extent practicable, time spent in travel status during regularly scheduled duty time. However, the proposal would prevent the agency from requiring employees to travel during nonduty time in those circumstances where it was determined that travel during duty time was not practicable. Thus the proposal interferes with management's right to assign work under § 7106(a)(2)(B). (proposal 5)

Generalized and conclusionary reasoning is not enough to support a finding of compelling need. The Authority is not in a position on its own to determine the purposes agency regulations are designed to achieve or the importance the agency attaches to those regulations. To establish that a proposal is barred by an agency regulation for which there is a compelling need, the agency must (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in § 2424.11 of its regulations. Because the agency did not meet its burden of properly supporting the compelling need for its regulation that the agency claimed barred negotiations on a union proposal, the Authority could not sustain the agency's claim of a compelling need. Accordingly, the Authority found a proposal to be within the duty to bargain that requires the agency to provide $ 8.00/day plus mileage and other expenses to an employee whose duty assignment location on any particular day causes the employee's absence from residence to exceed 10 hours. The agency, a government controlled corporation, is not subject to statutory and regulatory provisions governing travel on official business for the Government (5 U.S.C. § 5701]. (proposal 7)

A proposal is within the duty to bargain that would reduce the waiting periods for within-grade salary increases to one year for steps 5 through 10 of each grade. The agency is a government controlled corporation within the meaning of 5 U.S.C. § 103(2). Consequently its employees are not covered by the General Schedule pay system. The proposal only concerns the timing of an employee's step increase and not the amount of salary which an employee will receive. Finally, the agency did not demonstrate the compelling need for its regulation that it alleged barred negotiations on the proposal. (proposal 8)

A proposal is negotiable that concerns the "5-4-9" compressed work schedule. The proposal is consistent with the Federal Employees Flexible and Compressed Work Schedules Act of 1982 [the Act]. Compressed work schedules do not concern the methods and means of performing work within the meaning of § 7106(b)(1). The agency did not establish the alleged compelling need for an agency regulation barring alternate work schedules. Employees are not required by the proposal to work the "5-4-9" compressed schedules nor does the proposal preclude the agency from requiring employee to work five 8-hour days when that is necessary to accomplish the agency's mission, or give employees the right to refuse to appear for work when ordered to do so. Finally, in subsequent negotiations, the agency might decide not to establish a "5-4-9" workweek because, in the agency's view, it would have an adverse impact. If impasse is reached, FSIP has the responsibility under the Act [5 U.S.C. § 6131] for settling the "adverse impact" dispute. [proposal 9]

A proposal is nonnegotiable that requires the agency to lease automobiles for employees' use, primarily for transportation to bank examining assignments which are frequently located outside the commuting area of the examiners' duty stations and residences. The proposal interferes with management's elective right under § 7106(b)(1) to determine the means of performing work. (proposal 10)

A proposal is negotiable that requires the agency to notify the union when it decides to change its travel regulations and provide the union an opportunity to negotiate on the application of those regulations to the bargaining unit. The agency is a "government controlled corporation" that is not subject to the statutory and regulatory provisions governing travel on official business for the Government. [5 U.S.C. § 5701] The proposal would not foreclose the agency from contesting the negotiability of any union proposal during future negotiations relating to specific changes in agency travel regulations. Moreover, the agency did not establish the alleged compelling need for an agency regulation barring negotiations on the proposal. Finally, a contract reopener to negotiate the application of changes in travel regulations is not bared by management's right under § 7106(b)(1) to determine the technology of performing work. The mere possibility that a union proposal might concern this matter is not enough to render the proposal nonnegotiable. (proposal 11)

A proposal is nonnegotiable that limits the duration of teaching assignments to two years. If the proposal concerns the assignment of employees to teaching positions, it in inconsistent with management's right to assign employees under § 7106(a)(2)(A). If the proposal concerns the assignment of teaching duties to employees already in certain positions, the proposal is inconsistent with management's right to assign work under § 7106(a)(2)(B). (proposal 13)

A proposal is nonnegotiable that would extend the agency's part-time policy to any employee who has a legitimate reason. The proposal would preclude the agency from requiring an employee to return to full-time status when the agency determines it has a need of the employee's services on a full-time basis. Accordingly, the proposal interferes with management's right to assign work under § 7106(a)(2)(B). (proposal 14)

A proposal is nonnegotiable that would provide employees with 8 days per year of administrative time for personal business. Under applicable Government-wide regulations [FPM ch. 630, subch. 11-5 and FPM Supplement 990-2, ch. 630, subch. S11-5] the head of an agency has discretion to grant administrative leave to employees of the agency in certain situations for brief periods of time. Based on the guidance set forth in several

Comptroller General interpretations of the governing provisions in the FPM, the Authority concluded that a blanket authorization of eight (8) days of administrative leave for personal business, without consideration of the specific circumstances of each case, exceeded the limits of appropriate exercise of discretion under the FPM. (proposal 15)

A "rule or regulation" within the meaning of § 7117(a)(1) is not intended to refer only to those rules and regulations which meet formal requirements as to notice and comment [see, for example 5 U.S.C. § 553]. The term also includes official declarations of policy which are binding on the officials and agencies to which they apply. Since the provisions of FPM Supplement 990-2, ch. 630, subch. S11-5 regarding an agency's limited discretion to authorize administrative leave is enforceable by the Comptroller General against officials and agencies, that regulation is a Government-wide rule or regulation. (proposal 15)

A proposal concerning official time was rendered moot by the certification of another union as the exclusive representative of the bargaining unit employees to which the proposal applied. (proposal 16)

Federal Labor Relations Authority

21 FLRA No. 105

NAGE, Local R14-87 and Dep't of the Army, Kansas Army National Guard, Case No. 0-NG-879 (Decided May 20, 1986)

DIGEST HEADINGS	**STATUTE**
2000 NEGOTIABILITY	7105(a)(2)(E)
2600 Conditions for Review	7106(a)(2)(A) and (C)
2601 Proposal Inconsistent with Federal Law	7106(b)(3)
	7117(a)(1)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Alleged to be Inconsistent with Federal Law
      - 5 U.S.C. § 5704
  - Management Rights
    - Assign Employees
    - Fill Positions
  - National Guard
    - Compatibility Requirement [32 U.S.C.§ 709(b)]
  - Reduction-in-Force
    - Right to be Offered Vacant Position at Former Job Location
    - Transportation and Travel Expenses to New Location
      - Terminated Only when Residence is Moved

DIGEST NOTES

A proposal is nonnegotiable that would require employees who are transferred in a RIF to be reimbursed for their commuting expenses to their new duty station until such a time that they move their residences to the new duty location. Reimbursement for such expenses is inconsistent with 5 U.S.C. § 5704. (proposal 1)

A proposal is nonnegotiable that would require the agency, whenever a position becomes vacant, to offer that position to a technician who, as a result of a RIF, was transferred to another location. Under the proposal the agency could not elect not to fill the position. Moreover, management could not make qualifications determinations, including determining whether a

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technician employee holds the compatible military grade [32 U.S.C. § 709(b)] for the vacancy. Thus the proposal excessively interferes with management's right to assign employees under § 7106(a)(2)(A) and to make selections for vacancies under § 7106(a)(2)(C). (proposal 2)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL LODGE 39, INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS
Union

and Case No. 0-AR-1135

NAVAL AIR REWORK FACILITY
Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Herbert Fishgold filed by the Department of the Navy (the Agency) on behalf of the Activity pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated March 25, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended, 1/ and section 2425.1 of the Authority's Rules and Regulations, as amended, 2/ which amendments are applicable to exceptions pending or filed with the Authority on or after

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on April 28, 1986. However the exceptions were not filed until April 29, 1986. Therefore, the exceptions were untimely filed.

Accordingly, as the Agency's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., May 15, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 153

Union

and

Case No. 0-NG-620

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
REGION II

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This petition for review comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of three Union proposals.

The Union offered these proposals in impact bargaining concerning the Agency's decision to establish a telephone "hotline." The purpose of the hotline was to serve as "a vehicle for the public to report (anonymously, if they so desired) criminal conduct, primarily the acceptance of bribes by certain employees." In addition, the Agency planned to send a short press release, providing the telephone number of the hotline, to newspapers that printed stories about criminal conduct by Customs Service employees.

II. Proposals

Union Proposal 1

(4) Information received via the hotline, involving non-criminal matters, shall not be investigated or incorporated in any record or

system of records within the control of the U.S. Customs Service.

Union Proposal 2

(5) A press release for the hotline will include the following statement: "Information received via this press release involving non-criminal matters shall not be investigated or incorporated in any record or system of records within the control of the U.S. Customs Service."

Union Proposal 3

(6) The Union shall receive a summarization of each of the allegations obtained through the Customs hotline involving non-criminal matters.

III. Positions of the Parties

A. Union Proposals 1 and 2

The Agency argues that Union Proposals 1 and 2 will limit management's use of information from the hotline to the investigation of allegations of criminal activity. Thus, these proposals, according to the Agency, will violate its right under section 7106(a)(1) of the Statute to determine its internal security practices. Furthermore, the Agency contends, the proposals are contrary to management's right to discipline under section 7106(a)(2)(A) as they will preclude investigations into allegations of non-criminal activity to determine whether employees should be disciplined or removed.

The Union contends that its proposals will not prevent the achievement of the Agency's stated objective of gathering information involving criminal activities by Customs Service employees. In addition, the Union asserts that information received from the hotline concerning non-criminal matters will have an adverse affect on bargaining unit employees and that its proposals constitute "appropriate arrangements" within the meaning of section 7106(b)(3) of the Statute.

B. Union Proposal 3

Regarding Union Proposal 3, which is discussed separately here as the parties treated it as a distinct issue, the Agency makes three arguments. First, the Agency contends that it is under no duty to bargain on the proposal because the dissemination of information concerning complaints about or allegations against employees was negotiated with NTEU and is covered by Article 3, Section 13 of the National Agreement. Second, the Agency asserts that the compilation and disposition of the information the Union seeks is an integral part of its internal security process and conflicts with the broad mandate granted to agencies in section 7106(a)(1) of the Statute to determine their internal security practices. Third, the Agency argues that Union Proposal 3 may violate the Privacy Act.

In response to the Agency's contentions, the Union urges that proposal 3 is limited to the Union's receipt of a summary of allegations obtained through the hotline whereas the language in the National Agreement requires management to notify employees of written complaints it receives about employees. Also, the Union contends that the hotline is unique and was not anticipated or discussed at the national negotiations. With regard to internal security, the Union asserts that its proposal will not interfere with Agency practices as its purpose is simply to ensure that the only allegations investigated are those of a criminal nature. Finally, the Union states that since the Agency will prepare the summary, it will control what is disclosed. In response to the allegation that Union Proposal 3 may violate the Privacy Act, the Union specifically notes that the proposal does not require the Customs Service to divulge the names of employees who are the subject of complaints.

IV. Analysis

A. Union Proposals 1 and 2

The Authority has held that where an agency alleges a union's proposal of an appropriate arrangement is nonnegotiable because it conflicts with management rights described in section 7106(a) or (b)(1), the Authority will consider whether such an arrangement is appropriate for negotiation within the meaning of section 7106(b)(3) or, whether it is inappropriate because it excessively interferes with the exercise of management's rights. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

As relevant in this case, the Authority has previously held that an agency's right to determine its internal security practices under 7106(a)(1) of the Statute includes policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information or to prevent the disruption of the agency's activities or operations. See American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 14 FLRA 6 (1984) (Union Proposal 2), reversed as to other matters sub nom. FLRA v. OPM, 778 F.2d 844 (D.C. Cir. 1985).

The record in this case indicates that the Agency has a particular need to maintain an honest and reliable workforce. That is, the Customs Service is responsible for the enforcement of customs laws and other related laws against the smuggling of contraband; for the assessment, collection and protection of revenue by levying import duties and taxes; and for the control of carriers, persons and articles entering or departing the United States. The actual establishment of the hotline, for the purpose of reporting criminal conduct is not challenged by the Union. The Authority finds such a hotline constitutes a part of the Agency's internal security plan to maintain the integrity of its operations.

Union Proposals 1 and 2, however, would substantially limit the usefulness of this hotline, by restricting management to the investigation of only criminal allegations from the hotline. To illustrate, pursuit of non-criminal allegations which might lead to revelations of criminal activities by employees is precluded. Moreover, the hotline may not be used as an investigative tool to gather information on employee misconduct that does not involve allegations of criminal activity. Union Proposals 1 and 2 would prevent management from employing every possible means, including the utilization of investigations of non-criminal conduct, to guard against any dishonest or prohibited conduct, whether criminal or not among its employees. Such a limitation is inconsistent with management's right to determine its internal security practices under section 7106(a)(1) of the Statute. See National Treasury Employees Union, Chapter 21 and Department of the Treasury, Bureau of Engraving and Printing, 18 FLRA No. 54 (1985) (the Authority found a proposal nonnegotiable which required that searches be conducted only if authorized by warrant and/or incident to arrest because it would defeat the agency's security plan).

In addition, although the hotline was ostensibly established to enable the Agency to receive information about criminal activity, it is clear that if non-criminal information received on the hotline is investigated, employees may be subject to disciplinary and removal actions. Under the Union's proposals, however, management is specifically prevented from utilizing information acquired through the hotline to initiate investigations into non-criminal matters. Therefore, in these circumstances the Agency is effectively prevented from taking action to discipline or remove employees for improper conduct. See National Federation of Federal Employees, Local 15 and U.S. Army Armament Munitions and Chemical Command, Rock Island Arsenal, Illinois, 19 FLRA No. 6 (1985) (Union Proposal 2) (where a proposal which provided criteria for management's use in determining whether to authorize employee absences was found nonnegotiable as it would prevent the agency from taking disciplinary action against employees on the basis of those absences). Moreover, the proposals' restrictions on the use of discipline also have the effect of preventing management from using discipline as one method to maintain an honest and reliable workforce, that is, to determine its internal security practices under section 7106(a)(1). Union Proposals 1 and 2 are therefore inconsistent with management's rights to determine its internal security practices under section 7106(a)(1) and to take disciplinary actions against employees under section 7106(a)(2)(A).

We turn now to the question of whether the Union's proposals constitute appropriate arrangements within the meaning of section 7106(b)(3) of the Statute. Although the Union does not specifically address the adverse impact from management's exercise of its reserved rights under section 7106(a), it is obvious that employees would be subject to disciplinary and adverse actions based on non-criminal information derived from the hotline. The Union's proposed amelioration of this adverse effect would be to totally shield employees from investigation of non-criminal information received through the hotline and any resulting disciplinary action based on such information.

While employees may arguably benefit from a prohibition on investigation of non-criminal matters, on balance, it is outweighed by the negative impact on management's ability to enhance the integrity of Agency operations by investigating improper conduct, criminal or non-criminal, and taking appropriate disciplinary action. It is clearly not in the interest of efficient and effective Government operations to preclude management from utilizing all the information available through the hotline.

Finally, this analysis is not changed by the Union's suggestion, contained in its Reply Brief, that the Agency could designate a separate hotline or another Agency telephone line to receive reports of non-criminal conduct. In the first place, a separate hotline is not a part of the proposals at issue which expressly preclude investigation or the taking of appropriate disciplinary action based on allegations of non-criminal conduct received via the hotline. But, even assuming that this suggestion is an attempt to ameliorate the adverse effects of management's exercise of its rights under 7106(a), it would require that the Agency inform a caller who was reporting employee conduct via the "criminal" hotline that it was necessary to call on another line. The resulting inconvenience to the caller creates the risk that the caller will abandon the attempt to provide the Agency information about employee conduct. Thus, whether the Union's proposals to limit the investigation to reports of criminal matters or the alternative hotlines are considered, the interference with management's rights to determine its internal security practices and take disciplinary and adverse actions is excessive.

B. Union Proposal 3

1. Obligation to Bargain

Contrary to the Agency's claim, there does not appear to be a conflict between Article 3, Section 13 of the National Agreement and Union Proposal 3. That is, a review of the language of Article 3, Section 13 of the National Agreement reveals that the provision requires that an employee be notified as soon as practicable of a written complaint received by management. This provision is clearly different from Union Proposal 3 which would only require that the Union receive a summary of allegations that management obtains through the hotline without identification of the employees concerned. Compare American Federation of Government Employees, Council 147 and Social Security Administration, 17 FLRA 908 (1985) where the Authority determined that the language of a national agreement precluded negotiation of local proposals.

To the extent there are factual issues in dispute between the parties as to the intended application of Article 3, Section 13 in the circumstances of this case, such issues should be resolved in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

2. Management's Right to Determine Its Internal Security Practices

Under Union Proposal 3 the Agency retains the discretion to determine the timing of the release and the nature of the information that will be disclosed as well as the right to take any action necessary to protect confidential information or sources. Because the Agency has not established that Union Proposal 3 interferes with its right to conduct its investigative functions, which is part of its internal security practices, the proposal is within the duty to bargain. Compare National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983, 987 (1982) (provision requiring employees to be notified as soon as practicable of written non-criminal complaints concerning that employee found within the duty to bargain) with National Federation of Federal Employees, Local 1300 and General Services Administration, 18 FLRA No. 97 (1985), petition for review filed, No. 85-1541 (D.C. Cir. Aug. 27, 1985) (proposal prescribing conditions for regular progress reports on on-going investigations concerning employees held nonnegotiable).

3. Inconsistent With the Privacy Act

Although the Agency contends that Union Proposal 3 may violate the Privacy Act, it has failed to point out any part of the proposal which is inconsistent with that statute. It is noted that the plain language of the proposal requires "a summarization of each of the allegations" obtained through the hotline rather than disclosure of the identity of employees involved. Also, as the Union states, the Agency will prepare the summaries and is therefore able to control the content. In these circumstances, the Authority is unable to conclude that there is a violation of the Privacy Act.

V. Conclusion

Based on the foregoing analysis, the Authority finds that Union Proposals 1 and 2, which would limit the Agency to the investigation of criminal allegations received on the telephone hotline, would excessively interfere with management's right under section 7106(a)(1) to determine its internal security practices and with its right under 7106(a)(2)(B) to discipline and remove employees. Regarding Union Proposal 3, the Authority finds that the Agency has failed to substantiate its contentions that it has no duty to bargain on the proposal, that the proposal violates the Privacy Act or that it interferes with the Agency's right to determine its internal security practices. Thus, the Authority finds that Union Proposal 3, which would require that the Agency furnish the Union with a summary of non-criminal allegations received over the hotline, is within the duty to bargain.*/

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review, insofar as it relates to Union Proposals 1 and 2, be, and it hereby is, dismissed. IT IS FURTHER ORDERED, that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposal 3.

Issued, Washington, D.C., May 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding this proposal within the duty to bargain the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS
MEDITERRANEAN REGION
NAPLES AMERICAN HIGH
SCHOOL (NAPLES, ITALY)

Respondent

and

Case Nos. 1-CA-40036
1-CA-40076

WILL SCHUSSEL

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the General Counsel and the Charging Party filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order, except as modified herein.

Contrary to the General Counsel's assertion, the Authority does not read the Judge's Decision as requiring a finding of intent as an element in establishing a violation of section 7116(a)(1) of the Statute. The Authority has previously held that in deciding whether agency management violates section 7116(a)(1) by removing union documents from a bulletin board, it must be determined whether the conduct would reasonably tend to discourage union activity and support. See U.S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan, 17 FLRA 1023, 1036 (1985). With respect to the Judge's finding of a violation of the Statute in this case based on the Respondent's conduct in prohibiting the Charging Party from posting union literature, the Authority notes the Judge's finding of a past practice whereby the Respondent allowed employees to post notices of all kinds in the teachers' lounge. By comparison, in Federal Election Commission, 20 FLRA No. 3 (1985), the Authority found that management did not violate the Statute by prohibiting the posting of notices since there was no negotiated agreement or past practice authorizing such postings. Finally, as to the Judge's finding of a violation based on the Respondent's interference with the Charging Party's right to gather information to support his charge of an unfair labor practice, the Authority notes that the protected right to file a charge encompasses the right to gather information in support of the charge. See Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA No. 100 (1985), in which the Authority found that protected activity under section 7102 of the Statute encompasses an employee's right to conduct an investigation on his own time to support a grievance, or in contemplation of filing a grievance.

ORDER*/

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of Defense Dependents Schools, Mediterranean Region, Naples American High School, Naples, Italy, shall:

1. Cease and desist from:

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*/ The Judge's recommended Order is modified to exclude holiday and vacation periods from the required posting period due to the nature of teachers' work periods during the school year. See Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 19 FLRA No. 96 (1985), petition for review filed sub nom. North Germany Area Council, Overseas Education Association v. FLRA, No. 85-1595 (D.C. Cir., Sept. 20, 1985).

(a) Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by section 7102 of the Statute, by prohibiting the posting of and removing union literature placed in the teachers' lounge or other non-work areas by its employees during non-work time.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by section 7102 of the Statute, by prohibiting employees from conducting investigations and gathering evidence in support of unfair labor practice charges filed with the Federal Labor Relations Authority.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by section 7102 of the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind and revoke the Special Faculty Bulletin issued in December 1983, prohibiting the posting of materials on behalf of organizations other than the exclusively recognized labor organization.

(b) Rescind and revoke the letter dated December 6, 1983, to employee William Schussel, directing him to cease and desist from distributing a questionnaire for the purpose of gathering evidence in support of his unfair labor practice charge.

(c) Post at the Naples American High School, Naples, Italy, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official, and shall be posted and maintained for 60 consecutive days thereafter, excluding holiday and vacation periods, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. May 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by section 7102 of the Statute by prohibiting the posting of, and removing union literature placed in the teachers' lounge or other non-work areas by our employees during non-work time.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by section 7102 of the Statute by prohibiting them from conducting investigations and gathering evidence in support of unfair labor practice charges filed with the Federal Labor Relations Authority.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed by section 7102 of the Statute.

WE WILL rescind and revoke the Special Faculty Bulletin issued in December 1983, prohibiting the posting of materials on behalf of organizations other than the exclusively recognized labor organization.

WE WILL rescind and revoke the letter dated December 6, 1983, to employee William Schussel directing him to cease and desist from distributing a questionnaire for the purpose of gathering evidence in support of his unfair labor practice charge.

____
(Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS - MEDITERRANEAN REGION
NAPLES AMERICAN HIGH SCHOOL
(NAPLES, ITALY)

Respondent

and

Case Nos. 1-CA-40036
1-CA-40076

WILL SCHUSSEL

Charging Party

Gerard M. Greene, Esq.
For the General Counsel

Joseph Caneva
Ronald E. Richards
For the Respondent

William Schussel
For the Charging Party

Before: ELI NASH, Jr.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq., (herein referred to as the Statute).

Upon unfair labor practice charges filed by William Schussel (herein called the Charging Party or Mr. Schussel) on October 25, 1983 and December 7, 1983 against the Department of Defense Dependents Schools, Mediterranean Region Naples American High School, (Naples, Italy) (herein referred to as Respondent DODDS-M or Naples High School), the General Counsel of the Authority, by the Regional Director for Region I, issued a Consolidated Complaint and Notice of Hearing on February 27, 1984. The Consolidated Complaint alleged that Respondent violated section 7116(a)(1) by maintaining an overly broad policy regarding the posting of literature in the teachers lounge; and, by prohibiting an employee from gathering information or evidence to support an unfair labor practice charge which had been filed with the Authority.[1]

Respondent's Answer denied the commission of any unfair labor practice.

A hearing on the Complaint was conducted in Naples, Italy at which time Respondent and the General Counsel were represented by Counsel and afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses and argue orally. All parties filed briefs which have been duly considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

The record is undisputed that the Overseas Federation of Teachers, (hereinafter called OFT), at all times material herein, was the exclusive representative of all nonsupervisory professional school-level personnel, with certain statutory exclusions not relevant to this matter, employed by DODDS-M at the Naples High School. It is also clear from the record that the Overseas Educational Association (herein referred to as OEA) did not have "equivalent status" with the OFT within DODDS-M or the Naples High School, at any time material herein.

The Naples High School began using its present facility in 1982. As with many schools it provides a teachers' lounge or smoking room containing tables, chairs, lockers and couches to be used by its teachers. Teachers, administrators and administrative staff enter the lounge through the teachers' work room which is connected to the lounge by a short corridor. The lounge is located approximately ten to fifteen feet from the administrative offices. Although school administrators at one time used the teachers' lounge they discontinued use of the lounge and lockers during the 1983-84 school year. The situation now is that administrators such as the vice-prinicipal visit the lounge on both official school and unofficial business. The record therefore, revealed the presence by administrators in other than an official capacity in the teachers lounge and Respondent does not seriously dispute such use by its administrators. Accordingly, it is found that administrators dropped into the lounge often enough to become familiar with its condition and its use.

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[1] The General Counsel's unopposed Motion to Correct Transcript is granted.

Since the hearing was held at the school the parties had an opportunity to view or inspect the lounge during the hearing. The inspection revealed approximately forty-eight lockers lining the wall opposite the entrance to the lounge and in plain view of anyone entering. The room also contained six other lockers and a bulletin board. It is uncontraverted that during 1983, a number of teachers posted cartoons, postcards, decals, clippings, messages and other materials, mostly having to do with the school on the outside of their lockers. One teacher, Ms. Jayne Osgood testified that this posting of materials was not unusual and that from time to time during the 1982-83 school year she had attached cut-outs and humorous ads to the outside of her locker and that she had done the same during the fall of 1983, which began a new school year. Ms. Osgood's locker is situated about in the middle of the bank of lockers directly opposite the entrance. Further, Ms. Osgood testified that she was not told by school administrators to remove any of the items from her locker during 1982-83. The practice of posting messages on the outside of lockers was even engaged in by the school administrative staff. This practice continued even after the lockers were painted in late 1983. Even thereafter a teacher posted a sign-up sheet for a drama show on the outside of her locker.[2] The lockers themselves, although painted in late 1983, still bear the marks of having paper or tape attached to their exterior. It is clear, that the posting of materials on the outside of these lockers was at one time a customary practice at Naples High School.

Respondent contends that prior to the 1983-84 school year the Naples High School administration had a policy concerning neatness in the school's facilities, to include the teachers' locker room. This policy according to Respondent included a prohibition against posting of materials on teachers mailboxes/lockers. The physical evidence and testimony reveals that the observance of this policy had been "a little lax." Respondent contends however, that with a new school principal assuming the chief administrator's postion for 1983-84 school year the neatness policy, including the prohibition against posting of materials on teacher's mailboxes and lockers, was reaffirmed and publicized both orally and in writing during the 1983-84 school year.[3] However, when asking Mr. Schussel to remove his materials, the neatness policy, as we later see, was never mentioned to him.

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[2] This posting prompted a memorandum from Mr. Migliaccio to the teacher involved and is Respondent's only evidence bearing on its "neatness" policy as set forth above. Despite that warning note the evidence shows that sign-up sheets for drama performances, etc., are still posted in the lounge.

[3] Respondent in support of its neatness position submitted into evidence a faculty bulletin dated November 10, 1982 from Mr. Migliaccio which reminded everyone that "[a]announcements, posters and similar items must not be tacked, stapled or taped to any walls", but makes no mention of lockers or bulletin boards.

During the early part of September 1983 the OFT local representative Ms. Colette Grillo met with Assistant Principal Migliaccio and informed him of OEA material posted on the mailboxes/lockers. Ms. Grillo also informed Mr. Migliaccio that if the administration did not take action to have the material removed, she would file an unfair labor practice charge with the Federal Labor Relations Authority.

Based on the above-cited physical evidence and record testimony indicating a lax or non-existent neatness policy, at least with respect to the teachers lounge, it is found that no such neatness policy existed or if it existed it was never enforced prior to the 1983-84 school year. Respondent therefore, had no established policy prohibiting posting materials on lockers. In short, it appears that Respondent simply was not concerned with the teachers' use of their lockers until Mr. Schussel's display of OEA material aroused the ire of local union representative, Colette Grillo.

In August 1983, Mr. Schussel, an Industrial Arts teacher employed at the school since 1982-83, attached a clipboard to the outside of his locker by means of a sheet metal tab. The clipboard was easily removable. In addition to the clipboard, Schussel placed an OEA insignia decal, which had an adhesive backing and could be removed without damaging the locker's finish, on his locker. Mr. Schussel's locker is one of those facing the entrance to the lounge. Schussel placed several memoranda and bulletins on the clipboard published by OEA allegedly describing OEA's efforts and accomplishments in collective bargaining with DODDS. Mr. Schussel according to record testimony was formerly an OEA Area Director in the Pacific Region before his employment in Naples. During 1983-84, Schussel remained a member of OEA and an officer in OEA.

Around September 19, 1983, Vice-Prinicipal Migliaccio ordered Mr. Schussel to remove the clipboard. When the clipboard was not removed on the following day, Mr. Migliaccio informed Mr. Schussel that unless he removed "all the OEA material from government property by the end of the school day," disciplinary action would be taken against him. Migliaccio also directed another teacher Jesse Gonzalez, who was present in the locker room, to remove an OEA insignia decal which Gonzalez had attached to his locker, or to similarly be disciplined. Mr. Schussel inquired whether he could put the same items on the teachers' lounge bulletin board used by teachers for ads and messages. Migliaccio replied, "no where in this High School may you display anything that belongs to any other organization other than the organization that is represented in this school." Schussel and Gonzalez then complied by removing the clipboard and decals. During this same period of time other teachers continued to display a variety of cartoons, decals and similar materials on their lockers.

The evidence firmly suggests that Migliaccio ordered Schussel to remove the OEA material because the OFT local representative, Ms. Grillo, complained of its posting and threatened to file an unfair labor practice charge, and not because Migliaccio acted on his own initiative after seeing the clipboard. Migliaccio's testimony describes the clipboard as a "danger and a safety hazard," something he "bumped into" before seeing. Mr. Migliaccio made no mention of such a hazard in his directives to Schussel.

School administration was aware of Schussel's use of the clipboard long before September 19, 1983. Schussel's testimony confirms that the clipboard hung on his locker in the spring 1983 and stands uncontradicted.

In late November 1983, the School administration again directed Mr. Schussel in writing, to remove material from his locker. On this occasion, Schussel placed a "Support NTEU" label and miscellaneous non-union items on the clipboard. One week later, in late November or early December, 1983 the administration issued a "Special Faculty Bulletin" prohibiting the "posting of materials of organizations other than the elected and exclusively recognized organization[s]." The intent of this Bulletin admittedly was to prohibit the posting of such material anywhere in the School, including the teachers' lounge. Apparently the bulletin led to confusion among the teachers as to which material could be affixed to lockers. Such confusion is understandable in view of the practice tolerated the previous year. At almost the same time the administration announced in early December 1983 that all lockers would be painted during the Christmas break, and consequently all material had to be removed from the face of the lockers.

Minutes of the December 8, 1983 Joint Labor Management Committee meeting reveal the following:

> Federal rules have for years prohibited any labor organization, other than the exclusively recognized groups, from posting materials except during election campaigns. Management feels that the minutes of this JLMC should once and for all establish clearly for all employees what the policy is regarding the placing of materials on government-owned teacher-assigned messages/mailboxes. And, again, Management expresses it regrets if this has caused a problem for any employee.

After filing the charge in Case No. 1-CA-40036, approximately a month later, in early December 1983, Schussel distributed a questionnaire to the teachers by putting it into their lockers one morning before the start of classes. Mr. Schussel testified that he developed the questionnaire in order to find out whether other teachers were aware of a past practice or policy prohibiting posting material on lockers. The following day, December 1, 1983 Schussel received a letter from Mr. Migliaccio, ordering Schussel to "cease and desist from polling in this school." Schussel admittedly had not informed the school administration of his intent to distribute the questionnaire. In explanation of the letter, Migliaccio testified that Ms. Grillo complained about the "polling" and demanded that the school administration do something about it. Ms. Grillo confirms that she threatened to file an unfair labor practice charge regarding the polling. The reference in Migliaccio's letter to "polling" apparently comes from Article 32[4] of the OFT-DODDS-M collective bargaining agreement. Reliance on that Article seems misplaced since it addresses surveys conducted by "Management" and not, as Migliaccio stated in the letter to Schussel, by "only the OFT representative." The above interpretation indeed is supported by the testimony of union representative Grillo. The cited Article without question is inapplicable to Schussel's distribution of the questionnaire. Migliaccio however, claimed that the School "always" had a policy requiring teachers to submit "formal things" to the administration before distributing them although this was not the reason cited to Schussel for the "policy."

During the hearing, Migliaccio admitted that the questionnaire could have been a sensible device to gather information on the unfair labor practice charge. To Ms. Grillo, the questionnaire "obviously"could have been a method to gather information on the charge. Respondent did not show that Schussel's distribution of the questionnaire through the lockers caused any interference with the School's operation. In fact the evidence tends to establish that the method used by Schussel here was a common practice followed by other teachers and organizations at the School when distributing information.

Discussion and Conclusions

1. Whether a defective charge requires that the complaint be quashed in this matter.

Respondent raises procedural questions which of necessity must be considered prior to addressing the substantive issues in this matter. Respondent contends, in essence, that no valid charge was filed and that under Section 2423.4 of the Authority's rules and regulations since there is no valid charge all that follows is defective.[5]

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[4] Article 32 states, in pertinent part:

> Section 1.
>
> No teacher will be required by Management to respond to any surveys involving personnel policies, practices or working conditions without prior approval of the Union.

[5] 5 C.F.R. Section 2423.4, "Contents of the charge; supporting evidence and documents," states:

> "(a) A charge alleging violation of 5 U.S.C. 7116 shall be submitted on forms prescribed by the Authority and shall contain the following:

(Footnote continued)

The hyper-technical arguments submitted by Respondent to support this contention are wide of the mark. It has long been recognized in administrative matters such as this that a charge is not a pleading. The charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued. A charge has consistently been held to be sufficient for the above purposes in administrative proceedings if it informs the alleged violator of the general nature of the violation charged against him to preserve the evidence relating to the matter. Moreover, the Authority has adopted at least in priniciple a rule that where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged defect. See Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA 575 (1982). Here Respondent made no effort to show prejudice, but relies merely on what it views as a technical defect. I see no reason, based on Respondent's submission, to quash the complaint herein because of a defective charge. To do so, in my view, would not effectuate the purposes and policies of the Statute in this matter.

2. Whether the "equivalent status" rule applies or whether the real issue is one of access to the facility by an individual in nonwork areas during nonwork hours.

Respondent maintains that it had two legitimate reasons for directing Schussel to remove OEA materials from his locker. First, based upon legitimate managerial concerns, no material of any type was to be posted on teachers' mailboxes. And second, to have allowed the use of its facilities for the posting of OEA materials would expose it to valid unfair labor practice charges.

The initial contention of Respondent is not supported by the record. Contrary to Respondent's insistence, the record shows at best a lax neatness policy which it is not clear was ever applied to teachers.

Before moving to the second contention, I must agree with the General Counsel that this case does not concern the principle of "equivalent status" which Respondent assumed would expose it to a valid unfair labor practice charge by the incumbent union. Respondent's reliance on Perry Education Association v. Perry Local Educators Association, U.S. Sup. Ct.,

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5/ (Footnote continued)

> "(3) A clear and concise statement of the facts constituting the alleged unfair labor practice charge, a statement of the section(s) and subsection(s) of Chapter 71 of Title 5 of the United States Code alleged to have been violated, and the date and place of occurrence of the particular acts;

Case No. 81-896, February 23, 1983, dealing with a public school internal mail system is completely misplaced.6/ There the question involved whether the school district should provide access to communication facilities such as access to teachers mailboxes and the right to use the interschool mail delivery system. The question was whether the access could be provided to the exclusive representative of bargaining unit employees without having to provide equal access to rival unions.7/ Here, Schussel and Gonzalez were not using the mailboxes or lockers of others, but were using their own lockers to disseminate information much in the same way other teachers had done in the past. The thing that distinguishes Perry, as the General Counsel points out in brief, is that neither Schussel nor Gonzalez was acting as a labor organization nor were they seeking to rival the incumbent by their actions. The equivalent status rule was designed to deal with demands of competing labor organizations for equal access by non-employee agents to an agency's premises and for use by those organizations of an agency's services and facilities during organizational campaigns. The rule was not intended to prohibit or restrict employees on their own time from engaging in solicitation or distribution of literature although on the agency's premises. As the Court pointed out in Perry, fn. 11, the courts have frequently invalidated restrictions that prohibit individual employees from distributing union literature during nonwork hours in nonwork areas. This is that type of case. Here Respondent made no showing that its application of the rule to Schussel was necessary to preserve discipline among teachers or that it was justified by any special circumstances, including its so called neatness policy.

The question to be resolved here is not one of "equivalent status" but, whether an agency can prohibit distribution of literature on nonwork time in a nonwork area for the reasons asserted by Respondent. That question has been answered previously by the Authority. See, Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981); Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts, 7 FLRA 596 (1982). Respondent reasons that it would be subject to a valid unfair labor practice charge if Schussel were

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6/ Respondent obviously did not read the facts in the Perry case, for even there the PLEA, which was not the exclusive representative of the teachers involved was not prevented from "using the school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after hours; and may, with the approval of the building principals, make announcements on the public address system . . ." considerable more than which is involved in this matter.

7/ In view of the above rulings it is unnecessary to rule of the General Counsel's Motion to Strike Portions of Respondent's Brief or Respondent's reply to that motion.

allowed to post his decal and clipboard on his locker, a practice established to have been prevalent among many of the teachers at Naples High. A practice that prior to the 1983-84 school year was unrestricted until the incumbent complained that Schussel was posting rival literature on his locker. Interestingly, Respondent never sought to prevent Schussel from carrying a shopping bag with an OEA symbol, a practice, in my view, which was almost identical to the conduct which it threatened to discipline him about here.

The exercise of opportunities to solicit or distribute literature is paramount to the right conferred by section 7102 of the Statute, "to form, join or assist any labor organization. . . ." Surely Respondent realizes that there are ongoing efforts between labor organizations to show that their product is better. In pursuit of these goals they often distribute literature to facilities which are already organized by their competitors. Their competitors no doubt complain about these efforts. Those complaints, alone, however, are no reason to inhibit that distribution. Here Respondent reacted to the complaints by promulgating a broad rule prohibiting all distribution of literature in a nonwork area without regard to whether it was done on nonwork time. Such a broad policy undoubtedly carries an inhibiting effect on others who might in the future wish to exercise section 7102 rights and seek ouster of the bargaining representative. The rule as announced and practiced by Respondent has the effect of freezing out any other union or entrenching the incumbent by infringing on the section 7102 rights of dissident employees. A desirable result for the incumbent, but certainly contrary to an employee right to form, join, or assist any labor organization. In this same vein, the Authority has long recognized that where an agency grants its employees a privileged means of communication, such as a bulletin board for posting a variety of non-work-related personal items and messages, the agency may not prohibit the posting of messages and notices related to unions and collective bargaining. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, 11 FLRA 77 (1983). In that case, the Authority held that the respondent agency unlawfully removed from the employees' bulletin board, commonly used for personal notices, cards, etc., a notice announcing the appointment of union stewards.

I am in agreement with the General Counsel that Respondent's defense is based on its apparent misreading of the "equivalent status" rule and its preoccupation with Schussel's position with OEA. For purposes of this case those preoccupations are fatal since it clearly establishes that the Naples School policy was established only to suppress Schussel's views.

Respondent portrays this case as an attempt to provide OEA or Schussel acting as an agent for OEA, the same or equivalent services and facilities which OFT has obtained in bargaining. The facts as shown by the record are that Respondent has allowed its employees to post items on the exterior of their lockers and also to use a bulletin board in the teachers' lounge without restraints. Schussel, too, as an individual employee or other dissidents have the right to use those facilities without being subject to discriminatory restraints in their use of that opportunity. In view of the evidence and applicable case law it is my conclusion that Respondent violated Section 7116(a)(1) of the Statute by maintaining and enforcing a policy, first announced to Schussel and Gonzales in September, 1983 and later promulgated in the "Special Faculty Bulletin" prohibiting the posting or display, on lockers or on anywhere else in the lounge, or the School for that matter, of OEA and NTEU literature and/or insignia.

Since the record clearly reveals that the actual reason for the policy was Respondent's misapplication of the "eqivalent status" rule, I also reject Respondent's alternate argument that management had legitimate concerns about materials of any type being posted on the teachers' mailboxes and lockers. Indeed this is or may be a legitimate concern but, the record establishes beyond doubt that this reason was pretextual and was not the reason Respondent asserted to Schussel as early as September 1983.

3. Whether an individual has a right to gather information in support of an unfair labor practice charge by reasonable means.

Respondent seemingly sees this matter as a castigatory proceeding for Schussel, who it views as a dissident troublemaker intent on harassing the local school administration. In so doing Respondent ignores fundamental statutory rights afforded individuals. It has already been found that Schussel filed an unfair labor practice charge with regard to Respondent's threatened disciplinary action on his distribution of OEA and NTEU literature. It is my opinion that individuals are entitled to gather information to support charges filed with the Authority at any stage of the proceedings. Furthermore, the gathering of such information is not limited to conventional means. Any theory asserted which would prevent information gathering in support of a charge would certainly be a novel one. The only question here is whether the method used by Schussel was a reasonable one. In view of the fact that both the incumbent representative and administrator Migliaccio, in essence, testified upon seeing Schussel's questionnaire which was distributed to other teachers, that it could be construed as a reasonable means of gathering the necessary information, dispells in my mind any inferences to the contrary. Accordingly, it is found that Schussel employed a traditional means of gathering information in the Naples High School and that his placing questionnaires for teachers to respond to in support of his unfair labor practice charge was certainly a reasonable method of gathering evidence in support of his charge with the Authority.

Respondent raises several reasons why Schussel's distribution of the questionnaire was improper. However, Respondent has not shown how Schussel's distribution of the questionnaire hindered Respondent's use of its property, the teachers' mailboxes. Respondent cites a contract provision which on its face is inapplicable to the circumstances, and a policy of approval which, even if it was substantiated by this record, would reasonably tend to deter an employee from filing unfair labor practice charges and gathering information needed to support its position. In this case Schussel could hardly have devised a more efficient means of gathering information and caused no proven interference with the daily functioning or discipline of the School. Schussel dropped the questionnaire in lockers on his own time and there is no showing that he caused teachers to use work time in responding. Schussel did not compel or pressure teachers to respond to the questionnaire. Indeed, as the questionnaire did not seek names or other identifying information, confidentiality was assured to respondents and non-participants alike. Respondent's description of locker 'drops' as the "School mail distribution system" is no more than semantics.

Respondent's contention that once an unfair labor practice charge is filed, only the Office of the General Counsel may conduct an investigation of the charge lacks merit. This position ignores not only statutory policy but, the practicalities of the situation designed to facilitate the investigation and processing of unfair labor practice charges (for example, Section 7131(c) provides for official time) "consistent with the requirement of an effective and efficient Government," as set forth in Section 7101. The gathering of information by a charging party at any stage of a proceeding, through reasonable means and without engaging in flagrant misconduct seemingly assists all sides in obtaining a speedy resolution of the matter.

Respondent also contends that it was unaware of the unfair labor practice charge at the time it ordered Schussel to "cease and desist" distributing the questionnaire, and therefore cannot be found liable. I do not agree. Schussel distributed the questionnaire about one month after the filing and service of the charge in Case No. 1-CA-40036 giving Respondent ample time to be aware that an unfair labor practice action as being taken against it. It can reasonably be inferred from the facts that that Respondent was aware or should have been aware that an unfair labor practice charge existed. Respondent does not deny service of the charge, but only the particular date alleged. Here the questionnaire was clearly related to the unfair labor practice charge and Schussel's conduct in distributing it was well within the bounds of protected activity. It logically follows that Respondent's directive in these circumstances that he "cease and desist" naturally tended to interfere with Schussel's exercise of statutory rights, and so violated section 7116(a)(1) of the Statute. Thus, Respondent never inquired as to the nature of the questionnaire, but proceeded to admonish Schussel. Such action when there was a valid charge was at its peril.

Accordingly, it is found that Respondent's conduct in directing Schussel to cease and desist distribution of the questionnaire designed to gather information to support an unfair labor practice charge filed with the Authority violated section 7116(a)(1) of the Statute.

Having found that Respondent violated section 7116(a)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to 5 U.S.C. Section 7118(a)(7) and Section 2423.26 of the Final Rules and Regulations, U.S. Fed. Reg. 3482, 3510 (1980), it is hereby ordered that Department of Defense Dependents Schools, Mediterranean Region, Naples American High School:

1. Cease and desist from:

(a) Maintaining or enforcing an overly broad and/or discriminatory policy regarding the posting or displaying of literature or insignia of any labor organization on employees' lockers or employees' bulletin boards.

(b) Prohibiting employees from gathering information and evidence to support an unfair labor practice charge filed with the Federal Labor Relations Authority.

(c) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Permit William Schussel, Jesse Gonzalez and other employees to display literature and insignia of any labor organization on employees' lockers and employees' bulletin boards.

(b) Rescind and revoke the Special Faculty Bulletin issued in December 1983 concerning posting of materials of organizations other than the elected and exclusively recognized organization[s].

(c) Rescind and remove from its files the November 30, 1983 letter to William Schussel directing him to remove materials from his locker, and any other memoranda or documentation on the subject of Schussel's posting of union literature and insignia on his locker.

(d) Rescind and revoke its December 6, 1983 letter to William Schussel directing him to cease and desist from distributing a questionnaire for the purpose of gathering information and evidence to support an existing unfair labor practice charge.

(e) Post at its school within the Mediterranean Region copies of the attached Notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 1 after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region I in writing, within 30 days from the date of this Order, what steps it has taken to comply herewith.

Eli Nash, Jr.

ELI NASH, Jr.
Administrative Law Judge

Dated: March 25, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT maintain or enforce an overly broad and/or discriminatory policy regarding the posting or display of literature and insignia of any labor organization on employees' lockers and employees' bulletin boards.

WE WILL NOT prohibit employees from gathering information to support an unfair labor practice charge.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and revoke the Special Faculty Bulletin issued in December 1983 concerning posting of materials of organizations other than the elected and exclusively recognized labor organization.

WE WILL rescind and revoke a November 30, 1983 letter to William Schussel directing him to remove materials from his locker, and any other memoranda or documentation on the subject of his posting of union literature and a decal on his locker.

WE WILL rescind and revoke the December 6, 1983 letter to William Schussel directing him to cease and desist from distributing a questionnaire for the purposes of gathering information to support an existing unfair labor practice charge.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116 and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3804

Union

and

Case No. 0-NG-655

FEDERAL DEPOSIT
INSURANCE CORPORATION,
MADISON REGION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute and raises issues concerning the negotiability of fourteen Union proposals.[1]

II. Union Proposal 1

Article 1, Section 4.

In the interest of the employee's health, the Employer agrees to pay all costs associated with annual eye examinations, physical examinations and all devices associated with job-related better health, such as eye

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[1] The Union has withdrawn two proposals from its appeal in this case: Proposal 6, concerning the filing of financial statements by employees' spouses, and Proposal 12, concerning employees' evaluations of their supervisors. Union Reply to Agency Statement of Position at 4. These proposals will not be considered further here.

> glasses, hearing aids, etc. In addition, the Employer agrees to pay on an annual basis, the deductible cost associated with most medical insurance programs.

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with law, 5 U.S.C. § 8906, and applicable Government-wide regulation, 5 C.F.R. § 890.501. The Agency also contends that the proposal is nonnegotiable under section 7117(a)(2) because it conflicts with an Agency regulation for which a compelling need exists. Finally, the Agency contends that the proposal violates its right to determine its organization under section 7106(a)(1). The Union disputes each of the Agency's contentions.

B. Analysis and Conclusion

Under existing Authority precedent, we find that the proposal is nonnegotiable for reasons other than those alleged by the Agency. In particular, Union Proposal 1 would require the Agency to pay the cost of various medical expenses, including but not limited to medical, eye, and dental examinations which would also be covered by medical insurance provided employees under chapter 89 of title 5 of the United States Code.

Under chapter 89 of title 5 of the U.S. Code, almost all Federal employees are eligible for health insurance, a portion of the cost of which is paid by the Federal Government.[2] The term "employee" as used in chapter 89 is defined in 5 U.S.C. § 8901[3] to include, under 5 U.S.C. § 2105,[4] persons "appointed in the civil service" by "the head of a Government controlled corporation." See American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 218 (1981) (FDIC is a "Government corporation"). "Government controlled corporation" is defined as a Government corporation which is not a Government owned corporation. 5 U.S.C. § 103(2).[5] Under 31 U.S.C. § 9101, the FDIC is a "mixed-ownership corporation" and not a "wholly owned Government corporation."[6] Therefore, the FDIC is not a Government owned corporation but, in terms of 5 U.S.C. § 103, a "Government controlled corporation." *Compare National Treasury Employees Union and Pension Benefit Guaranty Corporation*, 9 FLRA 692 (1982), *aff'd mem. sub nom. National Treasury Employees Union v. Federal Labor Relations Authority*, 711 F.2d 420 (D.C. Cir. 1983) (Pension Benefit Guaranty Corporation is a corporation owned by the Government under 5 U.S.C. § 103 because it is a wholly owned Government corporation under 31 U.S.C. § 9101). Employees of the FDIC are thus "employees" within the meaning of 5 U.S.C. § 8901 who are covered by the health insurance provisions of chapter 89. More specifically, they are covered by the limitations in that chapter on Government contributions to the costs of such insurance.

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[2] For the text of 5 U.S.C. § 8906 see the Appendix to this decision.

[3] For the text of 5 U.S.C. § 8901(1)(A) see the Appendix.

[4] For the text of 5 U.C.S. § 2105(a)(1)(E) see the Appendix.

So interpreted, Union Proposal 1 has the same effect as Union Proposal 17 in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519, 523-26 (1983), which would have required the agency to provide "employer-paid" medical and dental insurance. In that case, the Authority held that the amount which a Federal Government agency must contribute to the cost of employee health insurance is set forth in 5 U.S.C. § 8906 and, therefore, is a matter which is "specifically provided for by Federal statute" under section 7103(a)(14)(C) so as to be excluded from those "conditions of employment" over which an agency can be required to bargain under the Statute.

For the reasons set forth in *Fort Bragg Dependents Schools*, Union Proposal 1 in this case, which similarly requires Agency contributions to the costs of employee health insurance, is excluded from the definition of "conditions of employment." Therefore, the proposal is outside the duty to bargain. In view of our decision, we do not need to decide whether the proposal is inconsistent with law, 5 U.S.C. § 8906, whether it violates management's rights under section 7106(a)(1), or whether the Agency has shown that it is barred from negotiation by an Agency regulation for which a compelling need exists.

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[5] For the text of 5 U.S.C. § 103 see the Appendix.

[6] For the text of 31 U.S.C. § 9101 see the Appendix.

III. Union Proposal 2

Article 29, Section 30.

> Personnel taking maternity leave will be allowed to take all available leave accrued and then begin a period of up to six months leave without pay.

A. Positions of the Parties

The Agency contends that Union Proposal 2 is nonnegotiable because it interferes with management's right under section 7106(a)(2)(B) to assign work and because it conflicts with an Agency regulation for which a compelling need exists. The Union disputes the Agency's contentions.

B. Analysis and Conclusion

Federal personnel laws and regulations contain no provision for maternity leave as a separate type of leave. Absence from duty for maternity reasons is a combination of sick leave, annual leave, and leave without pay. See Federal Personnel Manual (FPM) Supplement 990-2, chapter 630, subchapter S13-2 and 3.

Union Proposal 2 requires the Agency to grant an employee's request for up to six months of leave without pay for maternity reasons after such employee has used all available sick and annual leave. As such, the proposal precludes the Agency from requiring the employee to return to work at any point during the period covered by the request, even if the employee is able to do so and the Agency determines it has need of the employee's services.7/ Union Proposal 2 in this case has the same effect as Union Proposal 4 in American Federation of Government Employees, AFL-CIO, Local 2263 and Department of

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7/ For policies governing employee requests for, and employee return to work following, maternity leave, see FPM Supplement 990-2, chap. 630, subchap. S13-4.a. and 5.a.

the Air Force, Headquarters, 1606th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA 580 (1984). The proposal at issue in that case required that supervisors grant leave in all cases where the need is clearly documented on the request for leave. The Authority held, relying on its decision in National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), affirmed sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982), that the proposal nullified management's ability to determine when assigned work will be performed. The Authority found, therefore, that the proposal directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute.

For the reasons set forth in the Bureau of the Public Debt and Kirtland Air Force Base decisions, Union Proposal 2 directly interferes with management's right to assign work under section 7106(a)(2)(B) and is outside the Agency's duty to bargain.[8] In view of our decision, we do not have to decide whether the Agency has shown that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists.

IV. Union Proposal 3

Article 29, Section 42.

> If the FOS [Field Office Supervisor] is to justify why specific examiners are or are not to write certain jobs to the Regional Office, the FOS is to notify the prospective EIC [Examiner In Charge] concerned.

A. Positions of the Parties

The Agency contends that the proposal does not concern a matter affecting conditions of employment of unit employees because it relates to matters wholly internal to management. The Agency also contends that the proposal violates management's right to assign work under section 7106(a)(2)(B) of the Statute. The Union disputes the Agency's contentions and argues that the proposal is procedural in nature and negotiable under section 7106(b)(2) and (3).

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[8] An agency's determination as to the amount of leave to grant an employee for maternity reasons is subject to applicable law and regulation. See FPM Supplement 990-2, chap. 630, subchap. S13-3 and 6.

B. Analysis

1. Conditions of Employment

Contrary to the Agency's contention, we find that the proposal concerns management's decision to assign or not assign work to employees, which is a matter affecting conditions of employment.

2. Management Rights

Union Proposal 3 requires that an employee be notified by the field office supervisor [FOS] whenever higher level management makes an inquiry regarding the assignment of work to a particular employee. The proposal, therefore, would provide an employee with information as to internal management discussions and deliberations concerning its work assignments.

The Authority has consistently held that the management rights enumerated in section 7106 of the Statute encompass not only the right to act but also the right to discuss and deliberate concerning the relevant factors upon which decisions as to the exercise of those rights will be made.9/ Moreover, the Authority has held that proposals which require union participation in such discussions and deliberations pertaining to the exercise of management's

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9/ National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574, 579-81 (1981), enforced sub nom. National Federation of Federal Employees v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982); National Federation of Federal Employees, Local 1431 and Veterans Administration Medical Center, East Orange, New Jersey, 9 FLRA 998 (1982).

rights are not procedures but are a part of management's substantive decision-making process. They would have the effect of directly interfering in management's statutory right to make the decisions involved. See, for example, Homestead Air Force Base, (union observers at management conferences regarding decisions to contract out work nonnegotiable); VA Medical Center, (union participation on committees which decide, among other things, whether to remove probationary employees nonnegotiable); National Federation of Federal Employees, Local 1497 and Headquarters, Lowry Technical Training Center (ATC), Lowry Air Force Base, Colorado, 11 FLRA 565, 566-68 (1983) (Union Proposal 1) (union participation on panel to determine selective factors nonnegotiable).

While the cited cases concern union involvement in internal management discussions and deliberations, and the proposal here concerns access to those deliberations by an employee, the substantive impact on management's decision-making is the same. In both instances, an outside party is interjected into, and acquires knowledge of, management's internal decision-making process. Union Proposal 3 directly interferes with the deliberative process associated with management's right to assign work under section 7106(a)(2)(B) of the Statute. In so holding, we note that the Union provides no support for the conclusion, nor is it otherwise apparent, that the proposal constitutes an "appropriate arrangement" within the meaning of section 7106(b)(3). See National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), in which the Authority discussed the approach it will take in deciding cases involving section 7106(b)(3) of the Statute.

C. Conclusion

Union Proposal 3 directly interferes with management's right to assign work under section 7106(a)(2)(B) and is outside the Agency's duty to bargain.

V. Union Proposal 4

Article 29, Section 49.

Transferees should have the option of temporarily performing in their new field office prior to making a final decision to move.

A. Positions of the Parties

The Agency contends that the proposal interferes with management's right to assign employees under section 7106(a)(2)(A) of the Statute. The Union contends that the proposal is a negotiable procedure under section 7106(b)(2).

B. Analysis and Conclusion

Union Proposal 4 would provide an employee with the option of a temporary reassignment prior to a transfer or permanent reassignment to a different field office. Union Proposal 4 in this case has the same effect as Union Proposal 3 in American Federation of Government Employees, Local 1395 and Social Security Administration, Great Lakes Program Center, Chicago, Illinois, 14 FLRA 408, 411-12 (1984). The proposal at issue in that case provided that employees who were performing unsatisfactorily had the option of reassignment to another position of the same grade. The Authority held, relying on its decision in International Organization of Masters, Mates, and Pilots and Panama Canal Commission, 11 FLRA 115, 119-20 (1983), that by subjecting management's decision concerning reassignment of an employee to the control of that employee's decision to seek reassignment, the proposal directly interfered with management's right to assign employees under section 7106(a)(2)(A) of the Statute. Similarly, Union Proposal 4 provides employees with the right to determine whether or not they will be transferred. The proposal, therefore, directly interferes with management's right to assign employees under section 7106(a)(2)(A) and is not a negotiable procedure under section 7106(b)(2).

For the reasons more fully set forth in the Authority's Panama Canal Commission and Great Lakes Program Center decisions, Union Proposal 4 is outside the Agency's duty to bargain. See also National Treasury Employees Union and Internal Revenue Service, San Francisco, California, 14 FLRA 65, 71-72 (1984).

VI. Union Proposal 5

Article 29, Section 55.

It is agreed to allow travel time on Monday and Friday to include carry over assignments.

A. Positions of the Parties

The Agency contends that the proposal is barred from negotiation by the Agency's travel regulations, for which a compelling need exists under section 7117(a)(2) of the Statute. The Union disputes the Agency's contention.

B. Analysis and Conclusion

Under existing Authority precedent, we find the proposal nonnegotiable for reasons other than those alleged by the Agency. It appears that Union Proposal 5 is intended to permit employees an unlimited amount of travel time to return to their residences on Friday from a temporary assignment which is outside their normal commuting area and, on Monday, to return to that assignment, if it has not been completed. The proposal would grant an unlimited amount of time, normally spent performing work, for purposes of travel.

5 U.S.C. $ 6101(b)(2) requires agencies to schedule, to the maximum extent practicable, time spent in travel status during regularly scheduled duty time.10/ However, the proposal, by granting employees a right to unlimited travel time, would prevent the Agency from requiring employees to travel during nonduty time in those circumstances where it was determined that travel during duty time was not practicable, that is, where other alternatives to accomplishing a work assignment and still scheduling travel during a portion of the workday were not practicable.

10/ 5 U.S.C. $ 6101(b)(2) provides:

> $ 6101. Basic 40-hour workweek; work schedules; regulations
>
> . . . . . .
>
> (b)(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

See also 5 C.F.R. $ 610.123 and Federal Deposit Insurance Corporation General Travel Regulations, paragraph 1208(a), which authorizes up to two hours for travel on Friday and Monday in circumstances involving "carry over assignments."

Interpreted in this way, the proposal has the same effect as the proposals at issue in *American Federation of Government Employees, AFL-CIO, Local 3424 and Federal Home Loan Bank Board, San Francisco, California*, 14 FLRA 79 (1984) and *American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office*, 13 FLRA 446 (1983). In those decisions, the Authority held that, by precluding management from requiring employees to work a full workday and to travel on nonduty time where other alternatives were not practicable, the disputed proposals directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute.

For the reasons set forth more fully in the *Federal Home Loan Bank Board* decisions, Union Proposal 5 directly interferes with management's right to assign work under section 7106(a)(2)(B) and is outside the Agency's duty to bargain. In view of our decision, we do not have to decide whether the Agency has shown that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists.

VII. Union Proposal 7

> Article 29, Section 67.
>
> When employees commute to and from their residence and are out over 10-hours they will receive $8.00 plus mileage and other expenses.

A. Positions of the Parties

The Agency's sole contention is that the proposal is barred from negotiation by a provision of its travel regulations for which a compelling need exists. The Union disputes the Agency's contention.

B. Analysis and Conclusion

As a "Government controlled corporation" the FDIC is not subject to statutory and regulatory provisions governing travel on official business for the Government. 5 U.S.C. § 5701. Consequently, Agency policies regarding such travel are established by internal regulations. The internal regulation relied on by the Agency to bar Union Proposal 7 is Federal Deposit Insurance Corporation General Travel

Regulations (FDIC GTRs), paragraph 1205(a).[11] The regulation establishes the criteria which the Agency uses to determine whether to compensate employees whose duties on any given day require a commute which is significantly longer than normal. The Agency argues that the proposal, by shortening the time period to an amount close to that which would be required for commuting to and from work, negates the intent of its regulation to compensate employees whose commute, due to unusual circumstances, requires an inordinate amount of time. In support for this regulatory policy, the Agency contends that it is essential for there to be Agency-wide uniformity on this matter so as to provide equitable treatment for its employees.

The compelling need provisions of the Statute are meant to insure that otherwise negotiable bargaining proposals are taken outside the duty to bargain only if the agency involved demonstrates and justifies an overriding need for the policies reflected in the rules or regulations to be uniformly applied throughout the agency. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 220 (1981). Therefore, an agency must (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in section 2424.11 of its Regulations. See American Federation of Government

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[11] FDIC GTRs, paragraph 1205(a) provides in part:

> a. Commuting. Reimbursement in connection with travel of 24 hours or less, when lodging is not required, will be claimed on the basis of subsistence plus transportation. Subsistence is reimbursable at $8.00 for any day on which official duty requires both of the following:
>
> (1) Absence from residence exceeding 11 hours
> (2) Return to residence after 6:00 p.m.
>
> Transportation includes actual cost of public transportation and/or mileage at the prescribed rate, tolls, and parking costs. [Emphasis in original.]

Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 451, 454 (1980). Generalized and conclusionary reasoning is not enough to support a finding of compelling need. The Authority is not in a position on its own to determine the purposes Agency regulations are designed to achieve or the importance the Agency attaches to those regulations. Unless the Agency provides us with facts and arguments bearing on each of these questions, we cannot judge the validity of the Agency's contentions.[12]

In this case, the Agency has failed to indicate on which of the Authority's compelling need criteria it relies and makes no attempt to demonstrate that the cited regulation meets the requirements of those criteria. The Agency has merely made general statements as to how important its regulation is. The Authority does not have in the record before it, therefore, the facts and arguments which permit it to make a reasoned judgment on the Agency's claims. The Agency has not met its burden and its claim of compelling need cannot be sustained.

The Agency has not shown that Union Proposal 7 is barred by an Agency regulation for which a compelling need exists and, therefore, the proposal is within the Agency's duty to bargain.[13]

VIII. Union Proposal 8

> Article 29, Section 66.
>
> In order to bring the employees on an equal basis with the employees of the U.S. Postal

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[12] See also *National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, 681 F.2d 886, 891 (D.C. Cir. 1982), *affirming* *National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA 574 (1981).

[13] Our decision with respect to Union Proposal 7 does not mean that we would not, in different circumstances, find that a compelling need exists for this regulation. Of course, as the Authority has consistently stated, see note 34 *infra*, our determination that a proposal is negotiable is not a judgment on the merits of that proposal.

> Service, the Employer agrees that all within grade increases will be on an annual basis and the present practice of 2 and 3 year intervals be discontinued.

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation, Federal Personnel Manual, chapter 531, subchapter 4, paragraph 4-7. The Agency also contends that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists. The Union disputes the Agency's contentions.

B. Analysis

1. Inconsistent with Government-wide Regulation

Union Proposal 8 would eliminate the waiting period for within-grade increases at steps 5 through 10 of each grade of the Federal Deposit Insurance Corporation pay schedule. For employees covered by the Federal General Schedule pay system the waiting periods for within-grade increases of steps 5 through 10 of each grade are mandated by law, 5 U.S.C. $ 5335(a)[14] and Government-wide regulation, 5 C.F.R. $ 531.405.[15] The FDIC, however, is a "Government controlled corporation" within the meaning of 5 U.S.C. $ 103(2). See Union Proposal 1 above. Under 5 U.S.C. $ 5331(a)[16] and 5 U.S.C. $ 5102(a)(1)(i),[17] therefore, employees of the FDIC are not covered by the General Schedule pay system and, in particular, are not subject to the statutory and regulatory provisions as to waiting periods for within-grade increases. See National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598, 610 (1984) (Member Haughton dissenting), appeal docketed sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, No. 84-1286 (D.C. Cir. July 6, 1984) (Decision on Remand, 21 FLRA No. 36 (1986)). Thus, the proposal is not outside the duty to bargain because it is inconsistent with a Government-wide regulation. The regulation in question does not apply to FDIC employees and the decision of the FDIC to follow the regulatory provisions establishing waiting periods for within-grade increases does not bring its employees within the coverage of those regulations.

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[14] For the text of 5 U.S.C. $ 5335(a) see the Appendix.

[15] For the text of 5 C.F.R. $ 531.405(a)(1) see the Appendix.

[16] For the text of 5 U.S.C. $ 5331(a) see the Appendix.

[17] For the text of 5 U.S.C. $ 5102(a)(1)(i) see the Appendix.

2. Compelling Need

Based on the record, it appears that the Agency, in its own internal regulations, has promulgated the same requirements as to waiting periods for a within-grade increase as are set forth in 5 C.F.R. § 531.405.[18] The Agency claims that a "compelling need" exists for this regulation specifically citing only section 2424.11(c) of the Authority's Rules and Regulations.[19] As indicated above, FDIC employees are not subject to statutory and regulatory requirements as to waiting periods for within-grade increases. The Agency's internal regulation, therefore, does not implement a nondiscretionary mandate of law or regulatory authority, as the Agency claims. For this reason, the Agency regulation cannot serve as a bar to negotiation on the disputed proposal under section 2424.11(c) of the Authority's Rules and Regulations.

The Agency also contends that a compelling need exists for the cited regulation because it establishes a uniform policy regarding within-grade increases which is essential for fairness and the maintenance of employee morale. However, the Agency does not specifically reference either one of the other compelling need criteria set forth in section 2424.11(a) and (b) of the Authority's Rules and Regulations. Nor does the Agency advance any specific arguments as to how the cited Agency regulation meets the requirements of those criteria. The Agency has provided none of the facts and arguments which we would need in order to judge the validity of its contentions. See our discussion of Union Proposal 7 in this case. Since the Agency has provided no support for this additional compelling need contention, that contention cannot be sustained, and the cited Agency regulation does not provide a bar to negotiation on Union Proposal 8 herein. See American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 451 (1980). Compare National Treasury Employees Union, Chapter 207 and Federal Deposit Insurance Corporation, Washington, D.C., 14 FLRA 598, 610-12 (1984) (Member Haughton dissenting), appeal docketed sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, No. 84-1286 (D.C. Cir. July 6, 1984), (Decision on Remand, 21 FLRA No. 36 (1986)) (the Authority found that the agency had demonstrated that its regulation established uniform pay practices which were essential to the accomplishment of the Agency's mission in a manner consistent with the requirements of an effective and efficient government).

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[18] FDIC Within-Grade Increases Policy, subchapter 1-4. See Agency Statement of Position at Exhibit M.

[19] For the text of section 2424.11(c) of the Authority's Rules and Regulations see the Appendix.

C. Conclusion

Union Proposal 8 is not inconsistent with an applicable Government-wide regulation. Nor has the Agency shown that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists. The proposal, therefore, is within the Agency's duty to bargain.

In reaching this conclusion we note that the proposal does not concern the amount of the increase in salary which an employee will receive with each step increase. Rather, the proposal only concerns the timing of an employee's step increase. For this reason, the proposal does not involve issues concerning the negotiability of wages in the Federal sector.

IX. Union Proposal 9

> Article 27, Section 1.
>
> Management adopt a work schedule which incorporates the principle of flexitime which would provide for a nine hour work day for eight (8) days. The ninth work day would consist of an eight (8) hour work day.
>
> Article 27, Section 2.
>
> By providing for a nine-hour work day as set forth in Section 1 of this Article, every other week would consist of a four day work week.

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) because it is inconsistent with law. The Agency also contends that the proposal is barred from negotiation by Agency regulations for which a compelling need exists. Finally, the Agency argues that the proposal concerns the methods and means of performing its work and is negotiable only at its election under section 7106(b)(1). The Union disputes the Agency's contentions.

B. Analysis

1. Inconsistent with Federal Law

Union Proposal 9 concerns the compressed work schedule known as "5-4-9," that is, a 9-hour, 5-day workweek followed by an approximately 9-hour day, 4-day workweek. During the pendency of the appeal in this case, the Federal Employees Flexible and Compressed Work Schedules Act of 1982, Pub. L. 97-221, 96 Stat. 227, took effect.20/ That Act, as indicated both by its terms21/ and by its legislative history,22/ clearly contemplates the negotiation of such compressed work schedules.

20/ The Federal Employees Flexible and Compressed Work Schedules Act of 1982 applies to employees of FDIC. See 5 U.S.C. $ 6121(2) and 5 U.S.C. $ 2105. See also the discussion of Union Proposal 1 above at note 3 and following. As originally enacted into law, the Act provided only temporary authority for the establishment of flexible and compressed work schedules. That authority was to have expired in July 1985. Since that date, Pub. L. 99-196, 99 Stat. 1350 was enacted, which made the authority permanent.

21/ 5 U.S.C. $ 6127(a) provides:

> $ 6127. Compressed schedules; agencies authorized to use
>
> (a) Notwithstanding section 6101 of this title, each agency may establish programs which use a 4-day workweek or other compressed schedule.

See also 5 U.S.C. $$ 6121(5), 6130.

22/ For the text of S. REP. No. 97-365 see the Appendix.

2. Compelling Need

The Agency contends that its regulation pertaining to hours of work and tours of duty, and a related statement of policy which precludes alternative work schedules such as flexitime, are essential to the accomplishment of the mission or the execution of the functions of the Agency in a manner which is consistent with the requirements of an effective and efficient government within the meaning of section 2424.11(a) of the Authority's Rules and Regulations. Specifically, the Agency argues that its regulation setting specific limits on hours and tours of duty,[23] which is reinforced by its policy disfavoring alternate work schedules,[24] is essential to the accomplishment of the Agency's bank examining function because it facilitates the access of examiners to member banks during the operating hours of those banks.

However, the Agency has produced no evidence that its employees are unable to have access to bank offices for more than eight hours a day. Moreover, the Agency has not shown that the work of all, or even a significant portion, of unit employees requires that they have such access to banks, or that all their work, or a significant part thereof, must be performed on site in the banks. Even assuming employees have limited access to banks, the Agency has not shown that it would be prevented from accomplishing its mission in an efficient and effective manner if it were unable to require unit employees to work five 8-hour days per workweek, since it has not shown what portion of the unit would be subject to such limited access or what portion of unit employees' work is constituted of on-site examination of bank records. There is thus no basis in the record for concluding that, should the Agency agree to afford unit employees the opportunity to participate in an alternative work schedule such as the "5-4-9," it would have any detrimental effect on the Agency's productivity. We also find that neither the language of the proposal nor the record in the case suggest that the proposal is intended to require that unit employees work a "5-4-9" compressed schedule. Nor is the proposal intended to preclude the Agency from requiring employees to work five 8-hour days when that is necessary to accomplish the Agency's mission, or to give employees the right to refuse to appear for work when ordered to do so. *See* *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C.*, 14 FLRA 6, 7-8 (1984); *American Federation of Government Employees, AFL-CIO, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida*, 5 FLRA 441, 447-49 (1981). It must be determined, therefore, that the Agency has not shown that the cited regulations and policy are supported by a compelling need.

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[23] FDIC Circular 2100.1 (April 3, 1978) ("FDIC Hours and Tours of Duty"), paragraph 2.B. states, in part, as to Regional Office employees, that "[t]ours of duty for full-time employees will consist of an eight hour work day, exclusive of the lunch period." See also Agency Statement of Position at 22 and Exhibit N.

[24] FDIC Memorandum (May 31, 1979) ("Flexitime"). Agency Statement of Position at Exhibit O.

Under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6131, the Federal Service Impasses Panel (FSIP) has the responsibility of settling impasses with respect to agency claims that proposed alternate work schedules would have an "adverse agency impact." In subsequent negotiations on Union Proposal 9 the Agency may decide not to establish the proposed "5-4-9" compressed schedule because it would have such an adverse impact. We express no opinion as to whether, should the matter be referred to the FSIP, a finding of an "adverse agency impact" would be justified so as to preclude the adoption of Union Proposal 9. We decide only that the Agency has not shown that a compelling need exists for its regulation establishing hours and tours of duty to bar negotiation on the proposal.

3. Management Rights

For the reasons stated in *National Marine Fisheries Service*, cited above, we hold that the proposal for a compressed work schedule does not concern the methods and means of performing work within the meaning of section 7106(b)(1).

C. Conclusion

Union Proposal 9 is not inconsistent with Federal law or management's rights under section 7106(b)(1) of the Statute. Nor has the Agency shown that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists. The proposal, therefore, is within the Agency's duty to bargain.

X. Union Proposal 10

Article 29, Section 1.

> Each employee be given the option of having the Employer provide leased automobiles for their business use.

A. Positions of the Parties

The Agency contends that the proposal violates its right to determine its budget under section 7106(a)(1) and its right to determine the methods and means of performing its work under section 7106(b)(1). The Agency also contends that the proposal is barred from negotiation by its internal regulations concerning delegations of authority for which a compelling need exists. The Union disputes the Agency's contentions.

B. Analysis and Conclusion

Union Proposal 10 requires the Agency to lease automobiles for employees to use, primarily for transportation to bank examining assignments. As a necessary part of carrying out its mission to protect the deposits made by the public in member banks, the FDIC undertakes periodic examinations of the financial status of those banks. Many of the banks are outside the commuting area of examiners' duty stations and residences. Frequent travel is thus a necessary aspect of accomplishing examining assignments. The decision regarding transportation to and from such assignments concerns the means to be used to accomplish the Agency's work. National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 255 (1979). Management is not required to bargain over a particular "means" of performing its examining assignments. See also American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 4 FLRA 384 (1980) (Union Proposal I); American Federation of Government Employees, AFL-CIO, National Immigration & Naturalization Service Council and U.S. Department of Justice, Immigration & Naturalization Service, 8 FLRA 347, 349-51 (1982) (Union Proposal 2).

Union Proposal 10 concerns a matter which is subject to bargaining at the election of the Agency under section 7106(b)(1). Since the Agency has elected not to bargain, it is not within its duty to bargain under the Statute. In view of our decision, we do not have to decide whether the proposal violates management's right to determine its budget or whether the Agency has shown that the proposal is barred by an Agency regulation for which a compelling need exists.

XI. Union Proposal 11

Article 29, Section 2.

> Any and all changes, proposed or otherwise, to the Travel Regulations is [sic] subject to collective bargaining between the Employer and the Union.

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable because it conflicts with an Agency regulation concerning approval of changes in travel regulations for which a compelling need exists. The Agency also contends that the proposal concerns the technology, methods and means of performing its work, a matter which is negotiable only at its election under section 7106(b)(1). The Union disputes the Agency's contentions, arguing that the proposal requires nothing which is not already provided for under the Statute.

B. Analysis

1. Compelling Need

As a "Government controlled corporation" the FDIC is not subject to the statutory and regulatory provisions governing travel on official business for the Government. 5 U.S.C. § 5701. See also Union Proposal 7 above. Consequently, Agency policies regarding such travel are established by internal Agency regulation. Compare American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446 (1983) (Union Proposal 1) (where employees covered under Federal Travel Regulations, proposal designating employee's residence as his or her official duty station inconsistent with those Government-wide regulations).

Union Proposal 11 requires that the Agency notify the Union when it decides to change its travel regulations and provide the Union an opportunity to negotiate on the application of those regulations to the bargaining unit. The proposal constitutes a procedure which has the effect of reopening the parties' negotiated agreement to allow for limited bargaining. Nothing in the language of the proposal or the record of this case suggests that the proposal is intended to authorize the exclusive representative at the local level to negotiate over the substance of Agency-wide travel policy.[25]

In requiring the Agency to negotiate on the application of proposed changes in internal travel regulations to bargaining unit employees the proposal requires nothing which is not also required by law. Under section 7117, matters covered by agency regulations are subject to the duty to bargain unless the regulations are supported by a compelling need. Of course, any negotiation on proposed changes in such regulations must concern matters which affect the conditions of employment of unit employees and are otherwise consistent with law and regulation. Compare American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672 (1983) (Union Proposal 5) (proposal to negotiate supplemental agreements at the local level concerning specific matters not inconsistent with law). The record does not indicate that the Union proposed a blanket waiver of the Agency's right to assert a compelling need in connection with any proposed changes in its travel regulations. The Union states, in this regard, that the "appropriate time" to raise questions of compelling need "is during individual negotiations on specific changes." The proposal here would not foreclose the Agency from contesting the negotiability of any Union proposal during future negotiations relating to specific changes in the Agency's travel regulations.

As to the Agency's allegation that a compelling need exists for its regulation regarding the delegation of authority to change the Agency's travel regulations, the proposal, as discussed above, does not authorize the Union to negotiate changes in these travel regulations. Moreover, as stated with respect to Proposal 1, an agency cannot restrict bargaining on an otherwise negotiable matter by refusing to delegate authority over the matter to the level of recognition.

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[25] Even absent a contractual reopener such as is proposed here, the Agency would be obligated to notify the Union and provide the Union an opportunity to negotiate as appropriate regarding any proposed mid-contract changes in travel regulations which affect employee working conditions. See Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 5 FLRA 9 (1981).

Further, the Agency's claim that a compelling need exists for uniformity in its travel regulations because such uniformity is "essential" to prevent "administrative chaos" is wholly unsupported in the record. The Agency has provided none of the facts and arguments which we would need in order to judge the validity of its contentions. See our discussion of Union Proposal 7 in this case. Consequently, the Agency has failed to meet its burden of demonstrating that its travel regulations meet any of the criteria set forth in section 2424.11 of the Authority's Rules and Regulations. None of those regulations can, therefore, in the circumstances of this case, bar negotiation of the Union proposal. See American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 451 (1980). See also American Federation of Government Employees, Local 3488 and Federal Deposit Insurance Corporation, 12 FLRA 532 (1983) (Union Proposal 4).

2. Management Rights

The Agency's allegation that Union Proposal 11 concerns matters pertaining to the "technology, methods, and means" of performing the Agency's work is without any support whatsoever in the record. The Agency has not established that merely providing for a contract reopener as to travel regulations in and of itself has any technological relationship to accomplishing or furthering the Agency's work or involves the methods and means of such work performance. The mere possibility that Union Proposal 5 might concern such matters is not enough to render this proposal nonnegotiable. See American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672 (1983) (Union Proposal 5). Thus, there is no basis upon which to conclude that the proposal concerns the technology, methods and means of performing work, which are negotiable only at the election of the Agency under section 7106(b)(1). See Federal Deposit Insurance Corporation, supra.

C. Conclusion

The Agency has not shown that Union Proposal 11 is barred from negotiations by an Agency regulation for which a compelling need exists. Nor does the proposal concern a matter which is negotiable only at the election of the Agency under section 7106(b)(1). The proposal is therefore within the Agency's duty to bargain.

XII. Union Proposal 13

Article 29, Section 27.

> Regional staffing of teaching assignments at the FDIC training center shall be for a period not to exceed two years in duration to enable those desiring to teach the opportunity to do so.

A. Positions of the Parties

The Agency contends that the proposal violates management's right to assign work under section 7106(a)(2)(B). The Union claims that the proposal is a negotiable procedure under section 7106(b)(2) and (3).

B. Analysis and Conclusion

The record in this case is unclear as to whether the proposal involves the assignment of unit employees to teaching positions at the FDIC Training Center or concerns the assignment to employees of teaching duties at the Center. However, regardless of whether the proposal concerns assignment of employees to teaching positions and thus involves management's right to assign employees to positions in the Agency under section 7106(a)(2)(A), or concerns the assignment of teaching duties and thus involves management's right to assign work under section 7106(a)(2)(B), it in either instance restricts management's determination of the duration of such assignments. The proposal prescribes a maximum length for such assignments of two years. If the proposal concerns the assignment of employees to positions, it has the same effect as Paragraph (3) of Union Provision II in American Federation of Government Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma, 7 FLRA 292 (1981). In that case, the Authority held that a proposal restricting certain temporary assignments to a maximum of 60 days directly interfered with management's right, under section 7106(a)(2)(A), to assign employees in the agency by restricting management's right to determine the duration of an assignment. On the other hand, if the proposal concerns work assignments, it has the same effect as Union Proposals I and II in National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981). In that case, the Authority held, relying on its decision in International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 437 (1980), that a proposal limiting the duration of assigned training directly interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute. Therefore, whether Union Proposal 13 concerns assignment to teaching positions or assignment of teaching duties, for the reasons set forth in the Tinker Air Force Base, Federal Aviation Administration, and Philadelphia Naval Shipyard decisions, it directly interferes with the substantive exercise of management's rights under section 7106(a)(2) of the Statute. In so holding, we note that the Union provides no support for its conclusion, nor is any otherwise apparent, that the proposal constitutes an "appropriate arrangement" within the meaning of section 7106(b)(3).

Union Proposal 13 directly interferes with management's right to assign employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B). It is, therefore, outside the Agency's duty to bargain.

XIII. Union Proposal 14

Article 29, Section 33.

> The part-time policy shall be extended to all personnel with a legitimate reason, including education, with no time limit constraints.

A. Positions of the Parties

The Agency contends only that a compelling need exists for its regulations concerning part-time employment to bar negotiations on the proposal. The Union disputes the Agency's contention, contending that it does not intend its proposal to require the Agency to grant an employee's request.

B. Analysis and Conclusion

Under existing Authority precedent, we find the proposal nonnegotiable for reasons other than those alleged by the Agency. The Agency's part-time policy is to make part-time positions available to employees under limited circumstances.26/ The proposal would extend the policy would apply to any circumstances under which the policy would apply to any

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26/ Federal Deposit Insurance Corporation Memorandum on Part-Time Employment Policy, EX-02-80 (August 7, 1980). See Agency Statement of Position at Exhibit R.

employee with a "legitimate reason." The Authority interprets the proposal as preventing the Agency from denying an employee's request if the employee has a legitimate reason. The Agency would not have the authority to put any time limit constraints on its decision to grant an employee's request for part-time status. As a result, the effect of the proposal would be to limit the Agency's ability to require an employee to return to work when it determines there is a need for the employee's services on a full-time basis. The length of time an employee could remain in part-time status would depend on the decision of the employee without consideration of the Agency's need to perform its work. The proposal, therefore, has the same effect as Union Proposal 1 in National Federation of Federal Employees, Local 15 and U.S. Army Armament Munitions and Chemical Command, Rock Island Arsenal, Illinois, 19 FLRA No. 6 (1985). The proposal in that case required the Agency to grant an employee's request for leave without pay (LWOP) if the employee met the criteria set forth in the proposal. Relying on our decision in American Federation of Government Employees, AFL-CIO, Local 2263 and Department of the Air Force, Headquarters, 160th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA 580 (1984), we held the proposal nonnegotiable under section 7106(a)(2)(B) because it would require the agency to grant an employee's request for leave without pay regardless of the need for the employee's services during the period of the request. The proposal in this case, involving requests for part-time status, as opposed to requests for leave without pay, restricts the Agency's ability to determine when assigned work will be performed.

For the reasons set forth in the Rock Island Arsenal and Kirtland Air Force Base decisions, we find that Union Proposal 14 directly interferes with management's right to assign work under section 7106(a)(2)(B) and is outside the Agency's duty to bargain. In view of our decision, we do not have to decide whether the Agency has shown that the proposal would be barred from negotiation by an Agency regulation for which a compelling need exists.

XIV. Union Proposal 15

Article 29, Section 71.

> Each employee of the bargaining unit will receive eight (8) days (personal days) of official time to use at their discretion.

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation. The Agency also argues that the proposal is barred from negotiation by the Agency's leave regulations for which a compelling need exists. The Union disputes the Agency's contentions.

B. Analysis and Conclusion

Union Proposal 15 provides for eight (8) days of "official time" to be used for "personal" business which cannot be taken care of while an employee is in a travel status. The proposal is stated in terms of "official time," a phrase employed in the Statute to mean absence from duty without charge to leave or loss of pay for employees performing union representational activities. It is clear from the context and based on Union statements in the record that the proposal concerns "administrative leave," which is a term used to refer generally to absence from duty administratively authorized without charge to leave or loss of pay. The Authority adopts this interpretation for purposes of this decision.

It is well established that, under the Statute, an agency must negotiate with an exclusive representative on matters concerning conditions of employment of unit employees within its discretion to the extent consistent with law and regulation.27/ As to the subject matter of the instant proposal, the Authority has consistently construed those portions of the Federal Personnel Manual (FPM) concerned with "excused absence" or "administrative leave"28/ as providing that "the head of an agency has discretion to grant administrative leave to employees of the agency in certain situations for *brief* periods of time."

27/ International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA 212, 215 (1982); National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 759-62 (1980).

28/ Federal Personnel Manual, chap. 630, subchap. 11-5. FPM Supplement 990-2, chap. 630, subchap. S11-5.

[Underscoring in original; footnote omitted.][29] The first issue in this case is whether the administrative leave provided for in the Union's proposal exceeds the limitations on agency discretion imposed by the provisions of the FPM, so as to be inconsistent therewith. The second issue is whether those provisions of the FPM constitute Government-wide regulations under section 7117(a)(1) of the Statute.

We turn first to the issue of whether eight (8) days of administrative leave for personal business is outside the scope of an agency's permissible discretion under the FPM. The Office of the Comptroller General has considered a variety of situations involving grants of administrative leave and, in determining whether such grants are appropriate, interprets the applicable provisions of the FPM as limiting an agency to authorizing only brief periods of absence from duty. See, for example, 54 Comp. Gen. 706, 708 (1975).

Moreover, the Comptroller General has emphasized that while it is not necessarily a determinative consideration in connection with most circumstances involving a brief absence, a grant of administrative leave for an extended period of time is not appropriate unless it is in furtherance of an agency function.[30] See, for example, 61 Comp. Gen. 652 (1982). As the Comptroller General interprets the FPM, therefore, in determining whether a grant of administrative leave is appropriate, the crucial considerations are, depending on the circumstances involved, the length of time authorized and the purpose for which that time is to be used. In weighing those considerations in particular cases, the Comptroller General has approved agency grants of approximately five (5) hours of administrative leave for an employee to rest after prolonged and difficult travel, 55 Comp. Gen. 510 (1975), and eight (8) hours for an employee to locate suitable housing in connection with an extended temporary assignment, Comptroller General Decision B-192258 (September 25, 1978), both of which were work-related situations. The Authority has also found negotiable a proposal which would have required authorization of a maximum of thirty (30) minutes of administrative leave per pay period for tardiness (that is, a maximum of 13 hours a year).31/ National Labor Relations Board, Region 5, supra.

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[29] Long Beach Naval Shipyard, Long Beach, California and International Federation of Professional and Technical Engineers, Local 174, AFL-CIO and American Federation of Government Employees, Local 2237, AFL-CIO and Federal Employees' Metal Trades Council, Long Beach, California, 7 FLRA 362, 367 (1981). See also National Labor Relations Board, Region 5 and National Labor Relations Board Union, Local 5, 2 FLRA 327 (1979).

[30] The Comptroller General also stresses as important considerations whether the grant of administrative leave is for some purpose connected to the employee's work and, relying on references in the FPM to voting and blood donations, for some "civic" purpose. See, for example, Comptroller General Decision B-156287 (February 5, 1975).

Conversely, the Comptroller General has held that a grant of administrative leave for excess travel time is inappropriate where the excess time taken is attributable to an employee's delay for personal reasons or as a matter of personal convenience. 56 Comp. Gen. 865, 868-69 (1977). Moreover, the Comptroller General refused to question an agency's denial of eight (8) hours of administrative leave to an employee who, as the elected chief of a local all volunteer fire department, participated in fighting a fire and was absent from duty for that amount of time. 54 Comp. Gen. 706 (1974). In another case, the Comptroller General refused to restore to an employee's annual leave account five (5) days of annual leave which was charged after a previous grant of administrative leave, tc represent his installation in a chess tournament, was later denied. Comptroller General Decision B-176020 (August 4, 1972).32/

31/ The circumstances involved in the Long Beach Naval Shipyard case, note 30, supra, wherein the proposal involved, at most, an authorization of 4 to 5 days, are distinguishable. That case involved a group dismissal due to a shut-down of the shipyard for retooling and is a circumstance specifically referenced in the part of the FPM covering such dismissals. The proposal in this case concerns only individual instances of administrative leave and is covered by a different part of the FPM.

32/ The Comptroller General has also held that grants of administrative leave for 14 days, 28 days, and 31 days, to prepare for a bar examination are inappropriate, Comptroller General Decision B-156287 (February 5, 1975); that a grant of 23 days to participate in the Pan American Games as a member of the United States field hockey team is inappropriate, Comptroller General Decision B-185128 (December 3, 1975); that a grant of six weeks for voluntary, humanitarian service with Africare is inappropriate, Comptroller General Decision B-156287 (June 26, 1974).

Based upon the foregoing Comptroller General interpretations of FPM Supplement 990-2, chapter 630, subchapter S11-5, it does not appear that a blanket authorization of eight (8) days for personal business, without consideration of the specific circumstances of each case, constitutes a brief period of absence from duty for appropriate reasons which is within the Agency's discretion to grant. In thus exceeding the limits of an appropriate exercise of discretion under the FPM, Union Proposal 15 is inconsistent therewith within the meaning of section 7117(a)(1).

The remaining issue is whether the provisions of FPM Supplement 990-2, chapter 630, subchapter S11-5 constitute Government-wide rules or regulations within the meaning of the Statute. If so, those provisions would bar negotiations on Union Proposal 15. In National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado, 9 FLRA 151, 154-5 (1982), the Authority, relying on its decision in National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980), determined that chapter 511, subchapter 4-3.b. of the FPM was a Government-wide regulation within the meaning of section 7117(a)(1) because it applies to Federal civilian employees in the executive, legislative and judicial branches of the Government and thus is generally applicable to the Federal civilian work force. The provisions of FPM Supplement 990-2, chapter 630, subchapter S11-5 at issue in this case apply to a substantial portion of the civilian employees of the executive and judicial branches of the Federal Government. 5 U.S.C. §§ 6301(2)(A), 6311. 5 C.F.R. § 630.201(b)(4). See also Crain v. U.S., 77 F. Supp. 505 (D.C. Ill. 1948). Those provisions are likewise generally applicable to the Federal civilian work force so as to be "Government-wide" within the meaning of section 7117(a)(1).

As to whether FPM Supplement 990-2, chapter 630, subchapter S11-5 constitutes a "rule or regulation" within the meaning of section 7117(a)(1), the Authority determined in Lowry Air Force Base that the term was not intended to refer only to those rules and regulations which met formal requirements as to notice and comment, see, for example, 5 U.S.C. § 553. The term also includes official declarations of policy which are binding on the officials and agencies to which they apply. Concerning FPM Supplement 990-2, chapter 630, subchapter S11-5, which is issued by the Office of Personnel Management (OPM), OPM is statutorily empowered to regulate the leave system governing Federal employment, 5 U.S.C. § 6311. The requirements as to excused absence which are set forth in subchapter S11-5 constitute its determination of the policies necessary to implement that system. Moreover, the fact that the provisions of subchapter S11-5 are enforceable by the Comptroller General against the officials and agencies to which they apply leads us to conclude that they are binding on those officials and agencies. The Authority finds, therefore, that FPM Supplement 990-2, chapter 630, subchapter S11-5 regarding an agency's limited discretion to authorize administrative leave is a Government-wide rule or regulation.

Union Proposal 15 is outside the Agency's duty to bargain under section 7117(a)(1) because it is inconsistent with an applicable Government-wide regulation. In view of our decision, we do not have to decide whether the Agency has shown that the proposal is barred from negotiation by an Agency regulation for which a compelling need exists.

XV. Union Proposal 16

Article 3, Section 7.

> Only officers of the Union will be granted official time and expenses per the Employer's General Travel Regulations to participate in all business (excluding internal union business) in the Union's other bargaining unit (Chicago Region of the Employer).

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable under section 7117(a)(1) because it is inconsistent with Federal law. The Union disputes the Agency's contention.

B. Analysis and Conclusion

Union Proposal 16 requires the Agency to negotiate on official time for Union officers who are members of the Madison Region to represent the Union in the separate Chicago Region unit. On May 31, 1985, another union was certified as exclusive representative for the employees in the Chicago Region. Consequently, the Union which is party to the petition herein is no longer the exclusive representative of the Chicago unit.[33] There is no bargaining relationship between the Agency and the Union with respect to the Chicago Region unit and no obligation on the part of the Agency to bargain with the Union which filed the petition in this case with respect to its representation of the Chicago Region unit. Therefore, issues as to the scope of bargaining as it pertains to that unit are not appropriate for resolution by the Authority. See Overseas Education Association and Department of Defense, Office of Dependents Schools, Alexandria, Virginia, 7 FLRA 84 (1981).

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[33] An election had been conducted pursuant to a representation petition filed in Case No. 5-RO-50005.

We conclude that the negotiability issues raised by Union Proposal 16, insofar as they relate to the Chicago Region unit, have been rendered moot by the issuance of the certification of exclusive representative in Case No. 5-RO-50005. See American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, 18 FLRA No. 90 (1985).

XVI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the appeal as to Union Proposals 1-5, 10, and 13-16 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain on Union Proposals 7, 8, 9, and 11.[34]

Issued, Washington, D.C., May 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[34] In finding that Union Proposals 7, 8, 9, and 11 are negotiable, we express no opinion as to their merits.

APPENDIX

2/ 5 U.S.C. § 8906 provides, in pertinent part:

§ 8906. Contributions

. . . .

(b)(1) Except as provided by paragraphs (2) and (3) [relating to contributions for part-time employees] of this subsection, the biweekly Government contribution for health benefits for an employee or annuitant enrolled in a health benefits plan under this chapter is adjusted to an amount equal to 60 percent of the average subscription charge determined under subsection (a) of this section. . . .

(2) The biweekly Government contribution for an employee or annuitant enrolled in a plan under this chapter shall not exceed 75 percent of the subscription charge.

3/ 5 U.S.C. § 8901(1)(A) provides:

§ 8901. Definitions

For the purpose of this chapter--
(1) "employee" means--
(A) an employee as defined by section 2105 of this title[.]

4/ 5 U.S.C. § 2105(a)(1)(E) provides:

§ 2105. Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--
(1) appointed in the civil service by one of the following acting in an official capacity--

. . . .

(E) the head of a Government controlled corporation[.]

5/ 5 U.S.C. § 103 provides:

§ 103. Government corporation

For the purpose of this title--
(1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and
(2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

6/ 31 U.S.C. § 9101 provides, in pertinent part:

§ 9101. Definitions

In this chapter--
(1) "Government corporation" means a mixed-ownership Government corporation and a wholly owned Government corporation.

(2) "mixed-ownership Government corporation" means--

. . . .

(C) the Federal Deposit Insurance Corporation.

14/ 5 U.S.C. § 5335(a) provides, in relevant part, as follows:

§ 5335. Periodic step-increases

(a) An employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade in which his position is placed, shall be advanced in pay successively to the next higher rate within the grade at the beginning of the next pay period following the completion of--
(1) each 52 calendar weeks of service in pay rates 1, 2, and 3;
(2) each 104 calendar weeks of service in pay rates 4, 5, and 6;
or
(3) each 156 calendar weeks of service in pay rates 7, 8, and 9[.]

15/ 5 CFR 531.405(a)(1) provides as follows:

§ 531.405 Waiting periods for within-grade increase.

(a) Length of waiting period. (1) For an employee with a scheduled tour of duty the waiting periods for advancement to the following steps in all General Schedule grades are:

(i) Steps 2, 3, and 4--52 calendar weeks of creditable service;
(ii) Steps 5, 6, and 7--104 calendar weeks of creditable service;
(iii) Steps 8, 9, and 10--156 calendar weeks of creditable service.

16/ 5 U.S.C. § 5331(a) provides as follows:

§ 5331. Definitions; application

(a) For the purpose of this subchapter, "agency", "employee", "position", "class", and "grade" have the meanings given them by section 5102 of this title.

17/ 5 U.S.C. § 5102(a)(1)(i) provides as follows:

§ 5102. Definitions; application

(a) For the purpose of this chapter--
(1) "agency" means--

. . . .

but does not include--
(i) a Government controlled corporation[.]

19/ Section 2424.11 of the Authority's Rules and Regulations provides, in pertinent part, as follows:

§ 2424.11 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

. . . .

(continued)

(continued)

> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

22/ S. REP. No. 97-365, 97th Cong., 2nd Sess. 7 (1982) states as follows:

> Paragraph (3) defines the term "basic work requirement" to mean the number of hours, excluding overtime hours, which an employee is required to work or is required to account for by leave or otherwise.
>
> In view of the nature of a flexible schedule or compressed schedule experiment, any standard for determining what constitutes a regular work period must be adaptable to the particular flexible or compressed schedule. Accordingly, an employee's "basic work requirement" may be calculated on a daily, weekly, or biweekly basis depending on the hours which a particular employee is required to work or to otherwise account for. For example, a full-time employee working the standard 8-hour/5-day week has an 8-hour daily basic work requirement, a 40-hour weekly basic work requirement, and an 80-hour biweekly basic work requirement. An employee under a compressed schedule such as the 5-4-9 program, which consists of a 9-hour day/5-day workweek followed by an approximately 9-hour day/workweek [sic] has a 9-hour daily basic work requirement, one 45-hour weekly basic work requirement (first week), one 35-hour weekly basic work requirement (second week), and an 80-hour biweekly basic work requirement. Similarly, an employee under a compressed schedule which consists of four 10-hour days each week, has a 10-hour daily basic work requirement, a 40-hour weekly basic work requirement, and an 80-hour biweekly basic work requirement.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-87

Union

Case No. 0-NG-879

and

DEPARTMENT OF THE ARMY,
KANSAS ARMY NATIONAL GUARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals involving bargaining unit employees who are transferred to different duty stations within the state of Kansas as the result of a reduction-in-force (RIF).

II. Union Proposal 1

> Individuals affected will be furnished transportation and travel expenses until such time as they elect to move their families permanently.

A. Positions of the Parties

The Agency contends that this proposal would require employees to be reimbursed for commuting expenses and, thus, is inconsistent with 5 U.S.C. $ 5704. In support, the Agency relies on the Authority's decision in National Treasury Employees Union and Department of Treasury, Internal Revenue Service, 9 FLRA 726 (1982).

The Union argues that the case relied upon by the Agency concerns employees' commuting expenses from their residences to their regular place of employment and is not applicable to employees being transferred from one part of Kansas to another as a result of a RIF. Finally, the Union argues that, by requiring a transferred employee to be reimbursed for travel and transportation expenses for a reasonable period of time until such employee permanently moves to the new job location, the proposal is an attempt to alleviate the impact of a RIF.

B. Analysis

Under 5 U.S.C. § 5721 et seq. and Chapter 2 of the Federal Travel Regulations (FTR), an employee transferred to a new duty station generally is entitled to reimbursement for certain travel and relocation expenses incurred as a result of the transfer. However, there is no indication in the record that the Union intends this proposal to cover any travel or relocation expenses for which reimbursement is authorized under law and the FTR. Rather, the Union tacitly agrees with the Agency that the proposal would require transferred employees to be reimbursed for their commuting expenses, that is, their daily mileage expenses from their permanent residence to their regular, albeit new, duty station until such time as they move their residence to the new duty location. Thus, notwithstanding the Union's claim that reimbursement for such expenses is an attempt to alleviate the impact of a RIF, it is well settled that reimbursement for such expenses is inconsistent with 5 U.S.C. § 5704. Internal Revenue Service, 9 FLRA 726 (1982).

C. Conclusion

Based on the rationale in Internal Revenue Service, the Authority finds Proposal 1 to be inconsistent with law and therefore, outside the duty to bargain under section 7117(a)(1) of the Statute.

III. Union Proposal 2

> Should vacancies arise in an individual's original vicinity which are the same grade or representative rate or lower, after an individual has accepted a position at the MATES [new duty station], SPMO [management] will unofficially offer the position to the

individual concerned. If the individual indicates he will accept the offer, an official offer will be made. If he indicates he does not want the position, an official offer will not be made. These unofficial offers will be in accordance with past practice.

A. Positions of the Parties

The Agency alleges the underlined portion of this proposal, by requiring the selection of a particular employee for a position, interferes with management's right under section 7106(a)(2)(A) to assign employees and with management's right under section 7106(a)(2)(C) to fill positions by making selections from any appropriate source.

The Union contends that the disputed portion of the proposal merely attempts to alleviate hardship caused by a RIF. In support, the Union cites the decision of the U.S. Court of Appeals for the District of Columbia circuit in American Federation of Government Employees, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

B. Analysis

The Authority has held that where an agency alleges a union's proposal of an appropriate arrangement is nonnegotiable because it conflicts with management rights described in section 7106(a) or (b)(1), the Authority will consider whether such an arrangement is appropriate for negotiation within the meaning of section 7106(b)(3) or, whether it is inappropriate because it excessively interferes with the exercise of management's rights. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

Proposal 2 applies to National Guard technicians transferred, without personal cause, as the result of a RIF to a different duty station within the state of Kansas. National Guard technicians must possess not only the civilian qualifications required for the positions they hold but also the compatible military grade. See 32 U.S.C. § 709 (b). There is nothing in the record to indicate that, under this proposal, management could elect not to fill a vacant position. That is, if a position were to become vacant at the former duty station for any reason, including an Agency decision to abolish the position, management would still be required by this proposal to offer it to a transferred employee. In addition, there is nothing in the record to indicate that management would be able to make qualifications determinations, including determining whether a technician employee holds the compatible military grade for the vacancy arising at the original duty station. Thus, Proposal 2 is distinguishable from the proposal found to be an appropriate arrangement within the meaning of section 7106 (b)(3) of the Statute in National Association of Government Employees, Local R-14-87 and Department of the Army, Kansas Army National Guard, Topeka, Kansas, 21 FLRA No. 48 (1986). The proposal in the Topeka case required management to return employees to their former positions at their former duty station only if and when such positions were vacant and only then if the agency decided to fill them. No question was raised in that case as to whether the employees possessed the requisite qualifications for the vacant positions since the employees in question were merely returning to positions they would still occupy but for their reassignments as a result of a RIF. Further, that proposal specifically preserved the agency's right to elect to fill or not fill vacant positions. Unlike the proposal in Kansas Army National Guard, Topeka, Proposal 2 would absolutely eliminate the Agency's discretion concerning filling the vacancies involved. Thus, the proposal would constitute an excessive interference with management's right to assign employees under section 7106(a)(2)(A) of the Statute and with management's right under section 7106(a)(2)(C) of the Statute to make selections for vacancies.

C. Conclusion

Because Proposal 2 excessively interferes with management's rights it does not constitute an appropriate arrangement within the meaning of section 7106 (b)(3) of the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be and it hereby is, dismissed.

Issued, Washington, D.C., May 20, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier, III, Member

FEDERAL LABOR RELATIONS AUTHORITY

but also the compatible military grade. See 32 U.S.C. § 709 (b). There is nothing in the record to indicate that, under this proposal, management could elect not to fill a vacant position. [illegible] the [illegible] decide [illegible] required by this proposal to offer it to a transferred employee. In addition, there is nothing [illegible] indicate that management would be able to make qualifications determinations, including determining whether a technician employee holds the compatible military grade for the vacancy arising at the original duty station. Thus, Proposal 2 is distinguishable from the proposal found to be an appropriate arrangement within the meaning of section 7106 (b)(3) of the Statute in National Association of Government Employees, Local R-14-87 and Department of the Army, Kansas Army National Guard, Topeka, Kansas, 21 FLRA No. 48 (1986). The proposal in that case required management to return employees to their former positions at their former duty station only if and when those positions were vacant and only if the agency decided to fill them. No question was raised in that case as to whether the employees possessed the [illegible] for the vacant positions since the employees in question were merely returning to positions they would still occupy but for their reassignments as a result of a RIF. Further, that proposal specifically preserved the agency's right to elect to fill or not fill vacant positions. Unlike the proposal in Kansas Army National Guard, Topeka, Proposal 2 would absolutely eliminate the Agency's discretion concerning filling the vacancies involved. Thus, the proposal would constitute an excessive interference with management's right to assign employees under section 7106(a)(2)(A) of the Statute and with management's right under section 7106(a)(2)(C) of the Statute to make selections for vacancies.

C. Conclusion

Because Proposal 2 excessively interferes with management's rights it does not constitute an appropriate arrangement within the meaning of section 7106 (b)(3) of the Statute.

[RECONSIDERATION REQUEST OF
21 FLRA No. 24]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. 0-AR-727
21 FLRA No. 24

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

ORDER DISMISSING REQUEST FOR RECONSIDERATION AND RELATED REQUESTS

This matter is before the Authority on a request for reconsideration filed by the Agency on April 14, 1986, seeking reconsideration of the above-entitled Authority's Decision and Order of March 25, 1986. Filed with its request for reconsideration, the Agency submitted requests for stay, oral argument, and consolidation with Case No. 0-AR-583 (21 FLRA No. 27 issued March 27, 1986). On April 28, 1986, the Union filed an opposition to the Agency's request for reconsideration and related requests. For the reason set forth below, the Agency's requests must be dismissed.

Section 2429.17 of the Authority's Rules and Regulations, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. . . .

The Authority's Decision and Order was dated and served on the Agency by mail on March 25, 1986. Therefore, under section

2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which also are applicable to computation of the time limit here involved, the Agency's request for reconsideration and related requests were due in the national office of the Authority before the close of business on April 9, 1986. Since, as indicated above, the Agency's requests were not filed until April 14, 1986, they are clearly untimely and must be dismissed.

Accordingly, for the reason set forth above, and apart from other considerations, the Agency's request for reconsideration and related requests are hereby dismissed.

For the Authority.

Issued, Washington, D.C., May 8, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, BUREAUS AND OFFICES,
BALTIMORE, MARYLAND

Activity

and

Case No. 0-AR-1107

LOCAL 1923, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Arthur Eliot Berkeley filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 8, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER, HAMPTON,
VIRGINIA

Activity

and   Case No. 0-AR-1116

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-67

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator G. Robert Roadley filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 8, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 916

Union

and

Case No. 0-AR-1118

DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OKLAHOMA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Sol M. Yarowsky filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 15, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 366

Federal
Labor Relations
Authority

Washington, D.C. 20424

NUMBER 366 REPORT OF CASE DECISIONS May 27, 1986

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NEGOTIABILITY CASE

21 FLRA No. 110 (May 22, 1986)

National Association of Government Employees, SEIU, AFL-CIO and Missouri National Guard, Case No 0-NG-1270

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 111 (May 22, 1986)

Military Sealift Command (Atlantic) and National Maritime Union of America, AFL-CIO, Case No. 2-CA-40424

21 FLRA No. 112 (May 22, 1986)

U.S. Air Force, Washington, D.C. and U.S. Air Force, Electronic Systems Division, Hanscom Air Force Base, Bedford, Massachusetts, and National Association of Government Employees, Local R1-8, Case No. 1-CA-853

ARBITRATION CASES

21 FLRA No. 106 (May 22, 1986)

Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia and National Treasury Employees Union, Chapter 210 (Williams, arbitrator), Case No. 0-AR-803

21 FLRA No. 107 (May 22, 1986)

Internal Revenue Service, Baltimore District Office and National Treasury Employees Union and NTEU Chapter 62, Case No. 0-AR-822

Y3.F31/21-3:

21 FLRA No. 108 (May 22, 1986)

U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Kentucky and American Federation of Government Employees, Local 817 (Murphy, arbitrator), Case No. 0-AR-1025

21 FLRA No. 109 (May 22, 1986)

U.S. Customs Service and National Treasury Employees Union, Chapter 136, Case No. 0-AR-908

In the following arbitration case, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

May 22, 1986

0-AR-1109

Federal Labor Relations Authority

21 FLRA No. 106

HHS, Health Care Financing Administration, Region IV, Atlanta, Ga. and NTEU, Chapter 210 (Williams, Arbitrator), Case No. 0-AR-803 (Decided May 22, 1986)

DIGEST HEADINGS

1000 ARBITRATION
    1750 Remedies

STATUTE

7122(a)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Attorney Fees
    - Arbitrator's Authority
      - Actions Subject to Negotiated Grievance Procedures
    - Determination of
      - Attorney Who Is a Union Employee
      - Cost-Plus Formula
      - Lodestar Concept
    - Standards Governing Award - "Interest of Justice"
  - Award Modified - Contrary to 5 U.S.C. § 5596(b)(1)(A)(ii)
  - Back Pay Act
    - Personnel Actions
      - Omission or Failure to Take Action or Confer a Benefit
    - Unjustified or Unwarranted Personnel Action
      - Violation of Collective Bargaining Agreement
  - Exceptions Asserted in Appeal
    - Award Contrary to 5 U.S.C. § 5596 (Back Pay Act)
    - Award Contrary to 5 U.S.C. § 7701(g) and (g)(1)
  - Remedy
    - Attorney Fees
    - Retroactive Promotion with Backpay

DIGEST NOTES

The arbitrator awarded a retroactive promotion with backpay to the grievant after finding that the activity violated the parties' collective bargaining agreement by failing to temporarily promote the grievant for a period of approximately 11 months when he performed the duties of a higher-graded position. In an addendum opinion, the arbitrator awarded attorney fees for 22.2 hours at the market-value rate of $ 85.00 per hour.

In its first exception, the activity contended that the arbitrator's award was contrary to 5 U.S.C. § 5596 (Back Pay Act) and to 5 U.S.C. § 7701(g) because the case did not involve a prohibited personnel practice or an agency personnel action. The Authority held that an the agency's violation of the collective bargaining agreement constituted an unjustified or unwarranted personnel action for purposes of an award of a retroactive temporary promotion and backpay under the Back Pay Act. Also the broad category of personnel actions covered by the Back Pay Act includes the omission or failure to take an action or confer a benefit. Thus, the activity failed to establish that the award was contrary to law.

In its second exception, the activity alleged that the award was contrary to law because it was not in the "interest of justice" as required by 5 U.S.C. § 7701(g)(1). However, the arbitrator effectively found that the activity knew or should have known that it would not prevail on the merits. Therefore, the Authority concluded that the arbitrator's determination that the payment of attorney fees was warranted in the interest of justice was fully consistent with applicable legal requirements and the activity's exceptions provided no basis for finding the award deficient.

In its third exception, the activity contended that the arbitrator's award was not in accordance with the governing standards established under 5 U.S.C. § 7701(g) for determining the reasonableness of an award of attorney fees. In determining what constitutes reasonable attorney fees, courts have applied a variety of methods and analyses. An example of a method acceptable to administrative adjudicatory agencies and most courts is the "lodestar" method, in which the attorney's customary hourly billing rate is multiplied by the number of hours reasonably devoted to the case with appropriate adjustments for any special factors. This is the method ordinarily applied by the MSPB in determining reasonable attorney fees under 5 U.S.C. § 7701(g)(1) when the attorney involved is in private practice.

Where, however, the attorney is an employee of a union, a different method must be applied in computing reasonable attorney fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). Where such fees are to be paid to a union, the fees are computed based on actual cost rather than on the prevailing market rate for the legal services rendered. Further, a special fund created by a union into which all fees awarded to union-employed attorneys would be paid and expended solely for legal work does not entitle the union to market-rate fees for the services of its staff. Compensation of actual costs involves: (1) compensation paid to the attorney employee for the time expended on the case; (2) out-of-pocket expenses related to the case; (3) and overhead costs. Overhead costs may normally be an amount equal to 100 percent of the attorney's compensation in the absence of evidence the amount is substantially excessive or insufficient. Accordingly, the Authority modified the award of attorney fees to be consistent with this cost-plus method of determining attorney fees.

Federal
Labor Relations
Authority

21 FLRA No. 107

IRS, Baltimore District Office and NTEU and NTEU Chapter 62 (Duff, Arbitrator), Case No. 0-AR-822 (Decided May 22, 1986)

STATUTE

7122(a)

DIGEST HEADINGS

1000 ARBITRATION
  1750 Remedies

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Attorney Fees
    Arbitrator's Authority
      Partial Attorneys Fees
    Determination of
      Attorney Who Is A Union Employee
      Cost-Plus Formula
      Lodestar Concept
      Partial Attorneys Fees
    Standards Governing Award
  Award Modified
    Contrary to 5 U.S.C. § 5596(b)(1)(A)(ii)
  Exceptions Asserted in Appeal
    Award Contrary to 5 U.S.C. § 5596 (Back Pay Act)
    Award Contrary to 5 U.S.C. § 7701(g) and (g)(1)
  Remedy
    Attorney Fees
    Backpay for Wages and Benefits Lost Due to Suspension
    Expunge Personnel Records
    Suspension Set Aside

DIGEST NOTES

The arbitrator determined that the activity did not meet the substantial evidence standard required by the parties' agreement to sustain a 10-day suspension of the grievant. As his award, the arbitrator set aside the suspension, directed the activity to expunge from the grievant's personnel file all references to the charges against her, and to reimburse the grievant for all wages, leave and other benefits lost as a result of the suspension.

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The union then filed an application for attorneys fees as counsel for the grievant. The arbitrator determined that attorney fees were warranted in the interest of justice for the legal services related to those allegations for which the activity knew or should have known that it would not prevail on the merits in an arbitration proceeding. Concerning other charges, however, the arbitrator found that although the activity's evidence was insufficient to sustain those charges against the grievant, the charges were not wholly unfounded and this part of the case was not so clear that the activity knew or should have known that it would not prevail on the merits. Consequently, attorney fees were not awarded for the expenses of representing the grievant in this part of the case.

In its first exception, the activity contended that the award of attorney fees was contrary to law. Specifically, the activity contended that under MSPB's decision in Allen v. U.S. Postal Service, 2 MSPB 582 (1980) and 5 U.S.C. § 7701(g), a case such as this requires that an agency's reasons for initiating a disciplinary action must be viewed as a totality and not separately. The activity similarly argued that an arbitrator may only find either that there was a reasonable basis for the action or find that there was not such a basis, and that an issue-by-issue analysis and determination is not permitted. The Authority found that the activity failed to establish that the arbitrator's award of attorney fees was contrary to law. Neither the decision of MSPB in Allen nor 5 U.S.C. § 7701(g) precludes an arbitrator from granting part of a request for attorney fees based on a determination that only that part was warranted under applicable legal requirements.

In its second exception, the activity contended that the arbitrator's award of attorney fees to the union based on an hourly rate at or near the prevailing private practice rate for those hours was contrary to law. The Authority held that where the attorney is an employee of a union, fees are computed based on actual costs rather than the prevailing market rate (lodestar method) for the legal services rendered. Accordingly, the Authority modified the award to provide for computation of attorney fees calculated on a cost-plus basis.

Federal Labor Relations Authority

21 FLRA No. 108

Dep't of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Ky. and AFGE, Local 817 (Murphy, Arbitrator), Case No. 0-AR-1029 (Decided May 22, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1600 Grounds for Review
    1602 Award Conflicts with Applicable Law

STATUTE

7106(a)(2)(C)
7122(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Modified
    Award Unclear - Modified to be Consistent with § 7106(a)(2)(C)
  Exceptions Asserted in Appeal
    Award Conflicts with § 7106(a)(2)(C)
Promotion
  Priority Consideration
    FPM Chapter 335, Appendix A-4
    For a Higher-Graded Position than that of the Violation
  Priority Placement
Remedy
  Priority Consideration vs. Priority Placement for Promotion

DIGEST NOTES

The arbitrator determined that the grievant's evaluation for an appraisal period was substantially defective because it did not include input from the unit manager who acted as her supervisor during nine of the twelve months covered by the evaluation. The arbitrator concluded that since there was no basis upon which he could determine the actual rating, he was unable to make a finding that "but for" the error the grievant would have been promoted to a GS-8 position earlier than she was actually promoted. As a remedy, the arbitrator ordered that after the grievant had served at least one year in the GS-8 grade, the grievant be given "priority placement" for the next promotion to GS-9.

In its exception the agency contended that the award was contrary to management's right to make selection for appointment from any appropriate source under § 7106(a)(2)(C). Further, if the arbitrator meant by "priority placement", priority consideration, the award was contrary to FPM chapter 335. The Authority held that if "placement" meant selection, the award would be contrary to § 7106(a)(2)(C). However, judging from the arbitrator's recognition that there was no legal basis for ordering a retroactive promotion to a GS-8 position, the Authority concluded that the arbitrator intended that the grievant be given priority consideration to a GS-9 position. In the typical situation where an aggrieved employee has been wrongfully denied the consideration or process to which the employee was entitled in a promotion action, and the the employee has not yet been promoted when the grievance is considered, the Authority has recognized that an appropriate remedy under Appendix A-4c(2) of FPM chapter 335 is to direct that the employee be granted priority consideration for promotion to the next available higher-graded position for which the employee is qualified. Moreover, in circumstances such as in this case where the grievant was promoted after the being wrongfully denied proper consideration in a promotion action, but before the matter was decided by an arbitrator, the FPM does not prohibit a remedy of priority consideration for promotion to a higher-graded position than the position for which the grievant was wrongfully denied proper consideration. Therefore, the Authority concluded that the agency failed establish that the award was deficient. However, the Authority modified the award by changing "priority placement" to "priority consideration".

Federal Labor Relations Authority

21 FLRA No. 109

U.S. Customs Service and NTEU, Chapter 136 (Jaffe, Arbitrator), Case No. 0-AR-908 (Decided May 22, 1986)

STATUTE

7122(a)

DIGEST HEADINGS

1000 ARBITRATION
- 1750 Remedies

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Attorney Fees
    - Determination of
      - Attorney Who Is a Union Employee
        - Special Litigation Fund
      - Cost-Plus Formula
      - Lodestar Concept
    - Standards Governing Award
  - Exceptions Asserted in Appeal
    - Award Contrary to 5 U.S.C. § 7701(g)(1)
  - Remedy
    - Attorney Fees
- 5 U.S.C. § 5596 (Back Pay Act)

DIGEST NOTES

In his supplemental decision issued in response to the union's application for attorney fees, the arbitrator found that there was no dispute that the grievant was the prevailing party in the initial arbitration proceeding and that attorney fees had been incurred by the employee. The arbitrator further found that attorney fees were warranted in the "interest of justice" because the agency's failure to abide by its earlier grievance settlement agreement and its repudiation of the basis for its earlier payments to the grievant were wholly unfounded; because the agency knew or should have known that it would not prevail on the merits; and because the agency's action was clearly without merit. The arbitrator also found that the number of hours claimed by the union attorney was reasonable. However, an award of fees at the prevailing market rate to salaried union counsel would not be "reasonable" and would be at odds with the purposes

of the Back Pay Act and 5 U.S.C. § 7701(g) because such payments
provide the union with a windfall profits. Also, the arbitrator
found, that the creation of a special litigation fund by the
union into which attorney fees were to be paid did not overcome
those considerations. Accordingly, the arbitrator awarded
attorney fees on the basis of actual cost of the attorney's
salary plus an overhead cost allowance.

In its exception, the union contended that the award of
attorney fees was deficient because 5 U.S.C. § 7701(g)(1)
requires that an arbitrator must base an award of reasonable
attorney fees on the prevailing market rate. The Authority held,
however, that where the attorney is an employee of a union, a
different method must be applied in computing reasonable attorney
fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). Where such
fees are to be paid to a union, the fees are computed based on
actual cost rather than on the prevailing market rate for the
legal services rendered. Further, a special fund created by a
union into which all fees awarded to union-employed attorneys
would be paid and expended solely for legal work does not entitle
the union to market-rate fees for the services of its staff.
Accordingly, the Authority denied the union's exception.

21 FLRA No. 110

NAGE, SEIU and Missouri Nat'l Guard, Case No. 0-NG-1270 (Decided May 22, 1986)

Federal Labor Relations Authority

DIGEST HEADINGS

2000 NEGOTIABILITY
  2550 Agency Head Allegation
    of Nonnegotiability
    2553 Time Limits

STATUTE

7105(a)(2)(E)
7117(c)(2)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Timeliness

DIGEST NOTES

The Authority dismissed the union's appeal of an agency head's disapproval of certain provisions of the parties' collective bargaining agreement as untimely because it failed to comply with §§ 2424.3, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

of the Back Pay Act and 5 U.S.C. § 7701(g) because such payments provided the union with a windfall profits. Also, the arbitrator found that the creation of a special litigation fund by the union [illegible] fees were to be paid [illegible] those [illegible] Accordingly, the arbitrator [illegible] of actual cost of the [illegible] salary plus an overhead cost allowance.

In its exception, the union contended that the [illegible] attorney fees was deficient because 5 U.S.C. § [illegible] requires that an arbitrator must base an award of reasonable attorney fees on the prevailing market rate. The Authority held, however, that where the attorney is an employee of the [illegible] different method [illegible] be applied in computing reasonable attorney fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g). [illegible] fees are [illegible] to a union, the fees [illegible] based on actual cost [illegible] on the prevailing [illegible] for the legal services rendered. Further, a [illegible] created by a union into which all fees awarded to union-employed attorneys would be paid and expended solely for legal work [illegible] the union to market rate fees for the [illegible] staff. Accordingly, the Authority denied the union's exception.

Federal Labor Relations Authority

21 FLRA No. 111

Military Sealift Command (Atlantic) and Nat'l Maritime Union of America, AFL-CIO, Case No. 2-CA-40424 (Decided May 22, 1986)

DIGEST HEADINGS

1000 ARBITRATION
  1700 Implementation of Award
    1703.05 Enforcement Through Unfair Labor Practice Procedures

4000 UNFAIR LABOR PRACTICE: AGENCY
  4800 Otherwise Refuse to Comply with Statute

STATUTE

7116(a)(1) and (8)
7118
7122(a) and (b)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Finality of Award

Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7122

Remedy
  Comply with Arbitrator's Award

DIGEST NOTES

A party who seeks to challenge the propriety of an arbitration award may do so, as Congress intended, only by filing exceptions to that award under the provisions of § 7122(a); where a party fails to avail itself of this procedure, the award becomes final and binding and an agency is required to take such actions as are required by the award. To allow a party which has not filed exceptions to an award to defend its failure to implement that award in a subsequent unfair labor proceeding on grounds that should have been raised as exceptions to the award under § 7122 would circumvent the procedures provided in § 7122(a) and frustrate Congressional intent with respect to the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

finality of arbitration awards. The Respondent had complied with the award of an arbitrator except the part of his award which called for the payment of interest; the Respondent [illegible] the Judge that such payment was illegal based upon Authority precedent. The Authority, while acknowledging that it had upheld a similar contention that a requirement [illegible] interest on the award of shift premium was unlawful, concluded, as did the Judge, that since the Respondent did not raise the issue [illegible] of timely exceptions to the arbitrator's award here, it could not subsequently raise the contention as a defense for its refusal to comply with the award in an unfair labor practice proceeding. Accordingly, the Respondent violated § 7116(a)(1) and (8) by failing to fully comply with the arbitrator's award which had become final and binding, as required by § 7122.

Federal Labor Relations Authority

21 FLRA No. 112

U.S. Air Force, Wash., D.C. and U.S. Air Force, Electronic Systems Division, Hanscom Air Force Base, Bedford, MA and NAGE, Local R1-8, Case No. 1-CA-453 (Decided May 22, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4500 Refusal to Negotiate	7106(a)(1) 7116(a)(1) and (5) 7117 7118

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Standards for Assessing
    - Employee Liability
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Standards for Assessing
        - Employee Liability
  - Procedure
    - Forums
      - Compelling Need Determinations

DIGEST NOTES

A proposal which seeks to impose a standard of negligence for assessing employees' liability for lost, damaged or destroyed Government property other than the standard determined by management directly interferes with management's right to determine its internal security practices under § 7106(a)(1) and is, therefore, outside the duty to bargain. The union, in response to a proposed change in the existing standard of care required for assessing liability for the loss, damage or destruction of Government property, requested bargaining over the substance of the change, essentially proposing that the existing standard of gross negligence be retained. The union also requested bargaining over the procedures for implementing the change and the appropriate arrangements for adversely affected employees. The Respondent bargained with the union over the procedures and appropriate arrangements for implementing the revised regulation but refused to bargain over the substance of the change. Thus, the Authority concluded that as the union's proposal was outside the duty to bargain, the Respondent did not violate the Statute when it refused to bargain over its decision to change the standard of care here.

The Authority specifically did not adopt the Judge's rationale that since the union had hot sought a compelling need determination from the Authority prior to pursuing an unfair labor practice over the Respondents' refusal to engage in local negotiations concerning the implementation of its national regulation, the complaint must be dismissed. Questions concerning the existence of the compelling need of an agency's regulation may be decided in an unfair labor practice proceeding, and management is required to come forward with affirmative support for its assertion that there is a compelling need for the regulation in question which justified its refusal to bargain. Accordingly, the Authority did not adopt the Judge's rationale for dismissing the complaint.

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21 FLRA No. 106

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, HEALTH CARE FINANCING
ADMINISTRATION, REGION IV,
ATLANTA, GEORGIA

Activity

and

Case No. 0-AR-803

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 210

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the addendum award of attorney fees by Arbitrator Ralph Roger Williams filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

In his initial award in this matter, the Arbitrator found that the Activity violated the parties' collective bargaining agreement by failing to temporarily promote the grievant for a period of approximately 11 months when he performed the duties of a higher-graded position. The Arbitrator ordered that the grievant be promoted retroactively for the period with backpay. The Arbitrator also retained jurisdiction of the matter for the purpose of determining whether an award of reasonable attorney fees was warranted. The Union subsequently filed a request for such fees for the services of its staff attorney who represented the grievant in the case.

In his addendum opinion and award the Arbitrator found: (1) the grievant had incurred attorney fees; (2) the grievant was the prevailing party; (3) an award of attorney fees was warranted in the interest of justice since the weight of the evidence favored the Union, the Activity knew or ought reasonably to have known that it had the "weaker case" and that the grievant was in fact working at the higher level, and the Activity's action was without merit; and, (4) the grievant was entitled to reasonable attorney fees at the market-value rate, i.e., the number of hours spent in the preparation and presentation of the case multiplied by the reasonable market-value hourly rate for the geographic area for any attorney with similar experience and expertise. In calculating the fee due the grievant, the Arbitrator found that 22.2 hours claimed by the Union attorney were reasonable and proper under the circumstances and were appropriately itemized. As to the amount of fees, the Arbitrator concluded that the market-value rate of $85.00 per hour was reasonable for the locality for an attorney with the training and experience of the Union staff attorney. Accordingly, as his addendum award, the Arbitrator provided:

> The Grievant's request for attorney fees is allowed. The amount of such fees in the total of $1,887.00 is hereby awarded the Grievant.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Activity contends that the Arbitrator's award is contrary to 5 U.S.C. § 5596,[1] and to

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[1] 5 U.S.C. § 5596, the Back Pay Act, provides in part:

> § 5596. Back pay due to unjustified personnel action.
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> . . . . . .
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> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(Continued)

5 U.S.C. § 7701(g),2/ because the case did not involve a prohibited personnel practice or an agency personnel action. In support of this contention, the Activity argues that under the statutory provisions relied upon, particularly 5 U.S.C. § 7701(g)(1), attorney fees cannot be granted in matters which are not the result of an action or proceeding taken by an agency or the result of a prohibited personnel practice, and the matter involved in this case was the result of a grievance filed by the employee.

(Continued)

> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
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> . . . .
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title . . . shall be awarded in accordance with standards established under section 7701(g) of this title[.]

2/ 5 U.S.C. § 7701(g)(1) (1982) provides:

> Except as provided in paragraph (2) of this subsection, the Board . . . may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

B. Analysis and Conclusion

The Authority finds that the Activity's assertion that attorney fees are only warranted in situations involving agency prohibited personnel practices or actions taken against employees is without merit. It is well-established that an agency's violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action for purposes of a retroactive temporary promotion and backpay under the Back Pay Act. Veterans Administration Hospital and American Federation of Government Employees, Lodge 2201, 4 FLRA 419, 424 (1980). It is also clear that attorney fees may be awarded by arbitrators in a variety of unjustified and unwarranted personnel actions, including, but not limited to, actions subject to negotiated grievance procedures and that the broad category of personnel actions covered by the Back Pay Act includes the omission or failure to take an action or confer a benefit. Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25, slip op. at 4. Thus, the Authority concludes that the Activity has failed to establish that the award is contrary to law as alleged in this exception.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Activity alleges that the Arbitrator's award is contrary to law because it is not in the interest of justice as required by 5 U.S.C. § 7701(g)(1). In support of this exception, the Activity argues that it had substantial reason to believe it would prevail on the merits when it did not temporarily promote the grievant.

B. Analysis and Conclusion

In Naval Air Development Center, the Authority summarized the requirements for an award of reasonable attorney fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). In order for an award of attorney fees to be authorized, the award of fees must be in conjunction with an award of backpay to the grievant on correction of the unwarranted or unjustified personnel action; must be reasonable and related to the personnel action; and must be in accordance with the standards established under section 7701(g). Section 7701(g)(1), which applies to all cases except those of discrimination, requires that the fees must have been reasonable and have been incurred by the employee; the employee must have been the prevailing party in the proceeding; and the payment of the fees by the agency must be warranted in the interest of justice. Finally, there must be a "fully articulated, reasoned decision" setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount of fees was determined. In this case, it is clear that the Arbitrator established in a fully articulated and reasoned decision that the Union is entitled to an award of attorney fees. Thus, the award is in conjunction with an award of backpay to the grievant on correction of the unwarranted personnel action, the failure to temporarily promote the grievant. There is no dispute that fees were incurred on behalf of the employee and that the grievant is the prevailing party. With regard to the "interest of justice" standard, the Arbitrator effectively found, based upon consideration and discussion of the various facts and circumstances involved, that the Activity knew or should have known that it would not prevail on the merits. The Authority therefore concludes that the Arbitrator's determination that the payment of attorney fees was warranted in the interest of justice is fully consistent with applicable legal requirements and that the Activity's exception provides no basis for finding the award deficient.

V. THIRD EXCEPTION

A. Contentions

As its third exception, the Activity contends the Arbitrator's award is not in accordance with the governing standards established under 5 U.S.C. § 7701(g) for determining the reasonableness of an award of attorney fees. In support of this contention, the Activity argues that the Union should not receive fees calculated at the prevailing market rate but should recover only the salary of the Union attorney plus overhead costs.

The Union in its opposition maintains that it is entitled to an award of attorney fees calculated at the prevailing market rate since the fees recovered in this case are set aside for a Legal Services Program (LSP) used solely to litigate the rights of Federal employees before administrative and judicial tribunals. The Union argues that the LSP fund qualifies for treatment as a public interest organization or legal services firm and therefore it should be compensated under the market-rate formula.

B. Analysis and Conclusions

In determining what constitutes reasonable attorney fees, courts have applied a variety of methods and analyses. An example of a method acceptable to administrative adjudicatory agencies and most courts is the "lodestar" method, in which the attorney's customary hourly billing rate is multiplied by the number of hours reasonably devoted to the case with appropriate adjustments for any special factors. Naval Air Development Center, slip op. at 9. This is the method ordinarily applied by the MSPB in determining reasonable attorney fees under 5 U.S.C. § 7701(g)(1) when the attorney involved is in private practice, for example, Kling v. Department of Justice, 2 MSPB 620, 624-28 (1980), and applied by the Authority in reviewing an arbitrator's award of fees to an attorney in private practice. Naval Air Development Center, slip op. at 12.

Where, however, the attorney is an employee of a union, a different method must be applied in computing reasonable fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). Where such fees are to be paid to a union, the fees are computed based on actual costs rather than on the prevailing market rate for the legal services rendered. Further, a special fund created by a union into which all fees awarded to union-employed attorneys would be paid and expended solely for legal work does not entitle the union to market-rate fees for the services of its staff. Id. at 10; National Treasury Employees Union v. Department of the Treasury, 656 F.2d 848 (D.C. Cir. 1981); Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied 105 S. Ct. 958 (1985); Wells v. Schweiker, 12 MSPB 329 (1982).

With regard to the computation of actual costs, there are three elements to be considered: the compensation paid to the attorney employee for the time expended on the case; out-of-pocket expenses related to the case; and overhead costs. Additionally, as to overhead costs, in the absence of evidence that an allowance of 100 percent of the attorney's compensation for overhead is substantially excessive or insufficient, such an overhead allowance may normally be included as an element of actual costs. Powell v. Department of the Treasury, 8 MSPB 21 (1981).

Among the reasons for limiting fees for salaried union attorneys under those statutory provisions to recovery of actual costs is, as the MSPB held in Wells v. Schweiker, 12 MSPB at 333:

> [T]o award more . . . than that which is available under the cost-plus method would be inconsistent with the language and purpose of 5 U.S.C. § 5596(b)(1)(A)(ii), the fees provision of the Back Pay Act. An attorney fee award ordered under that provision may not exceed the cost reasonably incurred by or on behalf of the employee for legal representation. Cf. 5 U.S.C. § 7701(g). This is consistent with the general purpose of the Back Pay Act to "make whole" employees who had suffered a loss in salary and benefits as the result of an improper personnel action. Senate Report No. 1062, 89th Cong., 2nd Sess. (1966) 1-2. Nothing in the Civil Service Reform Act indicates that Congress, in amending section 5596, intended to deviate from this basic principle. Thus, section 5596 clearly limits the recovery of costs for legal expenses incurred by or on behalf of employees to the expense they suffered as a result of the action. It is not intended to provide a union with a windfall profit for the performance of services which it was created to provide and by their dues its members support.

In this case, it is undisputed that the attorney who represented the grievant is an employee of the Union. Consequently, reasonable attorney fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1) for his services can only be awarded on a cost-plus basis. Therefore, to the extent that the Arbitrator awarded attorney fees on other than a cost-plus basis, the award is deficient and must be modified.

VI. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified to provide as follows:

> Reasonable attorney fees are hereby awarded to reimburse the Union for its actual costs in representing the Grievant in this matter, including the 22.2 hours the Union attorney devoted to the case, in accordance with the applicable cost-plus formula.

Issued, Washington, D.C., May 22, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 107

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE,
BALTIMORE DISTRICT OFFICE

Activity

and

Case No. 0-AR-822

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 62

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the supplemental award of attorney fees by Arbitrator Clair V. Duff filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The underlying grievance in this case concerned the 10-day suspension of the grievant for alleged failure to process tax remittances and tax returns in a timely manner. The Activity's charges or reasons for the action were based on a number of specifications of unprocessed checks, tax returns and other documents found in or around the grievant's desk and in a file cabinet in the collection division office area. The Arbitrator separated the evidence presented into two parts: the items found in the file cabinet and the items found in the grievant's desk and adjacent work area. As to the specifications concerning the items discovered in the file cabinet, the Arbitrator found that no culpable conduct on the part of the grievant was established, but rather, that at most the evidence indicated inefficiency on the part of management. The Arbitrator concluded that the evidence presented as to those items did not constitute substantial evidence of an infraction, as required by a provision in the parties' collective bargaining agreement establishing the burden of proof for disciplinary actions. As to the items found in the grievant's desk and adjacent work area, the Arbitrator found that there was no substantial evidence proving that the grievant was in any way at fault or connected with the documents. The Arbitrator further found that the location of the documents in the grievant's work area was sufficient to create suspicion, but that upon careful examination of the documents and consideration of the other facts and circumstances involved, the evidence was more consistent with the grievant's innocence than with her guilt. The Arbitrator concluded that the Activity's proof concerning the items in and around the grievant's desk was inadequate to meet the required standard of substantial evidence.

Accordingly, as his award, the Arbitrator set aside the suspension, directed the Activity to expunge from the grievant's personnel file all references to the charges against her, and to reimburse the grievant for all wages, leave and other benefits lost as a result of the suspension. At the request of the Union, the Arbitrator also left the record in the proceeding open to permit the parties to file briefs on the issue of whether reasonable attorney fees should be granted pursuant to the Back Pay Act, 5 U.S.C. § 5596.[1] The Union subsequently filed an application for an award of fees in the amount of $6090 for the legal services provided the grievant by two of its staff attorneys. The Union's application and supporting brief claimed that it was entitled to compensation for the services of one of the attorneys for 87 hours at $75 per hour and for the services of the second attorney for 5 hours at $85 per hour based upon the market value of similar legal services in the locality.

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[1] 5 U.S.C. § 5596 provides, in pertinent part:

> § 5596. Back pay due to unjustified personnel action
>
> . . . .
>
> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

(Continued)

In his supplemental opinion and award, the Arbitrator identified the issue as whether the Union, as counsel for the grievant, was entitled to an award of reasonable attorney fees pursuant to 5 U.S.C. § 5596, 5 U.S.C. § 7701(g),[2] and the relevant provision of the parties' collective bargaining agreement. The Arbitrator found that the first two requirements of 5 U.S.C. § 7701(g)(1), i.e.,

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(Continued)

> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
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> . . . .
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title . . . shall be awarded in accordance with standards established under section 7701(g) of this title[.]

[2] 5 U.S.C. § 7701(g)(1982) provides, in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, the Board . . . may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

that the fees claimed be incurred by the employee and that the employee must be prevailing party, were satisfied and not in dispute. The Arbitrator further found that the focal point of the case was whether the payment of fees by the Activity was warranted in the interest of justice. As to this requirement, the Arbitrator found that two of the examples set forth in the decision of the Merit Systems Protection Board (MSPB) in Allen v, U.S. Postal Service, 2 MSPB 582 (1980), to illustrate "interest of justice" were applicable:

- Where the agency's action was "clearly without merit" (§ 7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency; and
- Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

Applying those standards to the Activity's charges against the grievant, the Arbitrator found with regard to the allegations concerning the items found in the office file cabinet that based on the various facts and circumstances involved the Activity knew or should have known that it would not prevail on the merits. The Arbitrator therefore concluded that attorney fees were warranted in the interest of justice for the legal services related to those allegations. In that regard, the Arbitrator essentially found that approximately half of the time claimed by the attorneys was devoted to this aspect of the case. As to the Activity's allegations concerning the items found in and around the grievant's desk, however, the Arbitrator found that while the evidence was insufficient to sustain the charges against the grievant, the charges were not wholly unfounded and this part of the case was not so clear that the Activity knew or should have known that it would not prevail on the merits. The Arbitrator therefore concluded that counsel fees were not warranted for the legal services related to those allegations. For the legal services for which fees were found to be warranted, the Arbitrator ruled that the compensation claimed by the Union was based on a reasonable allocation of time and an amount per hour that was reasonable but below the prevailing rate of legal compensation in the locality. As his award the Arbitrator provided:

The Union's Application for Award of Attorney's Fees is granted to the extent that a total of $3,000 is warranted and the Agency is directed to reimburse the Union in said amount.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Activity contends that the Arbitrator's award of fees is contrary to law. Specifically, the Activity contends that under MSPB's decision in the Allen case and 5 U.S.C. § 7701(g), a determination as to whether attorney fees are warranted in a case such as this requires that an agency's reasons for initiating a disciplinary action must be viewed as a totality and not separately. The Activity similarly argues that an arbitrator may only find either that there was a reasonable basis for the action or find that there was not such a basis, and that an issue-by-issue analysis and determination is not permitted. Thus, the Activity concludes, an award of attorney fees in a case such as this would be warranted only if an agency's reasons for the action were determined to be "wholly unfounded."

B. Analysis and Conclusions

The Authority finds that the Activity has failed to establish that the Arbitrator's award of attorney fees is contrary to law as alleged in this exception. Neither the decision of the MSPB in Allen nor 5 U.S.C. § 7701(g) precludes an arbitrator from granting part of a request for attorney fees based on a determination that only that part was warranted under applicable legal requirements. In this regard, the U.S. Court of Appeals for the Federal Circuit has clearly indicated in two decisions that an award of less than the full amount of fees claimed can be appropriate. In Thomson v. Merit Systems Protection Board, 772 F.2d 879, 882 (Fed. Cir. 1985), the court held in remanding the case to MSPB for correction of certain errors that "the Board should have the opportunity initially to determine whether full fees, no fees, or partial fees should be allowed." In Van Fossen v. Merit Systems Protection Board, No. 86-536, slip op. at 7-8 (Fed. Cir. April 10, 1986), the court held that because the charges against the employee that were sustained were technical and very minor and because the original drastic penalty of removal was significantly mitigated to a 30-day suspension, not only did the employee prevail in the proceeding but he had also shown himself to be substantially innocent of the charges so as to be entitled to attorney fees. In remanding the case to the MSPB for determination of an appropriate award, the court directed that "[t]he Board will have to decide whether to allow full attorney fees or to make some deduction for the fact that these minor and technical charges were sustained."

Based upon the decisions of the Federal Circuit, the Authority concludes, contrary to the Activity, that an arbitrator properly can award partial attorney fees based upon the Arbitrator's disposition of different aspects of a case, if the award of fees otherwise meets the requirements of 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1).

In this regard, the Authority recently summarized those requirements in Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986). In order for an award of attorney fees to be authorized, the award of fees first must be in conjunction with an award of backpay to the grievant on the correction of an unjustified or unwarranted personnel action; it must be reasonable and related to the personnel action; and it must be in accordance with the standards established under 5 U.S.C. § 7701(g). Section 7701(g)(1), which applies to all cases except those of discrimination, requires that the fees must be reasonable and must have been incurred by the employee; that the employee must be the prevailing party in the proceeding; and that payment of the fees by the agency involved must be warranted in the interest of justice. Finally, there must be a "fully articulated, reasoned decision" setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded. In this case, it is clear that the Arbitrator properly established in a fully articulated and reasoned decision that the Union is entitled to an award of attorney fees. Thus, the award of fees is in conjunction with an award of backpay to the grievant on correction of the unwarranted suspension action. There is no dispute that fees were incurred in behalf of the employee and that the grievant is the prevailing party. With regard to the "interest of justice" standard, the Arbitrator expressly found, based upon consideration and discussion of the various facts and circumstances involved, that the Activity knew or should have known that it would not prevail on the merits of its allegations against the grievant concerning the documents found in the office file cabinet. The Authority therefore concludes that the Arbitrator's determination that the Union is entitled to reimbursement for attorney fees incurred in defending the grievant against those allegations is fully consistent with applicable legal requirements and that the Activity's exception provides no basis for finding the award deficient.

The Authority turns now to the question of the reasonableness of the amount of fees awarded as raised in the Activity's second exception.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Activity contends that the Arbitrator's supplemental award of attorney fees to the Union based on an hourly rate at or near the prevailing private practice rate for those hours is contrary to law as enunciated by the Federal courts and MSPB. The Activity further contends that salaried union staff attorneys are only entitled to fees calculated on a cost-plus basis.

B. Analysis and Conclusions

In determining what constitutes reasonable attorney fees, courts have applied a variety of methods and analyses. An example of a method acceptable to administrative adjudicatory agencies and most courts is the "lodestar" method, where the attorney's customary hourly billing rate is multiplied by the number of hours reasonably devoted to the case with appropriate adjustments for any special factors. Naval Air Development Center, slip op. at 9. This is the method ordinarily applied by the MSPB in determining reasonable attorney fees under 5 U.S.C. § 7701(g)(1) when the attorney involved is in private practice, e.g., Kling v. Department of Justice, 2 MSPB 620, 624-28 (1980), and applied by the Authority in reviewing an arbitrator's award of fees to an attorney in private practice. Naval Air Development Center, slip op. at 12.

Where, however, the attorney is an employee of a union, a different method must be applied in computing reasonable fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). Where attorney fees are to be paid to a union, the fees are computed based on actual costs rather than on the prevailing market rate for the legal services rendered. Further, a special fund created by the union into which all fees awarded to attorney employees would be paid and expended solely for legal work does not entitle the union to market-rate fees for the services of its attorneys. *Id.* at 10; *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981); *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied* 105 S. Ct. 958 (1985); *Wells v. Schweiker*, 12 MSPB 329 (1982).

With regard to the computation of actual costs, there are three elements to be considered: the compensation paid to the attorney employee for the time expended on the case; out-of-pocket expenses related to the case; and overhead costs. Additionally, as to overhead costs, in the absence of evidence that an allowance of 100 percent of the attorney's compensation for overhead is substantially excessive or insufficient, such an overhead allowance may normally be included as an element of actual costs. *Powell v. Department of the Treasury*, 8 MSPB 21 (1981).

Among the reasons for limiting fees for salaried union attorneys under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1) to recovery of actual costs is, as the MSPB held in *Wells v. Schweiker*, 12 MSPB at 333:

> [T]o award more . . . than that which is available under the cost-plus method would be inconsistent with the language and purpose of 5 U.S.C. § 5596(b)(1)(A)(ii), the fees provision of the Back Pay Act. An attorney fee award ordered under that provision may not exceed the cost reasonably incurred by or on behalf of the employee for legal representation. *Cf.* 5 U.S.C. § 7701(g). This is consistent with the general purpose of the Back Pay Act to "make whole" employees who had suffered a loss in salary and benefits as the result of an improper personnel action. Senate Report No. 1062, 89th Cong., 2nd Sess. (1966) 1-2. Nothing in the Civil Service Reform Act

> Congress, in amending section 5596, intended to deviate from this basic principle. Thus, section 5596 clearly limits the recovery of costs for legal expenses incurred by or on behalf of employees to the expense they suffered as a result of the action. It is not intended to provide a union with a windfall profit for the performance of services which it was created to provide and by their dues its members support.

In this case, it is undisputed that the attorneys who represented the grievant are employees of the Union. Consequently, reasonable attorney fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1) for their services can only be awarded on a cost-plus basis. Therefore, to the extent that the Arbitrator awarded attorney's fees on other than a cost-plus basis, the award is deficient and must be modified.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified as follows:

> The Union's Application for Award of Attorney Fees is granted for that portion of the legal services provided for which compensation has been determined to be warranted in the interest of justice and the Agency is directed to reimburse the Union for its actual costs in accordance with the applicable cost-plus formula.

Issued, Washington, D.C., May 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, FEDERAL
CORRECTIONAL INSTITUTION,
LEXINGTON, KENTUCKY

. Activity

and Case No. 0-AR-1025

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 817

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator John J. Murphy filed by the Department of Justice (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Office of Personnel Management filed a brief as an amicus curiae.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant alleged that her performance evaluation of "fully successful" was erroneous and that as a result she was not selected for certain GS-8 positions for which she competed. The Arbitrator determined that the grievant's evaluation for the 1983-1984 appraisal period was substantially defective because it did not include input from the unit manager who acted as her supervisor during nine of the twelve months covered by the evaluation.

However, he found that although the grievant's rating would probably have been higher if the evaluation had been conducted properly, there was no basis upon which he could determine the actual rating. The Arbitrator therefore concluded that he was unable to make a finding that "but for" the error the grievant would have been promoted to GS-8 in June 1984 rather than May 1985, and that he was unable to award the grievant a retroactive promotion. The Arbitrator, noting that the grievant had subsequently been promoted to GS-8, determined that an appropriate remedy for earlier deficiencies in the process of rating the grievant would be the granting of preferential treatment for promotion to GS-9 and made the following award:

> The grievance is granted to the extent the Grievant shall be given priority placement for the next promotion to a GS-9 level at the Federal Correctional Institution in Lexington, Kentucky, that occurs after the Grievant has had at least one year in the GS-8 grade.

III. EXCEPTIONS

In its exceptions, the Agency contends that the award is contrary to section 7106(a)(2)(C) of the Statute because it requires "placement" of the grievant in a GS-9 position and therefore negates management's right to make a selection for appointment to such a position from any other appropriate source.

The Agency further contends that if the Arbitrator directed that the grievant be given priority consideration for promotion to GS-9, the award is contrary to Federal Personnel Manual (FPM) chapter 335. In support of this contention the Agency argues that according priority consideration to the grievant for a GS-9 position would be inappropriate and contrary to the intent of FPM chapter 335. The Agency acknowledges that under FPM chapter 335, Appendix A-4,*/ agencies have broad discretion to use priority consideration to remedy errors in promotion actions. However, the Agency argues that priority consideration is a limited exception to the merit promotion process and that the intent of the FPM provision is to give an employee who has been erroneously not selected or not properly considered for promotion, consideration ahead of others only for another position at the same grade level.

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*/ Appendix A-4 of FPM chapter 335 provides, in part:

> CHAPTER 335. PROMOTION AND INTERNAL PLACEMENT
>
> Appendix A. General Regulatory Provisions
>
> A-4. CORRECTIVE ACTIONS
>
> a. General.
>
> (1) Alternative actions . . . The nature and extent of actions to be taken in any case have to be determined on the basis of all the facts in the case, with due regard to the circumstances surrounding the violation, to the equitable and legal rights of the parties concerned, and to the interests of the Government.
>
> * * * * * * *
>
> c. Action involving nonselected employees.
>
> * * * * * * *
>
> (2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation may be given priority consideration under a new promotion or other placement action. Agencies may make the final determination on how they will handle actions involving nonselected employees, except when actions are mandated by law or regulation.

In its amicus curiae submission, the Office of Personnel Management agrees with the Agency's interpretation of FPM chapter 335.

IV. ANALYSIS AND CONCLUSIONS

The Authority finds that the decision on the issue of whether the Arbitrator's award is deficient as the Agency alleges depends on the meaning of the word "placement."

If "placement" means selection, the Agency is correct in its contention that the award is contrary to section 7106(a)(2)(C) of the Statute. It is well established that management's right to make the actual selection for an appointment can only be abridged if the arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected. Office of the Secretary, U.S. Department of Transportation and American Federation of Government Employees, Local 3313, AFL-CIO, 17 FLRA 54 (1985). The Arbitrator did not find any connection whatsoever between the Agency's improper action and the nonselection of the grievant for any GS-9 position. Rather, the Arbitrator specifically declined to even make a finding that but for the improper evaluation, the grievant would have been selected for a GS-8 position. Consequently, as the Arbitrator correctly recognized, there was no legal basis for ordering a retroactive promotion to GS-8, and there is likewise no legal basis for ordering the selection of the grievant for a GS-9 position. The Authority therefore concludes that the Arbitrator's award, to the extent it directs placement of the grievant in a GS-9 position, is contrary to management's right to make selections for appointment under section 7106(a)(2)(C) of the Statute.

If, however, "priority placement" means "priority consideration," the Agency has failed to establish that the award is deficient. In the typical situation where an aggrieved employee has been wrongfully denied the consideration or process to which the employee was entitled in a promotion action, and the employee has not yet been promoted when the grievance is considered, the Authority has recognized that an appropriate remedy under Appendix A-4c(2) of FPM chapter 335 is to direct that the employee be granted priority consideration for promotion to the next available higher-graded position for which the employee is qualified. E.g., Local R4-97, National Association of Government Employees and Naval Mine Engineering Facility, Yorktown, Virginia, 5 FLRA 452, 456 (1981). However, as the Agency acknowledges, FPM chapter 335 does not expressly limit the remedy of priority consideration to those typical situations. Specifically, the FPM does not prohibit priority consideration as a remedy in circumstances such as here involved. Rather, as the Agency further acknowledges, Appendix A-4 provides broad discretion in the use of priority consideration as a corrective action. In this case, it is clear that the Arbitrator, consistent with Appendix A-4, based his determination that priority treatment for a GS-9 vacancy was warranted to remedy the violation found on the facts, circumstances, rights and interests involved. Furthermore, it is well established that arbitrators have considerable latitude in fashioning remedies in disputes. Veterans Administration Hospital, Newington, Connecticut and National Association of Government Employees, Local R1-109, 5 FLRA 64 (1981). The Authority therefore concludes that the Agency has failed to establish that an award of priority consideration for promotion to GS-9 in this case is deficient.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified to provide as follows:

> The grievance is granted and the Grievant shall be given priority consideration for promotion to the next available GS-9 position at the Federal Correctional Institution in Lexington, Kentucky, that occurs after the Grievant has at least one year in the GS-8 grade and for which the grievant applies and is qualified.

Issued, Washington, D.C., May 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 109

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U. S. CUSTOMS SERVICE

Agency

and

Case No. 0-AR-908

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 136

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the supplemental award of attorney fees by Arbitrator Ira F. Jaffe filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

In his initial award in this matter, the Arbitrator found that the parties' collective bargaining agreement clearly required that the grievant should have been temporarily promoted for a period she performed the duties of a higher-graded position and that in settlement of the grievance the Agency had also agreed by letter that the grievant was entitled to backpay for the full period. The Arbitrator concluded that the Agency violated the terms of the grievance settlement and the collective bargaining agreement by its failure to pay the grievant at the higher rate of pay for the period. The Arbitrator awarded the grievant backpay for the period and retained jurisdiction of the matter for the limited purpose of entertaining an application for attorney fees. The Union filed a request for fees pursuant to 5 U.S.C. § 5596[1],

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[1] 5 U.S.C. § 5596 provides in part:

> **§ 5596. Back pay due to unjustified personnel action.**
>
> . . . .
>
> (h)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
>
> . . . .
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title . . . shall be awarded in accordance with standards established under section 7701(g) of this title[.]

5 U.S.C. § 7701(g),2/ and the applicable provision of the parties' agreement. The attorney claimed compensation for 66.9 hours at $95 per hour, the prevailing rate in the geographic area for a labor attorney with his experience.

In his supplemental award, the Arbitrator found that there was no dispute that the grievant was the prevailing party. The Arbitrator, citing O'Donnell v. Department of the Interior, 2 MSPB 604, 608-10 (1980), also found that attorney fees had been incurred by the employee. The Arbitrator further found that under the decision of the Merit Systems Protection Board (MSPB) in Allen v. U.S. Postal Service, 2 MSPB 582 (1980),3/ attorney fees were warranted in the "interest of justice" because the Agency's failure to abide by its earlier grievance settlement agreement and its repudiation of the basis for its earlier payments to the grievant were wholly unfounded; because the Agency knew or should have known that it would not prevail on the merits; and because the Agency's action was clearly without merit.

2/ 5 U.S.C. § 7701(g)(1) (1982) provides:

> Except as provided in paragraph (2) of this subsection, the Board . . . may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

3/ In Allen, the Board set forth some examples of circumstances in which attorney fees would be warranted in the interest of justice, including situations:

> - where the agency's action was "clearly without merit," or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency; and
>
> - where the agency "knew or should have known it would not prevail on the merits" when it brought the proceeding.

With regard to the actual amount of reasonable fees to be awarded, the Arbitrator found that the number of hours claimed by the Union attorney was reasonable. As to the reasonableness of the rate, however, the Arbitrator found, based on Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied 105 S. Ct. 958 (1985) and Wells v. Schweiker, 12 MSPB 329 (1982), that an award of fees at the prevailing market rate to salaried union counsel would not be "reasonable" and would be at odds with the purposes of the Back Pay Act and 5 U.S.C. § 7701(g). The Arbitrator further found that both Wells and Goodrich support the proposition that the make whole purposes underlying the statutory attorney fee provisions involved do not support payment of market-rate fees to salaried union attorneys because such fees would provide the union with a windfall profit. The Arbitrator further found that creation of a special litigation fund by the Union into which attorney fees were to be paid did not overcome those considerations. The Arbitrator therefore concluded that recovery of attorney fees in this case was limited to the actual cost of the attorney's salary plus an overhead cost allowance. On that basis, the Arbitrator awarded 66.9 hours of attorney fees at the cost-plus rate and reimbursement of the attorney's travel costs.

III. EXCEPTION

A. Contentions

In its exception, the Union contends that the award of attorney fees is deficient because 5 U.S.C. § 7701(g)(1) requires that an arbitrator must base an award of reasonable attorney fees on the prevailing market rate. In support of its contention, the Union argues that under the Civil Rights Act of 1964, the Freedom of Information Act and the Privacy Act, provisions for an award of reasonable attorney fees are construed as an entitlement to fees at the market rate and, therefore, any award of reasonable attorney fees under 5 U.S.C § 7701(g)(1) also must be based on such a rate. The Union also argues that the concerns raised by the court in National Treasury Employees Union v. U.S. Department of the Treasury, 656 F.2d 848 (D.C. Cir. 1981), and by the MSPB in Powell v. Department of the Treasury, 8 MSPB 21 (1981), have been resolved by the Union's establishment of a Legal Services Program (LSP). In the NTEU case, the court found that an attorney employed by a union could not receive legal fees in excess of the union's actual expenses in providing the particular services because the union compensated the attorneys at well below the going value of their services on the open market and that the union therefore would profit on the legal activities of its lawyers, contrary to the American Bar Association's Code of Professional Responsibility, under any arrangement whereby market value fees found their way into the union's general treasury. The Union in this case maintains that any attorney fees recovered will be set aside for the LSP and used solely to litigate the rights of Federal employees before administrative and judicial tribunals. Therefore, the Union argues, the LSP should qualify for treatment as a public interest organization or legal services firm and be compensated under the market-rate formula.

B. Analysis and Conclusions

In determining what constitutes reasonable attorney fees, courts have applied a variety of methods and analyses. An example of a method acceptable to administrative adjudicatory agencies and most courts is the "lodestar" method, in which the attorney's customary hourly billing rate is multiplied by the number of hours reasonably devoted to the case with appropriate adjustments for any special factors. Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), slip op. at 9. This is the method ordinarily applied by the MSPB in determining reasonable attorney fees under 5 U.S.C. § 7701(g)(1) when the attorney involved is in private practice, e.g., Kling v. Department of Justice, 2 MSPB 620, 624-28 (1980), and applied by the Authority in reviewing an arbitrator's award of fees to an attorney in private practice. Naval Air Development Center, slip op. at 12.

Where, however, the attorney is an employee of a union, a different method must be applied in computing reasonable fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1). Where such fees are to be paid to a union, the fees are computed based on actual costs rather than on the prevailing market rate for the legal services rendered. Further, a special fund created by a union into which all fees awarded to union-employed attorneys would be paid and expended solely for legal work does not entitle the union to market rate fees under 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1) for the services of its staff. Id. at 10, citing Goodrich and NTEU v. Department of the Treasury. Among the reasons for limiting fees for salaried union attorneys under those statutory provisions to recovery of actual costs is, as the Arbitrator in this case recognized and the MSPB held in Wells v. Schweiker, 12 MSPB at 333:

> [T]o award more . . . than that which is available under the cost-plus method would be inconsistent with the language and purpose of 5 U.S.C. § 5596(b)(1)(A)(ii), the fees provision of the Back Pay Act. An attorney fee award ordered under that provision may not exceed the cost reasonably incurred by or on behalf of the employee for legal representation. Cf. 5 U.S.C. § 7701(g). This is consistent with the general purpose of the Back Pay Act to "make whole" employees who had suffered a loss in salary and benefits as the result of an improper personnel action. Senate Report No. 1062, 89th Cong., 2nd Sess. (1966) 1-2. Nothing in the Civil Service Reform Act indicates that Congress, in amending section 5596, intended to deviate from this basic principle. Thus, section 5596 clearly limits the recovery of costs for legal expenses incurred by or on behalf of employees to the expense they suffered as a result of the action. It is not intended to provide a union with a windfall profit for the performance of services which it was created to provide and by their dues its members support.

In this case it is undisputed that the attorney who represented the grievant was an employee of the Union. Consequently, as the Arbitrator determined consistent with 5 U.S.C. § 5596 and 5 U.S.C. § 7701(g)(1), reasonable attorney fees for his services were limited to providing for reimbursement of the actual costs[4] of those services.

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[4] With regard to the computation of actual costs, there are three elements to be considered: the compensation paid to the attorney employee for the time expended on the case; out-of-pocket expenses related to the case; and overhead costs. Additionally, as to overhead costs, in the absence of evidence that an allowance of 100 percent of the attorney's compensation for overhead is substantially excessive or insufficient, such an overhead allowance may normally be included as an element of actual costs. Powell v. Department of the Treasury, 8 MSPB at 28-30.

Therefore, the Authority concludes that the Union has failed to establish that the Arbitrator's award of reasonable attorney fees on the cost-plus basis is deficient as alleged.5/.

IV. DECISION

Accordingly, for the above reasons, the Union's exception is denied.

Issued, Washington, D.C., May 22, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ The Authority notes that the Arbitrator established in a fully articulated and reasoned decision that an award of reasonable attorney fees was warranted in accordance with the applicable legal requirements as summarized by the Authority in *Naval Air Development Center*.

21 FLRA No. 110

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, AFL-CIO

Union

Case No. 0-NG-1270

and

MISSOURI NATIONAL GUARD

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under section 2429.23(d) of the Authority's rules of procedure, the time limit established in section 7117(c)(2) of the Statute may not extended or waived by the Authority.

The documents the Union submitted with its petition for review indicate that the parties forwarded a locally executed collective bargaining agreement to the Agency Head for review and approval pursuant to section 7114(c) of the Statute. As a result of such review, the Agency Head's designee disapproved certain provisions in the negotiated agreement by letter dated April 15, 1986. The disapproval apparently was served on the Union by mail on the same date. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, not later than the close of business on May 5, 1986. However, the petition was not filed with the Authority at its national office in Washington, D.C., until May 6, 1986.

In its negotiability appeal, the Union states at the outset that the Agency's disapproval was, "By letter received by the Union on April 21, 1986 . . . ." Inasmuch as the period for filing the instant petition for review began on the date the Agency's disapproval was served on the Union, that is, deposited in the mail (see section 2429.27(d) of the Authority's Rules and Regulations), and not on the date the disapproval was received, the Union's appeal was untimely filed.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., May 22, 1986.

Harold D. Kessler
Director of Case Management

21 FLRA No. 111

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MILITARY SEALIFT COMMAND (ATLANTIC)

Respondent

and

Case No. 2-CA-40424

NATIONAL MARITIME UNION OF
AMERICA, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of exceptions filed by the Respondent to the attached decision of the Administrative Law Judge. The issue concerns whether the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply fully with an arbitrator's award to which no exceptions were filed pursuant to section 7122 of the Statute and which therefore had become final and binding.

II. Background and Judge's Conclusion

The Judge found that the Respondent had complied with the award of the arbitrator except the part of his award which called for the payment of interest and which the Respondent argued before the Judge was illegal based on Authority precedent. The Judge concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply fully with the arbitrator's award to which no exceptions had been filed, and ordered the Respondent to pay interest at "the prevailing legal rate" on the backpay awarded, retroactive to July 1, 1983.

III. Positions of the Parties

In its exceptions, the Respondent, citing the Authority's earlier decision in Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, 7 FLRA 30 (1981),[1] argues that the arbitration award in this case, to the extent that it requires the payment of interest, is contrary to law. Therefore, the Respondent argues that its failure to comply with that part of the award did not violate the Statute. The Respondent further argues that the Authority's decision in Veterans Administration Medical Center, Phoenix, Arizona, 15 FLRA 706 (1984),[2] should not be dispositive of this case because the Authority's rationale in that case was erroneous in light of its decision in Portsmouth Naval Shipyard. The General Counsel and the Charging Party, in their respective oppositions to the Respondent's exceptions, assert that the Respondent's contentions are without merit and that the Judge's conclusion is correct and amply supported by Authority precedent. The Charging Party's cross-exceptions also take issue with the Judge's comments on page 5 of his Decision as to how he would view this matter if it were a case of first impression.

IV. Analysis

In this case the Respondent primarily seeks to raise the illegality of the arbitrator's award as a defense to the complaint alleging that its noncompliance was an unfair labor practice. In *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151, 153 (1984), *affirmed sub nom. Department of the Air Force, et al. v. Federal Labor Relations Authority*, 775 F.2d 727 (6th Cir. 1985), the Authority stated:

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[1] In Portsmouth Naval Shipyard, an arbitration case involving timely filed exceptions to an arbitrator's award, the Authority on review modified the arbitrator's award after having determined that the Back Pay Act did not authorize the payment of interest.

[2] In Veterans Administration Medical Center, Phoenix, Arizona, involving the same issue as in this case and where no exceptions to the arbitrator's award were filed, the Authority rejected the agency's defense that interest payments were precluded by the Back Pay Act and therefore unlawful, and concluded that the agency violated section 7116(a)(1) and (8) of the Statute by failing to fully comply with an arbitrator's award as required by section 7122 of the Statute.

> [W]here a party seeks to challenge the propriety of an arbitration award, the appropriate mechanism for doing so, as Congress clearly intended, is through the filing of exceptions to that award under the provisions of section 7122(a) of the Statute. Where a party fails to avail itself of this procedure within the allotted time period, the award becomes final and binding and an agency is required to take such actions as are required by the award. . . . To allow a party which has not filed exceptions to an award to defend its failure to implement that award in a subsequent unfair labor practice proceeding on grounds that should have been raised as exceptions to the award under section 7122 . . . would circumvent the procedures provided in section 7122(a) and frustrate Congressional intent with respect to the finality of arbitration awards.

Subsequently, in *Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina*, 15 FLRA 686 (1984) and *Veterans Administration Medical Center, Phoenix, Arizona*, 15 FLRA 706 (1984), the Authority, relying on the rationale expressed in *Wright-Patterson Air Force Base, Ohio*, found in each case that the agency had failed to file timely exceptions to the arbitrator's award, and therefore violated the Statute by virtue of its failure to comply with the award. The Authority specifically reaffirms its rationale expressed in *Wright-Patterson Air Force Base, Ohio*, and its holdings in the latter two cases.

Turning to the instant case, the Authority finds, based on the above decisions and for the reasons expressed in those cases, that the Respondent was required to file timely exceptions to the award of the arbitrator under section 7122 if it wished to raise a contention that all or part of that award was contrary to law. This is exactly what the agency did in *Portsmouth Naval Shipyard*, and the Authority upheld the agency's contention that a requirement to pay interest on the award of shift premium was unlawful. However, where the Respondent has failed to raise the issue in that forum, it cannot subsequently seek to raise the contention as a defense for its refusal to comply with the award in an unfair labor practice proceeding under section 7118 of the Statute.3/ Accordingly, the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to fully comply with the arbitrator's award which had become final and binding, as required by section 7122 of the Statute.

Finally, in view of the foregoing, the Authority finds it unnecessary to address the Judge's comments with regard to how he would have decided the case if it had been a matter of first impression.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties, and the entire record, and adopts the Judge's findings, conclusions, and recommended Order. We therefore conclude that the Respondent's refusal to pay interest at the prevailing legal rate on the backpay awarded, as required by the arbitrator's award, which had become final and binding under section 7122(b) of the Statute in the absence of timely exceptions, constituted a failure to comply fully with the arbitrator's award and therefore a violation of section 7116(a)(1) and (8) of the Statute.

3/ In addition to the cases cited above, see also United States Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985), affirming the Authority's decision in United States Marshals Service, 13 FLRA 351 (1983). The Marshals Service case involved an agency's refusal to comply with an unfair labor practice remedial order of the Authority directing compliance with an arbitrator's award, even though the Authority in a separate proceeding under section 7122 of the Statute previously had rejected the agency's contentions that the arbitrator's award was deficient. In affirming the

(Continued)

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Military Sealift Command (Atlantic) shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement Arbitrator Earle Warren Zaidins' arbitration award rendered on April 6, 1984.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator Earle Warren Zaidins' April 6, 1984 arbitration award, including the payment of interest at the prevailing legal rate on the backpay awarded to all affected employees retroactive to July 1, 1983.

(b) Post at all facilities of the Military Sealift Command (Atlantic) copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Military Sealift Command (Atlantic), or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees in the bargaining unit represented by the

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(Continued)

Authority's remedial order, the court specifically declined to review the Authority's original determination that the award was not deficient, but examined the award only to determine whether an unfair labor practice was committed-- i.e., whether the agency had failed to comply with the arbitrator's award as the Authority ordered it to do. The court held that the agency's refusal to abide by the Authority's order enforcing a final arbitration award was an unfair labor practice.

National Maritime Union of America, AFL-CIO, are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C., May 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully implement Arbitrator Earle Warren Zaidins' arbitration award rendered on April 6, 1984.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL fully comply with Arbitrator Earle Warren Zaidins' April 6, 1984 arbitration award, including the payment of interest at the prevailing legal rate on the backpay awarded to all affected employees retroactive to July 1, 1983.

(Agency or Activity)

Dated: ________ By: (Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278, and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

MILITARY SEALIFT COMMAND (ATLANTIC)

Respondent

and

Case No. 2-CA-40424

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Charging Party

Sidney H. Kalban, Esquire
Phillip & Cappiello, P.C.
For the Charging Party

Thomas F. Wood, Esquire
For the Respondent

Jon R. Steen, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(1) and (8) of the Statute by refusing to pay interest awarded by an arbitrator where no exceptions were filed and the award had become final. Respondent fully complied with the decision and award of the arbitrator except as to the payment of interest which it asserts is illegal. This case was initiated by a charge filed on July 20, 1984 (Jt. Exh. 1), which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute and named as parties the Department of the Navy, Military Sealift Command, and Military Sealift Command (Atlantic). A Complaint and Notice of Hearing issued on September 28, 1984 (Jt. Exh. 3) and set the hearing for January 7, 1985. A First Amended charge was filed on December 17, 1984 (Jt. Exh. 2), named only the Military Sealift Command (Atlantic) and alleged violations of §§ 16(a)(1) and (8); and an Amended Complaint and Notice of Hearing issued on December 26, 1984, named only Military Sealift Command (Atlantic), alleged only violations of §§ 16(a)(1) and (8), and again set the hearing for January 7, 1985 (Jt. Exh. 5), pursuant to which a hearing was duly held on January 7, 1985, in New York City before the undersigned, at which time the parties submitted a Stipulation, G.C. Exh. 1, which constitutes the entire factual record in this proceeding (G.C. Exh. 1, Par. 25). At the close of the hearing, by agreement of the parties, February 21, 1985, was fixed as the date for mailing post-hearing briefs and each party timely mailed an excellent brief, received on, or before, February 25, 1985, which have been carefully considered.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(8) will be referred to, simply, as "§ 16(a)(8)."

Facts

Respondent and the Charging Party, National Maritime Union of America, AFL-CIO (hereinafter also referred to as "NMU") were parties to a collective bargaining agreement which expired June 15, 1981 (Jt. Exh. 7). The terms and conditions of employment set forth in the agreement have continued to remain in full force and effect (G.C. Exh. 1, Par. 6(b)). On, or about, April 6, 1984, Arbitrator Earle Warren Zaidins issued an award in FMCS Case No. 83K/28835 involving Respondent and NMU, which provided that Respondent was "to pay all affected employees the contractual longshore rate of pay, retroactive to July 1, 1983 . . . together with the prevailing legal rate of interest thereon" (G.C. Exh. 1, Par. 7; Jt. Exh. 8). No exceptions to the award were filed. By September 1, 1984, Respondent had complied with the award with respect to the payment of backpay (G.C. Exh. 1, Par. 11). However, Respondent has refused to pay interest on the backpay based on Portsmouth Naval Shipyard, 7 FLRA 30 (1981), which provides that interest payments in an arbitration award are not authorized by the Back Pay Act. (G.C. Exh. 1, Par. 12).

Discussion and Conclusions

In Portsmouth Naval Shipyard, 7 FLRA No. 9, 7 FLRA 30 (1981), which was before the Authority on an exception to that portion of an arbitration award directing the payment of interest, the Authority modified the award to strike out "with interest." The Authority noted that it was well settled that, ". . . unless authorized by an express provision in a relevant statute or contract, interest is not available against the Federal Government." (7 FLRA at 32); that it had been held that the Back Pay Act prior to the 1978 amendments did not authorize an award of interest [Fitzgerald v. Staats, 578 F.2d 435, 438 (D.C. Cir 1978), cert. denied, 439 U.S. 1004 (1978); Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied 429 U.S. 1093 (1977)]; and that, ". . . The legislative history to the Civil Service Reform Act indicates Congressional intent to continue this express omission in the Back Pay Act. In this regard, the final version of the bill passed by the House, H.R. 11280, included among its provisions amending the Back Pay Act a specific provision for the payment of backpay, 'plus 5 percent.' (footnote omitted). However, the version of the bill reported out of the Senate-House Conference Committee, which was ultimately enacted and signed into law . . . did not contain this 'plus 5 percent' provision. This action 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact.' See Gulf Oil Corporation v. Copp Paving Company, Inc., 419 U.S. 186, 200 (1974)[6] (7 FLRA at 32-33)

> "[6] Accordingly, we respectfully disagree in the present case with the decision of the Court of Appeals for the Fifth Circuit is Payne v. Panama Canal Co., 607 F.2d 155 (5th Cir. 1979), in which the court upheld, under the Back Pay Act as amended in 1978, a district court decision granting interest as part of an award of backpay." (7 FLRA at 33).

The Authority concluded,

> "Thus, the settled rule that interest is proscribed when not expressly authorized is controlling in this case. Because no statutory provision expressly permits the interest awarded by the Arbitrator, his award must be modified accordingly." (7 FLRA at 33).

In American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA No. 62, 10 FLRA 346 (1982), the Authority denied the award of interest against a union, stating,

> "Inasmuch as interest is not available against the Federal Government in the absence of an express provision in a relevant statute or contract, and no relevant statutory provision expressly permits the payment of such interest by Federal agencies (see, Portsmouth Naval Shipyard and Federal Metal Trades Council (Fallon, Arbitrator), 7 FLRA No. 9 (1981), the Authority concludes that it would not effectuate the purposes of the Statute to require labor organizations to pay interest in

> similar circumstances as included by the Judge in his recommended order. Accordingly, the Judges's recommendation that the Respondent be required to pay interest . . . is rejected." (10 FLRA at 352, n. 6).

The Authority has recognized that an agency may discontinue an unlawful past practice upon discovery of its illegality with no obligation to bargain concerning the decision to discontinue such practice, although it must, upon request, bargain upon impact and implementation. See, for example, *Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana*, 9 FLRA No. 65, 9 FLRA 543 (1982); and, under Executive Order 11491, as amended, it was recognized that ". . . any provision of an agreement which conflicts with law, the Order, or regulations of appropriate authorities outside the agency would be void and unenforceable. See Section VII of the Council's *Report and Recommendations* (1975)." (*Defense General Supply Center*, A/SLMR No. 790, 7 A/SLMR 102, 104, n. 4).

Confronted with the issue of an arbitration award, to which no exception had been filed, which required an improper payment, *i.e.*, a payment contrary to law, the Federal Labor Relations Council, in *Department of the Army, Aberdeen Proving Ground*, FLRC No. 74A-46, 3 FLRC 188 (1975), while first stating that, ". . . A party's refusal to comply with an arbitration award . . . where the party has failed to file exceptions . . . is a failure to comply with its obligations under the Order and may be deemed an unfair labor practice. And such a party may not relieve himself of such obligations under the Order by requesting an opinion from another agency such as the United States General Accounting Office. Hence, such action is not a defense to an unfair labor practice charged for failure to implement an arbitration award . . . ." (3 FLRC at 194), nevertheless, held,

> "However, the Assistant Secretary, in fashioning a remedial order in unfair labor practice cases, may not require a party to engage in an illegal action. In this connection, the Assistant Secretary's remedial order must 'effectuate the purposes of the Order.' (footnote omitted). Obviously, it would be inconsistent with such purposes to require a party to violate applicable law, appropriate regulation or the Order (footnote omitted). Thus, where the Assistant Secretary finds that an agency has committed an unfair labor practice under Executive Order 11491, as amended, by its failure to abide by an arbitration award to which no exceptions were filed with the council, *the Assistant Secretary may not, as part of his remedial order, direct the agency to comply with an award which*

> the Comptroller General has determined, under 31 U.S.C. § 74, to call for an improper payment and, hence, to be contrary to law." (3 FLRC at 195)(Emphasis supplied).

In his Supplemental Decision and Order, A/SLMR No. 518, 5 A/SLMR 349 (1975), the Assistant Secretary did not require the Respondent, Department of the Army, Aberdeen Proving Ground, to implement the arbitration award involved by making payment to the Complainant, International Association of Machinists and Aerospace Workers, Local Lodge 2424, ordered by the arbitrator, although posting and a cease and desist order issued, see 5 A/SLMR at 351.

In this case the arbitrator was wrong in awarding interest on backpay; Respondent was wrong in failing to file exceptions to the award; but two wrongs do not make a right. If this were a case of first impression, I should follow without hesitation the decision of the Federal Labor Relations Council in Department of the Army, Aberdeen Proving Ground, supra, and the Supplemental Decision of the Assistant Secretary therein, supra, and find that Respondent committed an unfair labor practice; but I would not order Respondent to pay the interest ordered by the arbitrator because such payment is contrary to law. Such disposition would be, in my opinion, wholly consistent with § 22(b) of the Statute, i.e. "If no exception to an arbitrator's award is filed . . . the award shall be final and binding" to the extent that such award does not require an action contrary to law. In this instance, the Authority has clearly and directly held that interest may not be awarded under the Back Pay Act, and Arbitrator Zaidins' award of interest was contrary to law and unlawful. The employees were never entitled to interest and neither the error of the arbitrator in granting it nor the error of Respondent in failing to file an exception to the award should result either in their receiving a windfall benefit or Respondent, as part of a remedial order, being directed to make an illegal payment.

But this is not a case of first impression. The Authority, in a series of cases, has reached a conclusion contrary to that of the Federal Labor Relations Council. Thus, in Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA No. 137, 15 FLRA 686 (1984), the Authority held, in part, as follows:

> ". . . In the Authority's view, any contention that an arbitrator's award is deficient because it is contrary to any law . . . must be made by invoking the procedure established by Congress in section 7122(a) of the Statute. If a party fails to file exceptions to an arbitrator's award . . . the award . . . becomes 'final and binding' and 'An agency shall take the actions required by an

> arbitrator's award' . . . any failure to comply with a validly obtained arbitrator's award to which no exceptions have been timely filed constitutes a failure to comply with the requirements of section 7122 of the Statute in violation of section 7116(a)(1) and (8) of the Statute. Any other conclusion would render section 7122(b) meaningless . . . ." 15 FLRA at 687-688).

See, also, Department of Health and Human Services, Region II, 15 FLRA No. 139, 15 FLRA 710 (1984).

In Veterans Administration Medical Center, Phoenix, Arizona, 15 FLRA No. 138, 15 FLRA 706 (1984), the Authority had before it precisely the same issue as presented in the present case, namely, the refusal to pay interest on an award based on the contention that interest payments are precluded by the Back Pay Act and therefore would be unlawful. There, as here, no exceptions to the arbitrator's award were filed. The Authority held as follows:

> "The relevant issue and supporting arguments raised by the parties are substantially identical to those involved in Department of Defense, Department of the Navy, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA No. 137 (1984), wherein the Authority, after denying Respondent's defense that compliance would require an unlawful act, concluded that any failure to comply with a validly obtained arbitrator's award to which no exceptions have been timely filed constitutes a failure to comply with the requirements of section 7122 of the Statute in violation of section 7116(a)(1) and (8) of the Statute. Accordingly, the Authority concludes herein that the Respondent violated section 7116(a)(1) and (8) of the Statute be failing to fully comply with an arbitrator's award . . . ." (15 FLRA at 707).

That there be no possible doubt, the Authority's Order specifically provided that the Veterans Administration Medical Center, Phoenix, Arizona, inter alia,

> "(a) Fully comply with Arbitrator August G. Eckhardt's . . . award, including the payment of 10% per year interest on the grievant's back pay . . . ." (15 FLRA at 707).

As I am bound by the Authority's decisions, I am constrained to conclude, not only that Respondent violated §§ 16(a)(1) and (8) of the Statute by failing to comply fully with Arbitrator Zaidins' award, dated

April 6, 1984 (Jt. Exh. 8), but that Respondent be ordered to pay interest at "the prevailing legal rate" on the backpay awarded, retroactive to July 1, 1983.

Accordingly, having found that Respondent violated §§ 16(a)(1) and (8) of the Statute by its failure to fully comply with an arbitrator's award, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7); and § 2423.29 of the Regulation, 5 C.F.R. § 2423.29, the Authority hereby orders that Military Sealift Command (Atlantic) shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement Arbitrator Earle Warren Zaidins' arbitration award rendered on April 6, 1984.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Fully comply with Arbitrator Earle Warren Zaidins' April 6, 1984, arbitration award, including the payment of interest at the prevailing legal rate on the backpay awarded to all affected employees retroactive to July 1, 1983.

(b) Post at all facilities of Military Sealift Command (Atlantic) copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Military Sealift Command (Atlantic), or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members of the bargaining unit represented by the National Maritime Union of America, AFL-CIO, are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region II, Federal Labor Relations Authority, 26 Federal Plaza, Room 2237, New York, New York 10278, in writing, within 30 days of the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 21, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully implement Arbitrator Earle Warren Zaidins' arbitration award rendered on April 6, 1984.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fully comply with Arbitrator Earle Warren Zaidins' April 6, 1984, arbitration award, including the payment of interest at the prevailing legal rate on the backpay awarded to all affected employees retroactive to July 1, 1983.

(Agency or Activity)

Dated: __________ By: __________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: Room 2237, 26 Federal Plaza, New York, New York, 10278 and whose telephone number is: (212) 264-4934.

21 FLRA No. 112

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. AIR FORCE, WASHINGTON, D.C.
AND U.S. AIR FORCE, ELECTRONIC SYSTEMS
DIVISION, HANSCOM AIR FORCE BASE
BEDFORD, MASSACHUSETTS

Respondents

Case No. 1-CA-853

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-8

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. The complaint alleged that Respondent U.S. Air Force (USAF) and Respondent U.S. Air Force, Electronic Systems Division, Hanscom Air Force Base (the Activity) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain in good faith with the National Association of Government Employees, Local R1-8 (NAGE), concerning a change in the Air Force regulation governing the standard of negligence to be used in assessing liability against unit employees for the loss, damage or destruction of Government property, and by unilaterally changing existing conditions of employment of employees in the bargaining unit by implementing the new regulation governing the standard of negligence without first bargaining with NAGE. The issue before the Authority is whether the Judge properly dismissed the complaint.

II. Background Facts

Prior to April 1981, Air Force Regulations (AFR 177-111) provided that civilian employees' liability for the loss, damage or destruction of Government property required a finding of gross negligence. In April, representatives of Respondent U.S. Air Force, Electronic Systems Division, Hanscom Air Force Base, the Activity, informed NAGE and other labor organizations at Hanscom Air Force Base that the Activity was going to implement a new AFR 177-111 which would change the existing standard of care so that employees would be liable for loss or damage to government property on the basis of their simple negligence. NAGE requested bargaining over the substance of the change, essentially proposing that the existing standard of care be retained, and over the procedures for implementation of the change and appropriate arrangements for adversely affected employees. The date for implementing the revised regulation was postponed while the Activity and NAGE exchanged proposals and negotiated concerning procedures and appropriate arrangements. However, the Activity's representative refused to negotiate concerning the substance of the change on the basis that it had no local authority to negotiate concerning the change in the standard of care. The Activity took this position based upon telephonic advice which it had received from Respondent USAF. NAGE continued to request negotiations concerning the substance of the change in the regulatory standard of care and the Activity continued to reject the request. Revised AFR 177-111, incorporating the change in the standard of care, was implemented by the Activity on July 6, 1981.

III. The Judge's Decision

The Judge dismissed the complaint on the basis that, under the provisions of section 7117 of the Statute, the Respondents had no duty to bargain on the subject matter of an agency regulation unless the Authority determined that no compelling need exists for the regulation and that such a determination cannot be made in the context of an unfair labor practice proceeding. Accordingly, the Judge concluded that neither Respondent had violated section 7116(a)(1) and (5) of the Statute.

IV. Positions of the Parties

The General Counsel excepted to the Judge's dismissal of the complaint. Essentially the General Counsel argued that the Judge erred as a matter of law in concluding that where the alleged unilateral change involves a regulation covered by section 7117(a)(2) of the Statute, the Union must first seek a determination by the Authority concerning whether or not there is a "compelling need" for the regulation before it could pursue an unfair labor practice over the Respondents' refusal to engage in local negotiations concerning the implementation of its national regulation. The General Counsel argued that the issue of compelling need could be initially addressed in an unfair labor practice proceeding; that the Respondents had the burden of establishing compelling need; that they had failed to do so; and that their conduct therefore constituted a violation of section 7116(a)(1) and (5) of the Statute.

The Respondents' brief in opposition to the exceptions of the General Counsel essentially argued that the Judge was correct in concluding that the Authority's negotiability procedures for determining "compelling need" must be utilized before any unfair labor practice could be found.

V. Analysis

The Authority adopts the Judge's conclusion that the complaint must be dismissed but not for the reasons stated by the Judge.

Subsequent to the issuance of the Judge's Decision in this case, the Authority issued its decision in Defense Logistics Agency (Cameron Station, Virginia) et al., 12 FLRA 412 (1983), affirmed sub nom. Defense Logistics Agency, et al. v. FLRA, 754 F.2d 1003 (D.C. Cir. 1985),*/ finding that questions concerning the existence of a compelling need for agency regulations may appropriately be decided in an unfair labor practice proceeding, and that management is required to come forward with affirmative support for its assertion that there is a compelling need for the regulation in question which justified its refusal to bargain. See also Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100 (1986) and Department of Defense Dependents Schools, Mediterranean Region (Madrid, Spain) and Zaragoza High School (Zaragoza, Spain), 19 FLRA No. 54 (1985). But see United States Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985), reversing the Authority's decision in U.S. Army Engineer Center and Fort Belvoir, 13 FLRA 707 (1984). Thus the Authority does not adopt the Judge's rationale for dismissing the complaint.

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*/ The court remanded the matter to the Authority for the sole purpose of permitting the petitioners to present evidence as to whether there existed a compelling need for the particular regulation at issue. On April 22, 1985, the Authority remanded the proceeding to the Chief Administrative Law Judge for disposition consistent with the direction of the court. Thereafter, on March 31, 1986, the complaint was withdrawn.

However, the Authority concludes that the Activity did not violate section 7116(a)(1) and (5) of the Statute by issuing its revised regulation without bargaining over the substance of such change because the subject over which the Activity refused to bargain was NAGE's proposal to change the standard of care for lost, damaged or destroyed Government property upon which to base employee liability. Thus, the new Air Force regulation established a standard of simple negligence for the imposition of liability while the Union's proposal sought to establish a standard of "proven, willful, wanton, or reckless conduct directly attributed to the actions of the employee." Proposals such as this have been determined to be nonnegotiable. The Authority has found that union proposals which seek to limit the amount of money an employee may be required to pay for lost or damaged property, or proposals which seek to establish the standard to be used in determining whether an employee will be held pecuniarily liable for the loss, damage, or destruction of government property, directly interfere with management's right to determine its internal security practices under section 7106(a)(1) of the Statute. American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 21 FLRA No. 34 (1986) and National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City Missouri, 21 FLRA No. 32 (1986). Therefore, NAGE's proposal was outside the duty to bargain and the Activity's refusal to negotiate over the proposal did not violate section 7116(a)(1) and (5) of the Statute. The Authority also concludes, based on the facts set forth above, that the Respondent USAF did not refuse to bargain nor did it cause the Activity improperly to do so.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings and conclusions only to the extent consistent with this decision. For the reasons set forth above, the Authority therefore concludes that the complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 1-CA-853 be, and it hereby is, dismissed.

Issued, Washington, D.C., May 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .
U.S. AIR FORCE, WASHINGTON, D.C. .
and U.S. AIR FORCE, .
ELECTRONIC SYSTEMS DIVISION .
HANSCOM AIR FORCE BASE .
(BEDFORD, MASSACHUSETTS) .
.
Respondent .
.
and . Case No. 1-CA-853
.
NATIONAL ASSOCIATION OF GOVERNMENT .
EMPLOYEES, LOCAL R1-8 .
.
Charging Party .
. . . .

James A. Harper, Esq.
For Respondents

Gerard M. Green, Esq.
For General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et seq.*, 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. XIV, § 2410 *et seq.*

A charge was filed on July 29, 1981 and was amended on August 5, 1981 by National Association of Government Employees, Local R1-8 (hereinafter called the Union and/or NAGE), against United States Air Force and U.S.

Air Force Electronic Systems Division, Hanscom Air Force Base, MA (hereinafter referred to as Respondents). Pursuant to the above described charge and amended charge the General Counsel of the FLRA, by the Director of Region 1, issued a Complaint and Notice of Hearing on October 9, 1981 alleging that Respondents violated Sections 7116(a)(1) and (5) of the Statute by unilaterally changing the standard of negligence to be used in assessing employee liability for damage to Government property. Respondents filed an Answer denying that the Statute had been violated.

A hearing in this matter was conducted before the undersigned in Boston, Massachusetts. The Respondents and Counsel for the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein NAGE has been the collective bargaining representative for a unit composed of all of Respondent's non-supervisory and non-professional General Schedule employees serviced by the U.S. Air Force Electronic Systems Division Central Personnel Office at Hanscom Air Force Base. The unit contains approximately 1,400 employees.

Since at least 1978 until April 22, 1981 Air Force Regulations (AFR 177-111) provided that civilian employees' liability for the loss, damage or destruction of Government property was based upon a finding of gross negligence.

On April 22, 1981 representatives of the U.S. Air Force Electronics Systems Division at Hanscom Air Force Base informed NAGE President Norman Downes and representatives of other labor organizations representing employees at the Hanscom Air Force Base, that the Hanscom Air Force Base would implement on May 1, 1981 a new AFR 177-111 which *inter alia*, changed the existing standard of care for lost, damaged, or destroyed Government property upon which to base employee liability, to simple negligence[1] from gross negligence. The Hanscom Air Force Base representatives provided Downes with a copy of revised AFR 177-111. Downes requested that representatives of U.S. Air Force Electronic Systems Division at the Hanscom Air Force Base negotiate with NAGE concerning the decision to change the standard of care. There was no response to Downes' request. On April 22 Downes wrote a letter to Denis Pelley, Chief of the Labor Relations Office of Hanscom Air Force Base, in which Downs requested to negotiate concerning the change in the proposed AFR.

---

[1] The revised provision of Chapter 1, Section 100, paragraph 10005(F) of AFR 177-111 provided:

> "When property is lost, damaged, or destroyed, pecuniary charges will be based on a standard of simple negligence, willful misconduct, or deliberate unauthorized use, and will be assessed as required by statute."

The date for implementing revised AFR 177-111, was postponed while the parties exchanged proposals and negotiated the impact and implementation of the change.[2/]

During June 1981, Respondents' representative, Captain Gruenwald, of the Judge Advocate General's Office, advised NAGE that Hanscom Air Force Base had no local authority to negotiate concerning the subatance of the change in AFR 177-111. Pelley and Mr. Kennedy, of the Hanscom Air Force Base Labor Relations Office, also advised NAGE that Hanscom Air Force base could not bargain with NAGE concerning the substance of the change in AFR 177-111; that this matter could not be negotiated at this local level. Pelley took this position after he was telephonically advised to do so in June 1981, by Chester Nelson, Chief of Staffing and Labor Relations, Headquarters, U.S. Air Force Systems Command, Andrews Air Force Base.

By memorandum dated June 29, 1981 Pelley advised Downes that the revised AFR 177-111 would be implemented on July 6, 1981.

By letter dated June 30, 1981 Downes submitted to Gruenwald a written proposal concerning AFR 177-111 and the standard of care. By letter dated July 2 from Downes to Pelley, Downes reiterated his request to negotiate concerning the change in the standard of care.

The revised AFR 177-111, incorporating the change in the standard of care, was implemented on July 6, 1981.

Downes wrote a letter dated July 10 to Pelley reiterating his request to negotiate with respect to the standard of care.

By letter dated July 14, 1981 from Colonel Thomas O. Duff, Commander of Hanscom Air Force Base, to Downes, Duff rejected Downes' request to bargain concerning the standard of care because "Management's obligation to bargian with you does not extend to the first proposal . . . as it would change the substance of an Air Force Regulation, specifically Chapter 1, Property Accountable-General, Paragraph 10005F, Principles of AFR 177-111 (Test) . . ."

[2/] There is no allegation that there was a refusal to bargain about the impact and implementation of the change.

NAGE was never given any reason for Hanscom Air Force Base's refusal to bargain about the change in the standard of care other than that it involved a change in an Air Force regulation and that the local activity lacked authority to negotiate about the substance of the change.

Discussion and Conclusions

Section 7117 of the Statute provides:

> "(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal Law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.
>
> (b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
>
> (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if -

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection."

Section 7117(a)(2) of the Statute provides that the duty to bargain extends to matters which are the subject of an agency regulation only if the FLRA has determined that no compelling need exists for the regulation.

The subject case deals with a matter, standard of care, which is the subject of an agency regulation, or more accurately a regulation issued by an agency or primary subdivision as described in Section 7117(a)(3) of the Statute. Pursuant to Section 7117(a)(2) of the Statute Respondents have no duty to bargain concerning standard of care until the FLRA has first determined that no compelling need exists for AFR 177-111. Thus, it is necessary that the FLRA make a finding that there is no compelling need for AFR 177-111 before a finding can be made that Respondents have an obligation to bargain about the standard of care set forth in revised AFR 177-111. Because NAGE did not first pursue the procedures provided for presenting the compelling need issue to the FLRA, I am unable to conclude that Respondent violated Sections 7116(a)(1) and (5) of the Statute by refusing to bargain with NAGE concerning the change in the standard of care. I adopt the reasoning and conclusions set forth by the Administrative Law Judges in Boston District Recruiting Command, 1-CA-206, OALJ-81-023 (1980); Defense Logistics Agency, et al, 1-CA-213, OALJ-81-131 (1981); Headquarters, Defense Logistics Agency, 3-CA-664, OALJ-81-133 (1981); and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5-CA-20018, OALJ-83-06 (1982).

Accordingly, although certain other unilateral changes might be pursued by either the unfair labor practice procedures or the negotiability procedures, where the alleged unilateral change involves a regulation covered by Section 7117(a)(2) of the Statute, the "compelling need" procedures must be utilized before any unfair labor practice can be found.

In view of the foregoing, I conclude that the record fails to establish that Respondents violated Sections 7116(a)(1) and (5) of the Statute. Accordingly, it is recommended that the FLRA issue the following:

ORDER

The Complaint in Case No. 1-CA-853 is hereby dismissed.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 22, 1982
Washington, DC

in writing that a compelling need for the
rule or regulation does not exist; or

(3) A hearing may be held, in the discretion of
the Authority, before a determination is made under
this subsection. [illegible]
include [illegible]

(A) The agency, or primary national subdivision,
as the case may be, which issued the rule or
regulation shall be a necessary party at any hearing
under this subsection.

(c)(1) Except in any case to which subsection (b)
of this section applies, if an agency involved in
collective bargaining with an exclusive representative
alleges that the duty to bargain in good faith does
not extend to any matter, the exclusive representative
may appeal the allegation to the Authority in
accordance with the provisions of this subsection."

Section 7117(a)(2) [illegible] that the duty to bargain
extends to matters which are the subject of an agency regulation only if
the FLRA has determined that no compelling need exists for the
regulation.

The subject case deals with a matter, standard of care, which is the
subject of an agency regulation, or more accurately a regulation issued
by an agency or primary subdivision as described in Section 7117(a)(3) of
the Statute. Pursuant to Section 7117(a)(2) of the Statute Respondents
have no duty to bargain concerning standard of care until the FLRA has
first determined that no compelling need exists for AFR [illegible]. Thus,
it is necessary that the FLRA make a finding that there is no compelling
need for AFR [illegible] before a finding can be made that Respondents have
an obligation to bargain about the standard of care set forth in revised
AFR [illegible]. Because NAGE did not first pursue the procedures provided
for presenting the compelling need issue to the FLRA, I am unable to
conclude that Respondent violated Sections 7116(a)(1) and (5) of the
Statute by refusing to bargain with NAGE concerning the change in the
standard of care. I adopt the reasoning and conclusions set forth by the
Administrative Law Judges in Boston District Recruiting Command,
1-CA-208, OALJ-81-021 (1980); Defense Logistics Agency, et al, 1-CA-213,

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ROBINS AIR FORCE BASE,
GEORCIA

Activity

Case No. 0-AR-1109

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edward L. Harrison filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C.,May 22, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 367'

Federal Labor Relations Authority

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NUMBER 367 REPORT OF CASE DECISIONS May 28, 1986

NEGOTIABILITY CASES

21 FLRA No. 114 (May 23, 1986)

Antilles Consolidated Education Association and U.S Navy Department, Puerto Rico, Case No. 0-NG-992

21 FLRA No. 115 (May 23, 1986)

National Association of Government Employees, Local R7-23 and Department of the Air Force, Headquarters 375th Air Base Group (MAC), Scott Air Force Base, Illinois, Case No. 0-NG-837

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 116 (May 29, 1986)

American Federation of Government Employees, AFL-CIO Local 1900 and Department of the Army, Headquarters, Fort Devens, Massachusetts, Case No. 0-NG-1258

21 FLRA No. 117 (May 29, 1986)

American Federation of Government Employees, AFL-CIO and Environmental Protection Agency, Case No. 3-CO-40003

21 FLRA No. 119 (May 29, 1986)

Department of the Treasury, United States Customs Service, New York Region, New York, New York and National Treasury Employees Union and National Treasury Employees Union, Chapter 161, Case No. 2-CA-50022

3.F31/21-3:

ARBITRATION CASES

21 FLRA No. 113 (May 23, 1986)

Department of the Army, New Cumberland Army Depot and American Federation of Government Employees, Local 2004 (Weiss, arbitrator), Case No. 0-AR-1003

21 FLRA No. 118 (May 29, 1986)

American Federation of Government Employees, Local 2014 and Social Security Administration, Region IV (Kanzer, arbitrator), Case No. 0-AR-999

Federal Labor Relations Authority

21 FLRA No. 113

Dep't of the Army, New Cumberland Army Depot and AFGE, Local 2004 (Weiss, Arbitrator), Case No. 0-AR-1003 (Decided May 23, 1986)

DIGEST HEADINGS

	STATUTE
1000 ARBITRATION	7121(c)(5)
1600 Grounds for Review	7122(a)
1601 Award Conflicts with Applicable Law	
1602 Award Conflicts with Appropriate Regulation	

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Award Contrary to Civil Service Law and Regulation
  - Back Pay Act
    - Retroactive Promotion
    - Unwarranted Personnel Action
  - Exceptions Asserted in Appeal
    - Award Contrary to Civil Service Law and Regulation
    - Award Contrary to FPM ch. 335, subch. 1-5
    - Award Contrary to 5 U.S.C. § 5596
    - Award Contrary to 5 U.S.C. § 7121(c)(5)
  - Promotion
    - Minimum Qualification Requirements
    - Temporary Promotion
  - Remedy
    - Retroactive Temporary Promotion with Backpay
- 5 C.F.R. § 335.102(f)(1) and (g)

DIGEST NOTES

The arbitrator found that the activity violated the parties' collective bargaining agreement by not temporarily promoting the grievant, a laborer (WG-2), to a warehouse-forklift operator (WG-5) position when assigned the duties of the higher-graded position. As a remedy the arbitrator awarded the grievant an amount equal to the difference between a WG-2, which he received, and a WG-5, which he should have received for a period of nearly four years.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its first exception, the agency contended that the award was contrary to § 7121(c)(5) which expressly precludes any grievance concerning the classification of a position which has not resulted in the reduction in grade or pay of an employee. However, the Authority found that the grievance pertained to whether the grievant should have been temporarily promoted during the period of the asserted assignment to the WG-5 position and that therefore the grievance did not directly concern the classification of any position.

In its second exception, the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. § 5596 because: (1) the arbitrator did not make the requisite award of a retroactive promotion; (2) the arbitrator did not find that but for an unwarranted personnel action, the grievant would have been paid at the WG-5 level; (3) there was not a vacant WG-5 position to which the grievant could have been promoted. The Authority held that the arbitrator's award effectively provided the requisite order and finding necessary for an award of backpay under the Back Pay Act. Additionally, the arbitrator found that the agreement mandated that the grievant be temporarily promoted as a result of the extended assignment of the duties of the WG-5 position.

In its third exception, the agency contended that the award was contrary to FPM chapter 335, subchapter 1-5, which limits the duration of a temporary promotion. Civil service regulations permit an agency to temporarily promote an employee to meet a temporary need for a definite period of one year or less and extend such a promotion for a definite period not to exceed one additional year. 5 C.F.R. § 335.102(f)(1); FPM chapter 335, subchapter 1-5. Agencies may temporarily promote an employee for more than two years only with the formal approval of the Office of Personnel Management (OPM). 5 C.F.R. § 335.102(g); FPM chapter 335, subchapter 1-5. The Authority found that to the extent that award effectively ordered the grievant temporarily promoted retroactively for a period in excess of two years without formal approval of OPM, the award was deficient as contrary to civil service regulations. The Authority modified the award to be consistent with civil service law and regulation.

In its fourth exception the agency contended that the award was contrary to civil service law and regulation to the extent it orders the grievant temporarily promoted for a period of time during which he was not minimally qualified for promotion. The Authority found that it was uncertain whether the grievant met minimum qualification requirements for the promotion. Consequently, the Authority modified the award to assure that it was consistent with civil service law and regulation.

Federal Labor Relations Authority

21 FLRA No. 114

Antilles Consolidated Education Ass'n and U.S. Navy Dep't, Puerto Rico, Case No. 0-NG-992 (Decided May 23, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
7500 Official Time

STATUTE

7105(a)(2)(E)
7131(a) and (d)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Official Time
  Procedure
    Failure to Provide Support for Allegation

DIGEST NOTES

Official time for more union negotiators than the number designated by management is negotiable. Representation of employees in matters concerning their employment clearly affects the working conditions of those employees. Further, the number of union representatives involved in the negotiation process necessarily influences the effective presentation of matters affecting bargaining unit working conditions. Thus, a request by a union for sufficient personnel to allow it to carry out its representational responsibilities under the Statute is inextricably tied to the conditions of employment of the employees it represents. The proposal does not in any manner, determine the number of negotiators who will represent the agency. Rather, the proposal would authorize official time for a number of union representatives beyond that authorized under section 7131(a).

Parties bear the burden of creating a record sufficient for the Authority to resolve a negotiability dispute. The Authority concluded that the agency failed to provide support for its claim that the union agreed to be represented at the negotiations by two negotiators.

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In its first exception, the agency contended that the award [illegible] which expressly preclude [illegible] classification of a position [illegible] grade or pay [illegible] have been [illegible] assignment [illegible] did not directly [illegible] classification of the position.

In its second exception, the agency contended [illegible] the Back Pay Act, 5 U.S.C. [illegible] the arbitrator [illegible]

[illegible] exception, the agency contended [illegible]

[illegible] Authority found that it was uncertain whether [illegible] minimum qualification requirements for the promotion. Consequently, the Authority modified the award to assure that it was consistent with civil service law and regulation.

21 FLRA No. 115

Federal Labor Relations Authority

NAGE, Local R7-23 and Dep't of the Air Force, HQ 375th Air Base Group (MAC), Scott Air Force Base, Ill., Case No. 0-NG-837 (Decided May 23, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2150 Management Rights	7106(a)(1)
2151.20 Internal Security	7117(a)(1)
2600 Conditions for Review	
2602 Proposal Alleged to be Inconsistent with Government-Wide Regulation	

SUBJECT MATTER INDEX ENTRIES

FPM Ch. 335
FPM Supplement Ch. 335
Negotiability
  Conditions for Review
    Proposal Alleged to be Inconsistent with Government-wide Reg.
      5 C.F.R. 300.103(a)
  Management Rights
    Internal Security Practices
      Management's Plan to Prevent Damage or Loss of Property
        Standard for Monetary Liability
          "Gross Negligence vs. Negligence"
  Positions, Filling of
    Crediting Plans
      Proposal Establishing Portion of Agency's Plan
5 U.S.C. § 2301(c)

DIGEST NOTES

A proposal is nonnegotiable that would prescribe certain abilities and accomplishments for which credit will be given, and the amount of credit, to candidates in the rating process involved in filling positions. Under the proposal, portions of the agency's "crediting plan" would be established without being based on a job analysis which demonstrates a connection between performance in a current position and job-related training and success in the positions(s) for which candidates are applying. Accordingly, the proposal is inconsistent with the job analysis requirement of 5 C.F.R. § 300.103(a), a Government-wide regulation within the meaning of § 7117(a)(1). (proposal 1)

A proposal is nonnegotiable that would establish the standard (gross negligence instead of negligence) to be used in determining whether an employee will be held "pecuniary liable" for the loss, damage, or destruction of agency property. The proposal directly interferes with management's right to determine its internal security practices under § 7106(a)(1). (proposal 2).

21 FLRA No. 116

**Federal
Labor Relations
Authority**

AFGE, Local 1900 and Dep't of the Army, HQ, Fort Devens, MA, Case No. 0-NG-1258 (Decided May 29, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2500 Procedure
    2554 Withdrawal, Effect of

STATUTE

7105(a)(2)(E)
7106(a)(2)(A)
7117

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Withdrawal of Allegation of Nonnegotiability

DIGEST NOTES

The Authority dismissed the union's appeal because the agency had withdrawn the allegation concerning the proposal and, therefore, there was no longer any issue as to whether the disputed proposal was within the duty to bargain.

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21 FLRA No. 117

Federal Labor Relations Authority

AFGE and EPA, Case No. 3-CO-40003 (Decided May 29, 1986)

DIGEST HEADINGS	STATUTE
5000 UNFAIR LABOR PRACTICE: UNION 5500 Refusal to Negotiate	7116(b)(5)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Union Violations
    Refusal to Negotiate
      Memorandum of Understanding
Remedy
    Comply with terms of Memorandum Understanding

DIGEST NOTES

Where a party unilaterally repudiates a memorandum of understanding or an agreement in its entirety, such conduct is violative of the Statute. The union entered into the memorandum of understanding which delegated local level impact and implementation bargaining authority to local representatives at the former levels of exclusive recognition. Subsequently, the union, while negotiating with the agency over a new collective bargaining agreement, notified the agency that the memorandum of understanding was rescinded by virtue of all matters covered by the union's proposals concerning the new agreement presently under consideration by the agency. The Authority found that as the union had repudiated the memorandum in its entirety and refused to abide by the terms set forth therein, it had violated § 7116(a)(5). Accordingly, the union was ordered to comply, to the extent that the memorandum of understanding was not inconsistent with the terms of any subsequently negotiated agreement between the parties, with the memorandum of understanding.

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Federal Labor Relations Authority

21 FLRA No. 118

AFGE, Local 2014 and SSA, Region IV (Kanzer, Arbitrator), Case No. 0-AR-999 (Decided May 29, 1986)

DIGEST HEADINGS	STATUTE
1000 ARBITRATION 1600 Grounds for Review 1601 Award Conflicts with Appropriate Regulation	7106(a)(2)(A) and (B) 7122(a)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Contrary to § 7106(a)(2)(A) and (B)
  - Exceptions Asserted in Appeal
    - Arbitrator Substituted his Judgment for Management's
    - Award Contrary to 5 U.S.C. § 7106(a)(2)(A) and (B)
    - Award Improperly Requires Agency to Reappraise Grievant
  - Performance Appraisal System
    - Arbitrator's Authority
      - May Not Substitute his Judgement for that of the Agency
      - Remedial Authority
    - Critical Elements
      - Arbitrator May Not Substitute his Judgment for that of the Agency
    - Performance Standards
      - Arbitrator May Not Substitute his Judgment for that of the Agency
      - Changes During Appraisal Period
      - Contents Are Nonnegotiable
      - Definition
      - Retroactive Application of Standards
- 5 U.S.C. § 4302(b)

DIGEST NOTES

The grievance in this case concerned the changing of "numeric guidelines", which the union considered to be performance standards, during the appraisal period and the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

retroactively application of those new standards. The arbitrator found that "numeric guidelines" used by the agency were actually performance standards; that under the parties' agreement, the activity did not have the right to unilaterally change performance standards during the appraisal period; the union had the right to object to and negotiate any changes prior to implementation. The arbitrator sustained the grievance and, as a remedy, ordered the activity to reappraise the grievants' performance for the entire year using the performance standards that were in effect at the beginning of that period.

In its first exception, the activity contended that by finding "numeric guidelines" to be performance standards, the arbitrator improperly substituted his judgment for that of management since the actual standard management had established was a non-quantitative standard. Under 5 C.F.R. § 430.203, "Performance standards means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance." Since the activity acknowledged that it used the quantitative requirements of the "numeric guidelines" to evaluate employee performance and the activity's supervisors considered the guidelines to be performance standards, the Authority held that the activity failed to show that the award was deficient.

In its second exception, the activity contended that the arbitrator's award improperly required the activity to negotiate on the contents of performance standards and prevented management from changing the standards after the start of the fiscal year. The Authority held that to the extend that the award may be construed as requiring the activity to negotiate concerning the establishment or content of any performance standard, the award was contrary to management's right to direct employees and assign work under § 7106(a)(2)(A) and (B). Also, the Authority held that to the extent the award may be construed as improperly denying the authority of the activity to exercise its rights to revise the grievants' performance standards and to prospectively evaluate their performance under the changed standards during the designated appraisal period, the award was contrary to § 7106(a)(2)(A) and (B).

In its third exception, the activity contended that the award improperly required the activity to reappraise the grievants' performance using performance standards of the prior year. The Authority held that the activity was properly directed to reappraise the grievants' performance for the period prior to the time when the grievants were notified of the changed performance standard.

21 FLRA No. 119

Dep't of the Treasury, U.S. Customs Service, NY Region, NY and NTEU and NTEU, Chapter 161, Case No. 2-CA-50022 (Decided May 29, 1986)

Federal
Labor Relations
Authority

DIGEST HEADINGS

1000 ARBITRATION
  1700 Implementation of Award
    1703.05 Enforcement Through Unfair Labor Practice Procedures
4000 UNFAIR LABOR PRACTICE: AGENCY
  4800 Otherwise Refuse to Comply

STATUTE

7116(a) (1) and (8)
7122(a) and (b)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award
    Finality
Unfair Labor Practice
  Agency Violations
    Otherwise Refuse to Comply with Statute
      § 7122
  Remedy
    Comply with Arbitrator's Award

DIGEST NOTES

A party that fails to raise an allegation regarding an arbitration award in the nature of timely exceptions, as provided by the procedures of § 7122(a), may not present that allegation as a defense to a complaint in a subsequent unfair labor practice proceeding based upon its failure to comply with the award. The failure to comply with any part of an arbitrator's award to which no exceptions have been filed once that award becomes final and binding constitutes a failure to comply with the requirements of § 7122 in violation of § 7116(a)(1) and (8). Any other conclusion would be inconsistent with § 7122(b), as a party could fail to file exceptions to portions of an arbitrators award

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

pursuant to § 7122(a), take no action to comply with the award, and then belatedly present its argument as a defense to a complaint in a subsequent unfair labor practice proceeding that the failure and refusal to comply with a final and binding award constituted an unfair labor practice. To permit such a protracted procedure would be inconsistent with the policy that the arbitration process provides both an expeditious and a final resolution of grievances. The Respondent filed exceptions to an arbitrator's award but its exceptions were denied by the Authority. Subsequently, the Respondent failed to comply with the award and in a subsequent unfair labor practice proceeding based upon such conduct, the Respondent raised as a defense that the award was contrary to the Back Pay Act and the Anti-Deficiency Act, a contention that it had not raised in the prior arbitration proceeding. Thus, the Authority concluded that the Respondent, having filed no exceptions pertaining to the Back Pay or Anti-Deficiency Acts to the arbitration award, was required to implement the award which had become final and binding when the Authority denied its original exceptions. Accordingly, by failing to do so, the Respondent violated § 7116(a)(1) and (8).

The Authority also rejected the Respondent's argument that the Authority should seek an opinion from the Comptroller General as to whether the arbitrator's award is consistent to the Back Pay Act. Congress intended that the awards of arbitrators, when they become final, not to be subject to further review by any other authority or administrative body, including the Comptroller General.

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21 FLRA No. 113

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY,
NEW CUMBERLAND ARMY DEPOT

Activity

and

Case No. 0-AR-1003

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2004

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Ernest Weiss filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.[1]

II. BACKGROUND AND ARBITRATOR'S AWARD

The issue submitted to the Arbitrator questioned whether the Activity violated the parties' collective bargaining agreement when it failed to temporarily promote the grievant to a WG-5 position. According to the Arbitrator, the grievant, a WG-2 laborer, was granted a temporary promotion to warehouseman-forklift operator, WG-5, for the period February 17, 1980, to June 16, 1980, at which time the grievant returned to his position as laborer, WG-2. Subsequently, the grievant filed a grievance claiming that after the termination of the temporary promotion, he had continued to perform the duties of the WG-5 position. The Arbitrator found that the grievant was regularly and consistently assigned the duties of the WG-5 position. Noting that the parties' agreement provided for a temporary promotion rather than a detail for an extended assignment to a higher-grade position, the Arbitrator further found that the grievant should have been temporarily promoted to the WG-5 position and paid accordingly. Consequently, the Arbitrator ruled that the Activity had violated the collective bargaining agreement when it failed to temporarily promote the grievant to the WG-5 position. As a remedy the Arbitrator awarded as follows:

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[1] In its opposition the Union maintains that the exceptions were not timely filed. However, contrary to the Union's assertion, the Authority finds that the exceptions were timely filed under the Statute and the Authority's Rules and Regulations.

> The [Activity] is hereby directed to pay the grievant in accordance with 5 U.S.C. 5596, an amount equal to the difference between a WG-2, which he received, and a WG-5, which he should have received, from thirty (30) days after June 16, 1980, until May 15, 1984, when the assignments ceased.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award is contrary to section 7121(c)(5) of the Statute, which expressly precludes any grievance concerning the classification of a position which has not resulted in the reduction in grade or pay of an employee. Specifically, the Agency argues that the grievance was barred and the award is deficient because the substance of the dispute between the parties was the grade level of the duties performed by the grievant.

B. Analysis and Conclusions

In U.S. Department of Justice, Immigration and Naturalization Service and National Immigration and Naturalization Service Council, American Federation of Government Employees, Local 2805, 15 FLRA 862 (1984), the grievance concerned whether the grievant was assigned to perform substantially all the duties of a higher-grade position for an extended period of time for which she was entitled under the parties' collective bargaining agreement to have been compensated at the higher rate of pay. In denying an exception that the grievance was barred by section 7121(c)(5) of the Statute, the Authority specifically ruled that the grievance pertained to whether the grievant should have been compensated at a higher rate of pay during the period of the asserted detail and that therefore the grievance did not directly concern the classification of any position. 15 FLRA at 863. The Authority similarly finds in this case that the grievance pertains to whether the grievant should have been temporarily promoted during the period of the asserted assignment to the WG-5 position and that therefore the grievance does not directly concern the classification of any position. Accordingly, the first exception fails to establish that the award is contrary to section 7121(c)(5) and therefore provides no basis for finding the award deficient.

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that the Arbitrator made no award of a retroactive promotion and made no finding that but for an unwarranted personnel action, the grievant would have been paid at the WG-5 level. The Agency also maintains that in any event the record does not establish that there was a vacant WG-5 position to which the grievant could have been promoted.

B. Analysis and Conclusions

The Authority has consistently recognized that in order for an award of backpay to be authorized by the Back Pay Act, the arbitrator must find that an agency personnel action was unjustified or unwarranted, that such action directly resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials, and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction. U.S. Army Aberdeen Proving Ground and Local 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, 19 FLRA No. 35 (1985). In this case the Arbitrator specifically ruled that the Activity had violated the parties' collective bargaining agreement when it failed to temporarily promote the grievant to the WG-5 position to which he had been assigned for an extended period of time. As a remedy the Arbitrator directed for that period of time that the grievant be paid an amount equal to the difference between a WG-2, which he received, and WG-5, which he should have received. Contrary to the argument of the Agency, the Authority finds that the Arbitrator effectively ordered the grievant temporarily promoted retroactively and that the Arbitrator made the findings necessary to an award of backpay under the Back Pay Act. See Department of Justice, INS, 15 FLRA at 863; American Federation of Government Employees, Local 1923 and Social Security Administration, Headquarters, Bureaus and Offices, 12 FLRA 511 (1983). Additionally, because the Arbitrator found that the agreement mandated that the grievant be temporarily promoted as a result of the extended assignment of the duties of the WG-5 position, the Authority also finds that the award of backpay is clearly consistent with the grievant's statutory entitlement under the Back Pay Act to receive the pay that he would have earned if the unwarranted action had not occurred without regard to whether the record in this case establishes that there was a vacant WG-5 position. See 5 U.S.C. § 5596(b)(1)(A)(i); National Labor Relations Board Union, Local 19 and Office of the General Counsel, National Labor Relations Board, 7 FLRA 21 (1981). Accordingly, this exception fails to establish that the award is contrary to the Back Pay Act and therefore provides no basis for finding the award deficient.

V. THIRD EXCEPTION

A. Contentions

In its third exception the Agency contends that the award is contrary to FPM chapter 335, subchapter 1-5, which limits the duration of a temporary promotion.

B. Analysis and Conclusions

The Authority has clearly indicated in these types of cases that the award by an arbitrator of a temporary promotion must be consistent with civil service law and regulation. Veterans Administration, V.A. Medical Center, Muskogee, Oklahoma and American Federation of Government Employees, Local 2250, 20 FLRA No. 48 (1985). Civil service regulations permit an agency to temporarily promote an employee to meet a temporary need for a definite period of one year or less and extend such a promotion for a definite period not to exceed one additional year. 5 CFR § 335.102 (f)(1); FPM chapter 335, subchapter 1-5. Agencies may temporarily promote an employee for more than two years only with the formal approval of the Office of Personnel Management (OPM). 5 CFR § 335.102(g); FPM chapter 335, subchapter 1-5. In this case the Authority finds that to the extent the award has effectively ordered the grievant temporarily promoted retroactively for a period in excess of two years without formal approval of OPM, the award is deficient as contrary to civil service regulation and must be modifed.2/

VI. FOURTH EXCEPTION

A. Contentions

In its fourth exception the Agency contends that the award is contrary to civil service law and regulation to the extent it orders the grievant temporarily promoted for a period of time during which he was not minimally qualified for promotion. Specifically, the Agency maintains that after the grievant's loss of his forklift operator's license in June 1981, he was no longer minimally qualified for promotion to the position of warehouseman-forklift operator, WG-5.

2/ In view of this decision, no basis is provided for finding the award contrary to section 7106(a)(2)(C) of the Statute because the Arbitrator assertedly awarded the grievant a permanent promotion.

B. Analysis and Conclusions

The Authority has uniformly recognized that in order for an employee to be properly promoted consistent with civil service law and regulation, the employee must meet the minimum qualification requirements for the position to which the employee is promoted. Veterans Administration, V.A. Medical Center, Muskogee, Oklahoma and American Federation of Government Employees, Local 2250, 20 FLRA No. 48 (1985). Although the Arbitrator mentioned the grievant's loss of his forklift operator's license, he did not address the loss in terms of the grievant's qualification to be promoted to warehouseman-forklift operator. In addition, the Authority finds that the Agency has not clearly substantiated that as a result of this loss, the grievant did not meet minimum qualification requirements for the position. Thus, whether the grievant met minimum qualification requirements for the promotion is uncertain. However, in order for the award to be consistent with governing law and regulation, the grievant must have met during the time of the disputed promotion the minimum qualification requirements for the position. Consequently, in these circumstances, the Authority must modify the award to assure that it is consistent with civil service law and regulation. Department of the Army, Headquarters XVIII Airborne Corps and Fort Bragg and American Federation of Government Employees, Local 1770, 18 FLRA No. 63 (1985).

VII. DECISION

Accordingly, for the reasons stated above, the Agency's first and second exceptions are denied, and the Arbitrator's award is modified to provide as follows:

> Provided that at all relevant times the grievant met the minimum qualification requirments for promotion to warehouseman-forklift operator, WG-5, the grievant is awarded a retroactive temporary promotion to such position for the period July 16, 1980, to July 15, 1982, with backpay, and the Activity shall request that the Office of Personnel Management formally authorize the Activity to award

> the grievant a retroactive temporary promotion with backpay for the period July 16, 1982, to May 14, 1984.[3]

Issued, Washington, D.C., May 23, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] If the grievant did not meet minimum qualification requirements for the position of warehouseman-forklift operator, WG-5, an award of a retroactive temporary promotion and backpay for any period of time during which the grievant was not qualified would be deficient and could not be implemented.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION

Union

and   Case No. O-NG-992

U.S. NAVY DEPARTMENT,
PUERTO RICO

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of one Union proposal.

Union Proposal

The union (A.C.E.A.) will be allowed three negotiators on official time.

II. Positions of the Agency[1]

Although not stated, it is apparent that the Agency determined to be represented at negotiation by less than three negotiators. Thus, the Agency argues that, under section 7131(a) of the Statute, the Union is limited to the same number of negotiators on official time as the number of negotiators representing management. The Agency also claims that the Union previously agreed to be represented at such negotiations by two negotiators. Finally, the Agency contends that the number of negotiators representing management is not a matter concerning the working conditions of bargaining unit employees. In support, the Agency relies on National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA 87 (1980), enforced sub nom. National Federation of Federal Employees v. FLRA, 652 F.2d 191 (D.C. Cir. 1981).

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[1] The Agency did not file a statement of Position and the Union did not file a reply Brief in this case.

III. Analysis and Conclusions

The Agency has provided no support for its claim that the Union agreed to be represented at the negotiations by two negotiators. It is well established that the parties bear the burden of creating a record sufficient for the Authority to resolve a negotiability dispute. See National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886, 891 (D.C. Cir. 1982), aff'g National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 588 (1981). A party failing to assume this burden acts at its peril.

Representation of employees in matters concerning their employment clearly affects the working conditions of those employees. National Treasury Employees Union and Department of Treasury, U.S. Customs Service, 21 FLRA No. 2, 7-8 (1986); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal II), enf'd as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). Further, the number of union representatives involved in the negotiation process necessarily influences the effective presentation of matters affecting bargaining unit working conditions. Thus, a request by a union for sufficient personnel to allow it to carry out its representational responsibilities under the Statute is inextricably tied to the conditions of employment of the employees it represents.

Contrary to the Agency's claim, this proposal does not, in any manner, determine the number of negotiators who will represent the Agency. Rather, the proposal would authorize official time for a number of union representatives beyond that authorized under section 7131(a). The Authority has previously held that, under section 7131(d) of the Statute, a proposal seeking more union negotiators than the number designated by management is within the duty to bargain. *American Federation of Government Employees, AFL-CIO and U.S. Environmental Protection Agency*, 15 FLRA 461 (1984). (Proposal 2). The Authority finds the Union's proposal to be within the duty to bargain for the reasons set forth in that case.[2]

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the proposal presented herein.

Issued, Washington, D.C., May 23, 1986.

J Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding this Union proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

21 FLRA No. 115

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R7-23

Union

and

Case No. 0-NG-837

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS 375th AIR BASE GROUP (MAC),
SCOTT AIR FORCE BASE, ILLINOIS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents an issue concerning the negotiability of two Union proposals.

II. Union Proposal 1

> Ranking Criteria. The screening factors established by the Office of Personnel Management are applied to all competing employees. Employees who meet the eligibility requirements of the Office of Personnel Management are considered to be at least minimally qualified and are eligible to be further evaluated and ranked. The following criteria are applied to the competing employees who meet minimal eligibility requirements:
>
> a. Experience: 1/2 point for each two weeks of experience directly related to the position being filled. Directly related experience is that experience gained while doing like or similar jobs

as that which is described in the position description of the job being filled. 1/4 point for each two weeks of experience indirectly related to the position being filled. Indirectly related experience is that experience in the same job family or related families.

b. Training: 1/4 point for each two weeks of training received which can be directly related to the position being filled. 1/4 point for each two two weeks of training received which can be indirectly related to the position being filled.

c. Education:

Doctor's Degree Awarded	200 points
Master's Degree Awarded	150 points
Bachelor's Degree Awarded	100 points
Each full year of college (no degree)	20 points
Graduate Work	4 points /credit hour
ECI Courses (for each 40 hours)	1/2 point

d. Awards: A maximum of 2 points is given for awards. Such awards must be directly related to the position being filled. Credit is given only within 1 year of the effective date of the award.

e. Supervisor Appraisal: Will only count for 5% additional points based upon a perfect appraisal. Anything less than a perfect appraisal will be prorated.

The employees will be ranked in accordance with the total number of points which they have received. Those employees with the most points will be referred to the selecting supervisor in rank order in accordance with the other provisions of this article. [Only the underlined portions of the proposal are in dispute.]

A. Positions of the Parties

The Agency contends that the proposal violates 5 U.S.C. § 2301(c), Federal Personnel Manual (FPM) Chapter 335, FPM Supplement Chapter 335, and Agency Regulation (AFR) 40-335 because the Agency must insure that personnel management is based on and embodies the merit system principles.

The Union maintains that the intent of the proposal is to rank promotion candidates who meet minimum qualifications of the X-118 and Air Force standards by applying credit for training, education, experience and awards that are relevant to the job being filled along with the supervisor's appraisal.

B. Analysis and Conclusion

Under existing Authority precedent we find the proposal nonnegotiable for reasons other than those alleged by the Agency. This proposal would prescribe certain abilities and accomplishments for which credit will be given, and the amount of credit, to candidates in the rating process. Essentially, the proposal would establish portions of the Agency's "crediting plan" and has the same effect as the proposal in The Montana Air Chapter of Association of Civilian Technicians and U.S. Department of the Air Force, Montana Air National Guard, 19 FLRA No. 112 (1985). In that case, adopting the decision of the United States Court of Appeals for the District of Columbia Circuit in Department of the Treasury, U.S. Customs Service v. Federal Labor Relations Authority, 762 F.2d 1119 (D.C. Cir. 1985), the Authority held that a proposal which assigned points for crediting plan purposes solely on the basis of seniority was inconsistent with 5 CFR 300.103(a) because it was not derived from a job analysis which linked seniority to success in the particular positions(s) in question.[1] Proposal 1 in this case similarly is not based on a job analysis which demonstrates a connection between performance in a current position and job-related training and success in the position(s) for which candidates are applying.[2]

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[1] 5 CFR 300.103(a) reads in pertinent part:

> § 300.103 Basic requirements
>
> (a) Job analysis. Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:
>
> (1) The basic duties and responsibilities;
>
> (2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and
>
> (3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics.

(Continued)

Thus, for the reasons set forth in the Montana Air National Guard decision, we find that Union Proposal 1 is inconsistent with 5 CFR 300.103(a) and outside the duty to bargain under section 7117(a)(1) of the Statute.[3]

III. Union Proposal 2

> That gross negligence continue to be the standard instead of just negligence.

(Continued)
The Authority has determined that Office of Personnel Management requirements codified at title 5 of the Code of Federal Regulations are Government-wide regulations within the meaning of section 7117(a) of the Statute. Professional Air Traffic Controllers Organization, AFL-CIO and Department of Transportation, Federal Aviation Administration, 4 FLRA 232, 233 (1980).

[2] The Court stated in the Customs Service decision, 762 F.2d 1119, 1122-23, as follows:

> Exclusion of non-job-related education and experience is not the same as a job analysis before the measurement scheme is adopted, and cannot reasonably be said to assure the same results. The latter is apparent from the fact that, even as so limited, the proposal establishes the number of points to be awarded for each level of the various factors without any reference to the demands of specific occupations. It requires, for example, that boards grant the same number of points for a (job-related) bachelor's degree in all positions; and that they grant the same number of points for a sustained superior performance award as for a bachelor's degree in all positions. [Emphasis in original.]

[3] In view of this conclusion, we find it unnecessary to consider the Agency's additional contentions that the proposal is nonnegotiable because it violates 5 U.S.C. § 2301(c), the FPM, and Air Force Regulation.

A. Positions of the Parties

The Agency contends that the proposal violates its rights to determine its internal security practices under section 7106(a)(1) and to determine the methods and means of performing work under section 7106(b)(1) of the Statute. The Union maintains that the proposal establishes the standard of negligence to be used in the Agency's regulation to assess pecuniary liability of employees. The Union therefore contends that the proposal is procedural in nature and negotiable because it does not prevent the Agency from acting at all.

B. Analysis and Conclusion

Union Proposal 2 would establish the standard to be used in determining whether an employee will be held "pecuniarily liable" for the loss, damage, or destruction of Air Force property. The proposal, therefore, has the same effect as Union Proposal 1 in American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 21 FLRA No. 34 (1986). In that case, relying on our decision in National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA No. 32 (1986), the Authority held that a proposal which established a standard of "gross negligence" directly interfered with management's right to determine its internal security practices under section 7106(a)(1). For the reasons stated in Wright-Patterson Air Force Base and Kansas City District, we find that the proposal in this case likewise directly interferes with management's right to determine its internal security practices and is not within the duty to bargain under section 7106(a)(1) of the Statute.[5]

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[5] In view of this conclusion, we find it unnecessary to consider the Agency's additional contention that the proposal is nonnegotiable because it violates management's right to determine the methods and means of performing work under section 7106(b)(1).

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 23, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 116

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1900

Union

and

Case No. 0-NG-1258

DEPARTMENT OF THE ARMY, HEADQUARTERS,
FORT DEVENS, MASSACHUSETTS

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of a negotiability issue filed by the Union.

From the record before the Authority, it appears that by letter dated November 26, 1985, the Activity notified the Union that it intended to implement the revision of Ft. Devens Memorandum, Civilian Personnel Administrative Manual 690-1, Chapter 7, "Conduct and Discipline" within fourteen (14) days absent any proposals from the Union. Subsequently, on December 3, 1985, the Union submitted its proposal to the Activity. By letter dated December 11, 1985, the Activity declared that the Union's proposal was outside the duty to bargain because it infringed on retained management rights under 5 U.S.C. 7106(a)(2)(A). Thereafter, on January 22, 1986, the Activity sent another letter to the Union informing it that since it had not appealed the Activity's nonnegotiability allegation and since it had not submitted any other proposals for consideration, the Activity would implement the Memorandum on February 3, 1986. Subsequently, by letter dated February 27, 1986, the Union explained the meaning of its proposal and requested that the Activity reconsider its allegation of nonnegotiability concerning the Union's proposal. The Activity responded by letter dated March 21, 1986, reiterating its position that the proposal was outside the duty to bargain. The Union then filed the instant petition for review with the Authority on April 9, 1986, seeking a determination, pursuant to section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, as to whether the disputed proposal was within the duty to bargain. Subsequently, on May 2, 1986, the Agency submitted its statement of position on the petition for review to the Federal Labor Relations Authority. In its statement of position, the Agency withdrew its allegation of nonnegotiability.

Since the Agency has withdrawn the allegation concerning the Union's proposal, there is no longer an issue as to whether the proposal is within the parties' duty to bargain under the Statute.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., May 29, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

21 FLRA No. 117

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Respondent

and

Case No. 3-CO-40003

ENVIRONMENTAL PROTECTION AGENCY

Charging Party

DECISION AND ORDER

This matter is before the Federal Labor Relations Authority pursuant to the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations.

Upon consideration of the entire record, including the stipulation of facts, accompanying exhibits, and the contentions of the parties, the Authority finds:

It is alleged that the Respondent, American Federation of Government Employees, AFL-CIO (AFGE), violated section 7116(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by rescinding a Memorandum of Understanding (MOU) and failing to abide by the terms and conditions set forth therein.

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[1] Section 7116(b)(5) provides:

§ 7116. Unfair labor practices

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

. . . . . .

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter[.]

The Respondent has been the exclusive representative for the majority of employees employed by the Environmental Protection Agency (EPA or the Agency) in a nationally consolidated unit since February 1, 1980.

On August 21, 1980, agents for the two parties executed the MOU which delegated local level impact and implementation bargaining authority to local representatives at the former levels of exclusive recognition. Subsequently, on October 3, 1983, the Respondent notified the Agency, by letter, of the Respondent's rescission of the MOU. That letter stated, in relevant part, as follows:

> We have been informed that Mr. Bob Davis, our Chief Negotiator for the national agreement, has sent you the union's proposals for the national agreement. This is to notify you that the 1980 [MOU] . . . is rescinded by virtue of all matters covered by the union's proposals being "on the table."
>
> . . . .
>
> Where you may find it necessary to effect a condition of employment . . . at a local area office of EPA, the Agency's proposals should be sent to Mr. Davis for consideration at the national negotiations. On a case-by-case basis, we will consider authorizing local union negotiators to negotiate on specified matters upon EPA's request. However, any negotiations conducted at the local level without specific and express authority by this office or the National EPA Council will be considered unauthorized. (Emphasis in original.)

The record also reveals that, at all times material herein, the parties were in the process of negotiating a collective bargaining agreement at the national level but had not yet reached agreement.[2/]

2/ In this connection, the Authority takes official notice of Union Recognition in the Federal Government (1985), at p. 415, which indicates that an agreement covering certain of the Agency's employees and AFGE became effective on June 11, 1984, for a three-year period.

In the Authority's view, the Respondent's unilateral repudiation of the MOU constituted a violation of section 7116(b)(5) of the Statute. In this regard, the Authority has previously held that where a party repudiates a memorandum of understanding or an agreement in its entirety, such conduct is violative of the Statute. See U.S. Patent and Trademark Office, 18 FLRA No. 82 (1985); Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982); and Veterans Administration Hospital, Danville, Illinois, 4 FLRA 432 (1980).[3/] In the instant case, as is evident from the Respondent's October 3 letter, the Respondent, AFGE, repudiated the MOU in its entirety and refused to abide by the terms set forth therein. The Respondent's conduct in this regard is therefore violative of section 7116(b)(5) of the Statute.[4/] Accordingly, to the extent that the MOU is not inconsistent with the terms of any subsequently negotiated agreement between the parties, AFGE shall be ordered to comply therewith.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the American Federation of Government Employees, AFL-CIO shall:

[3/] Such cases are to be distinguished from those in which the Authority found that single instances of noncompliance with agreements did not rise to the level of an unfair labor practice. See Internal Revenue Service and Internal Revenue Service, Detroit District, 12 FLRA 445 (1983) and cases cited therein at n. 3. Rather, they would constitute contract violations which are cognizable under applicable negotiated grievance procedures. See, in this regard, Environmental Protection Agency and Environmental Protection Agency, Region II, 20 FLRA No. 76 (1985) at n. 4 and Social Security Administration, 15 FLRA 614 (1984).

[4/] The Authority rejects the Respondent's argument that a memorandum of understanding executed on August 12, 1983 superseded the 1980 MOU and thus negated any subsequent repudiation. In the Authority's view, the substance of the 1983 memorandum, which concerned the delegation of authority in the event of an extended absence by either of the parties' designated representatives at the national level, pertained to a separate matter than was contained in the 1980 agreement and did not, even by its own terms, supersede the 1980 agreement.

1. Cease and desist from:

(a) Failing to abide by the terms set forth in the Memorandum of Understanding entered into with the Environmental Protection Agency on August 21, 1980, to the extent that such terms are not inconsistent with any subsequently negotiated agreement between the parties.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Abide by the terms set forth in the Memorandum of Understanding entered into with the Environmental Protection Agency on August 21, 1980, to the extent that such terms are not inconsistent with any subsequently negotiated agreement between the parties.

(b) Post at its business offices and in normal meeting places, including all places where notices are customarily posted at the Environmental Protection Agency, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, AFL-CIO, or a designee, and shall be posted for 60 consecutive days. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit signed copies of such Notice to the Environmental Protection Agency for posting in conspicuous places where unit employees are located, where they should be maintained for 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT fail to abide by the terms set forth in the Memorandum of Understanding entered into with the Environmental Protection Agency on August 21, 1980, to the extent that such terms are not inconsistent with any subsequently negotiated agreement between the parties.

WE WILL abide by the terms set forth in the Memorandum of Understanding entered into with the Environmental Protection Agency on August 21, 1980, to the extent that such terms are not inconsistent with any subsequently negotiated agreement between the parties.

_______________________________ (Union)

Dated:_______________ By: _______________________________ (Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

21 FLRA No. 118

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2014

Union

and

Case No. 0-AR-999

SOCIAL SECURITY ADMINISTRATION,
REGION IV

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Lawrence Kanzer filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievants in this case, contact representatives in the Activity's teleservice center, claimed that they received lower performance ratings than they should have because, after the beginning of the designated annual appraisal period, the Activity improperly changed and retroactively applied the requirements for the number of phone calls and workload reports to be completed each hour. According to the Arbitrator, the annual appraisal period was from October 1 of one year to September 30 of the following year; the Activity notified the Union of the changes in the requirements on October 28 of the appraisal year involved;

the employees were informed of the changes in November; and the Activity apparently implemented the new requirements on or about February 1 and applied them retroactively to the beginning of the appraisal period when the employees' performance for the period from October through December was evaluated at the first quarterly review of their performance. The Union claimed that the requirements were performance standards and that under the parties' national collective bargaining agreement, the Activity was required to give 30 days advance notice of any proposed change in such standards and to provide employees with the performance standards for their positions before the beginning of the annual appraisal period. The Union further maintained that under the parties' agreement and regulation,[1] employees were entitled to be evaluated for the entire 12-month period under the standards in effect on October 1 of the appraisal year. The Activity principally argued that although the requirements were used to evaluate employee performance, they were "numeric guidelines" and not performance standards; and that the establishment of such performance requirements is a management right under section 7106(a)(2) of the Statute.

The Arbitrator found that based on all the evidence, including the fact that a number of supervisors referred to the requirements in writing as "standards" and the fact that the requirements were used to evaluate employee performance, the requirements were performance standards. The Arbitrator further found that under the parties' agreement the Activity did not have a right to unilaterally change performance standards during the appraisal period and that the Union had a right to object to and negotiate any changes prior to implementation. The Arbitrator essentially concluded that the Activity was required to notify the Union and the employees prior to the start of the annual appraisal period of any new performance standards and that the Activity violated the parties' agreement by changing the standards at issue in this case after the beginning of the appraisal period involved and by implementing and retroactively applying those new standards in that period. The Arbitrator therefore sustained the grievances and, as a remedy, ordered the Activity to reappraise the grievants' performance for the entire year using the performance standards that were in effect at the beginning of that period.

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[1] The Union cited 5 CFR part 430, subpart B, which at the time pertinently provided:

> 5 U.S.C. 4302(a) and (b) require that each appraisal system shall provide for establishing performance standards based on the requirements of employees' positions, communicating the standards of performance and the critical elements of the position at the beginning of each appraisal period, and appraising employees based on a comparison of performance with the standards established for the appraisal period.

III. EXCEPTION

As its exception, the Activity contends that the award is contrary to section 7106(a)(2)(A) and (B) of the Statute. In support of its contention, the Activity argues: (1) by finding that the numerical guidelines are performance standards, the Arbitrator improperly substituted his judgment for that of management since the actual standard management had established was a non-quantitative standard; (2) assuming that the guidelines are performance standards, the Arbitrator's award improperly requires management to negotiate on the content of the standards and prevents management from changing the standards after the start of the appraisal period when the change was necessary to ensure accomplishment of its mission; and (3) the award improperly requires the Activity to reappraise the grievants' performance using performance standards of the prior appraisal year.

IV. ANALYSIS AND CONCLUSIONS

1. "Guidelines" or "Performance Standards"

Under 5 U.S.C. § 4302(b), an agency's performance appraisal system must provide for the establishment of "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." The Office of Personnel Management, the agency authorized under 5 U.S.C. § 4302(b) to issue regulations implementing the statutory requirements for performance appraisal systems, defines the term "performance standard" in 5 CFR 430.203 as follows:

> "Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

Thus, under the applicable law and regulations, performance standards establish the level of job performance required of an employee with regard to the duties and responsibilities of the employee's position. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982).

In this case, the Activity clearly established a level of quantitative performance required for each contact representative in its "guidelines" for the number of phone calls and workload reports to be completed each hour. As found by the Arbitrator, the Activity acknowledged that it used the quantitative requirements to evaluate employee performance and the Activity's supervisors considered the requirements to be performance standards. In these circumstances, the Authority therefore concludes that the "guidelines" meet the definition of "performance standards" and that the Activity has failed to establish that the Arbitrator's award finding that the guidelines were in fact performance standards is in any way deficient. Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148, 21 FLRA No. 15 (1986) (where the agency defined the standard for "outstanding" performance in a regulation).

2. Establishing and changing performance standards

The Authority has repeatedly held that an arbitration award may not interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under section 7106(a) of the Statute. National Treasury Employees Union and U.S. Customs Service, 17 FLRA 38 (1985). With regard to performance standards, the Authority has held that proposals that would require negotiations concerning the establishment or content of standards interfere with management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, such proposals are nonnegotiable. Bureau of Public Debt, 3 FLRA 769-81; American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784, 787-89 (1980). Thus, it is clear that the establishment and determination of the content of performance standards constitute an exercise of rights reserved to management under section 7106(a). Additionally, the Authority has held that a decision to revise performance standards is a right reserved to management under section 7106(a) of the Statute. *Department of the Air Force, Air Force Logistics Command, Wright Patterson Air Force Base, Ohio, and Newark Air Force Station, Newark, Ohio and American Federation of Government Employees, Local 2221, AFL-CIO*, 21 FLRA No. 78, slip op. at 2 (1986).2/ Moreover, with regard to the authority of an arbitrator in resolving grievances concerning performance appraisals, the Authority has specifically held that an arbitrator may not substitute his or her judgment for that of the agency as to the appropriateness of critical elements or performance standards established for a position. *Bureau of Prisons*, 21 FLRA No. 15, slip op. at 4, 6.

In this case, the Authority finds that the Arbitrator's award is deficient as contrary to section 7106(a)(2)(A) and (B) in two respects. First, to the extent that the award may be construed as requiring the Activity to negotiate concerning the establishment or content of any performance standard the award is contrary to section 7106(a)(2)(A) and (B). Second, to the extent the award may be construed as improperly denying the authority of the Activity to exercise its rights to revise the grievants' performance standards and to prospectively evaluate their performance under the changed standards during the designated appraisal period the award is also contrary to section 7106(a)(2)((A) and (B).

2/ In its decision in 21 FLRA No. 78, the Authority also noted that where an agency exercises a reserved management right under section 7106(a) of the Statute to change a condition of employment of unit employees, the agency has a duty to provide adequate prior notice to the exclusive representative and, upon request, to bargain consistent with section 7106(b)(2) and (3) of the Statute with respect to the procedures that management will follow in exercising such right and with respect to appropriate arrangements for employees who may be adversely affected by the exercise of the right.

However, to the extent that the award prohibits retroactive application of the new standards to the period before the requirements were implemented and the employees were made aware that their performance was going to be measured against the new requirements, the award is not deficient. In that regard, the U.S. Court of Appeals for the Federal Circuit recently held that agency changes in performance standards during the course of a designated annual appraisal period and evaluations of employees under the new standards are not prohibited by 5 U.S.C. $ 4302(b)(2) [3] provided that the substantive rights of employees are preserved. Weirauch v. Department of the Army, No. 85-2290 (Fed. Cir. Jan. 30, 1986). In its decision in that case, the court rejected the employee's two arguments: (1) that since 5 U.S.C. $ 4302(b)(2) required the agency to communicate the elements and standards of his position to him before the start of the annual appraisal period, he was therefore entitled to be evaluated for the full year under the elements and standards that were in effect at the beginning of the period, and (2) that the agency had violated section 4302(b)(2) by changing his standards and evaluating his performance under the changed standards during the annual appraisal period. The court found, in agreement with the Merit Systems Protection Board's interpretation of section 4302(b)(2), for example, Cross v. Department of the Air Force, 84 FMSR 6093 (1984), which interpretation the court also found was in accord with that of the Office of Personnel Management and was supported by the legislative history of the provision, that the substantive rights of employees in the appraisal situation described were not tied to the officially-designated annual appraisal period of the agency. The court agreed with MSPB that there was no statutory restriction on the number or frequency of evaluations of employees within the appraisal period fixed by the agency in its master appraisal system. The court determined that where an agency has a yearly appraisal period, the evaluation of individual employees properly may involve more than one standard if the standard has been changed, provided that the substantive rights of the employees are preserved, namely: to be made aware of the critical elements and standards by which their performance is to be appraised before being evaluated, and to be evaluated under those elements and standards after a period of time long enough to afford them an ample opportunity to improve.

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[3] 5 U.S.C. $ 4302(b)(2) provides:

> (b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--
>
> . . . . . .
>
> (2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position[.]

In the facts of this case, as determined by the Arbitrator, it appears that the requirements were not implemented until on or about February 1 of the annual appraisal period and that the employees were not made fully aware that their performance was being evaluated under the new standards until the time of their first quarterly performance review. In these circumstances, the Authority concludes that to the extent that the Arbitrator's award prohibits the retroactive application of the new performance requirements to the period before February 1, the award is not deficient as alleged.

3. Reappraisal of the grievants

The Authority has previously held that in resolving a grievance concerning a performance appraisal, an arbitrator may properly direct that an aggrieved employee's performance be reappraised in certain circumstances. Where the arbitrator determines that management failed to apply its established standards to the aggrieved employee or applied those standards to the employee in violation of law, regulation or an appropriate general, nonquantitative requirement the parties may have agreed upon, the arbitrator to that extent may sustain the grievance. In such circumstances, the arbitrator, as a remedy, may direct that the grievant's performance be reevaluated by management utilizing the performance standards it had established and/or that the grievant's performance be reevaluated in accordance with law, regulation or the appropriate general, nonquantitative requirement in the parties' agreement. Bureau of Prisons, at 5-6.

In the circumstances of this case, where the Arbitrator directed the Activity to reappraise the grievants' performance, the Authority finds that for the period from October 1 through January 31, the Arbitrator's remedy is not contrary to section 7106(a)(2)(A) and (B) of the Statute as alleged. Specifically, where the employees were entitled to be made aware of their performance standards before being evaluated and where the requirements apparently were implemented on or about February 1, and the employees were not made fully aware by the Activity that they were being evaluated under the new requirements until the first quarterly performance review, the Authority concludes that the Activity was properly directed to reappraise the grievants' performance for the period from October 1 through January 31 under the established standards that were in effect on October 1.

V. DECISION

Accordingly, for the above reasons, the remedy awarded by the Arbitrator is modified to direct the Activity to reappraise the grievants' performance for the period from October 1 through January 31 of the designated appraisal period under the standards that were in effect on October 1, to reappraise their performance for the period from February 1 to September 30 of that appraisal period under the standards that were implemented on or about February 1, and to grant the grievants the appropriate annual performance rating for the entire period.

Issued, Washington, D.C., May 29, 1986.

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 119

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
NEW YORK REGION
NEW YORK, NEW YORK

Respondent

and

Case No. 2-CA-50022

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 161

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The General Counsel and the Charging Party (the Union) filed oppositions to the exceptions. The issue concerns whether the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to comply fully with an arbitration award which became final and binding once the Authority denied all of the Respondent's timely filed exceptions to such award.

II. Background and Judge's Conclusion

As more fully set forth in the Judge's Decision, Arbitrator Monroe Berkowitz issued an arbitration award which found that the Respondent had improperly transferred employee Robert Alvarado*/ from Perth Amboy to Newark, New Jersey under the terms of the parties' agreement. As his award, the Arbitrator required the Respondent to return Alvarado to his former duties at Perth Amboy and to pay him at the usual government rates for the extra mileage he had driven during his reassignment to Newark.

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*/ The Judge's inadvertent misspelling of employee Robert Alvarado's name has been corrected within this decision.

The Judge found that the arbitration award in question had become final and binding when the Authority denied the Respondent's exceptions, and that on this date the Respondent was under a legal obligation to comply fully with the arbitration award. He also noted that the Respondent's exceptions to the award filed with the Authority did not raise the argument that payment of travel expenses would be a direct violation of the Back Pay Act. The Judge concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply fully with the arbitration award, and ordered the Respondent to compensate the grievant for travel expenses as required by the award.

III. Positions of the Parties

In its exceptions, the Respondent repeats the argument made before the Judge that for the Agency to pay travel expenses is illegal under the Back Pay Act and the Anti-Deficiency Act. It argues that such an award would violate the holdings in Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979) and Hurley v. United States, 624 F.2d 93 (10th Cir. 1980). It argues further that the Authority should seek a ruling from the Comptroller General before rendering a decision in this matter. The General Counsel and the Union, in their respective oppositions to the Respondent's exceptions, note that the Morris and Hurley cases did not involve (final and binding) arbitration awards. They argue that the Respondent's contentions are without merit and that the Judge's conclusion is correct and amply supported by Authority precedent.

IV. Analysis

The Judge concluded that the Respondent violated section 7116(1) and (8) of the Statute by failing and refusing to comply fully with an arbitration award which became final and binding once the Authority denied all of the timely filed exceptions to such award. The Authority notes particularly that the Respondent's allegation that the arbitration award is contrary to the Back Pay Act and the Anti-Deficiency Act was not raised before the Authority in its exceptions to the arbitration award.

In United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151 (1984), affirmed sub nom. Department of the Air Force, et al. v FLRA, 775 F.2d 727 (6th Cir. 1985), the Authority stated:

> To allow a party which has not filed exceptions to an award to defend its failure to implement that award in a subsequent unfair labor practice proceeding on grounds that should have been raised as exceptions to the award under section 7122 . . . would circumvent the procedures provided in section 7122(a) and frustrate Congressional intent with respect to the finality of arbitration awards.

The Authority in Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA 686 (1984) further stated:

> Given the Congressionally mandated exclusivity of section 7122(a) as a mechanism for questioning arbitrators' awards, it would be inappropriate for the Authority to entertain in subsequent unfair labor practice proceedings matters which more appropriately should be pursued in accordance with section 7122(a) of the Statute. In the Authority's view, any contention that an arbitrator's award is deficient because it is contrary to any law, rule, or regulation must be made by invoking the procedures established by Congress in section 7122(a) of the Statute. [Footnote omitted.]

In this case, the Authority finds that the Respondent was required to implement the arbitration award, which became "final and binding" within the meaning of section 7122(b) of the Statute, upon the Authority's denial of the Respondent's exceptions. See United States Department of Justice and Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA No. 5 (1985), petition for review filed sub nom. U.S. Department of Justice and Department of Justice, Bureau of Prisons et al. v. FLRA, No. 85-4167 (2d Cir. Nov. 5, 1985). In the Authority's view, failure to comply with any part of an arbitrator's award to which no exceptions have been filed once that award has become final and binding constitutes a failure to comply with the requirements of section 7122 of the Statute in violation of section 7116(a)(1) and (8) of the Statute. Any other conclusion would be inconsistent with section 7122(b), as a party could fail to file exceptions to portions of an arbitrator's award pursuant to section 7122(a), take no action to comply with the award, and then belatedly present its argument as a defense to a complaint in a subsequent unfair labor practice proceeding that the failure and refusal to comply with a final and binding arbitration award constituted an unfair labor practice. To permit such a protracted procedure would be inconsistent with the policy that the arbitration process provides both an expeditious and a final resolution of grievances.

The Respondent, having filed no exceptions pertaining to the Back Pay Act or the Anti-Deficiency Act in its exceptions to the Arbitrator's award and its other exceptions having been denied by the Authority, was required to take the actions required by the arbitrator's award, and its failure to do so violated section 7116(a)(1) and (8) of the Statute. See also United States Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985), affirming the Authority's decision in U.S. Marshals Service, 13 FLRA 351 (1983). That case involved an agency's refusal to comply with an unfair labor practice remedial order of the Authority directing compliance with an arbitrator's award, even though the Authority in a separate proceeding under section 7122 of the Statute previously had rejected the Agency's contentions that the arbitrator's award was deficient. In affirming the Authority's remedial order, the court specifically declined to review the Authority's original determination that the award was not deficient, but examined the award only to determine whether an unfair labor practice was committed--i.e., whether the agency had failed to comply with the arbitrator's award as the Authority ordered it to do. The court held that the agency's refusal to abide by the Authority's order requiring compliance with a final and binding arbitration award was an unfair labor practice.

Finally, the Respondent's argument that the Authority should seek an opinion from the Comptroller General as to whether the Arbitrator's award is consistent with the Back Pay Act is rejected. The Authority has pointed out in prior decisions that Congress intended the awards of arbitrators, when they become final, not to be subject to further review by any other authority or administrative body, including the Comptroller General. For example, see United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, cited above, which refers to H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 826 to this effect. (15 FLRA 151 at 154).

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that decision, the positions of the parties, and the entire record, and adopts the Judge's findings, conclusions, and recommended Order. We therefore conclude that the Respondent's failure to compensate employee Alvarado for travel expenses, as required by the Arbitrator's award in this case, violated section 7116(a)(1) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Treasury, United States Customs Service, New York Region, New York, New York shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by failing and refusing to compensate Customs Inspector Robert Alvarado for travel expenses as required by the award.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by compensating Customs Inspector Robert Alvarado for travel expenses as required by the award.

(b) Post at its facilities at the Department of the Treasury, United States Customs Service, New York Region, New York, New York copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, United States Customs Service, New York Region, New York, New York, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully implement the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by failing or refusing to compensate Customs Inspector Robert Alvarado for travel expenses as required by the award.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by compensating Customs Inspector Robert Alvarado for travel expenses as required by the award.

____
(Activity)

Dated:____________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237 New York, New York 10278 and whose telephone number is: (212) 264-4934.

[21 FLRA No. 119]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF THE TREASURY :
UNITED STATES CUSTOMS SERVICE :
NEW YORK REGION, NEW YORK, NEW YORK :
:
Respondent :
:
and : Case No.: 2-CA-50022
:
NATIONAL TREASURY EMPLOYEES UNION :
AND NATIONAL TREASURY EMPLOYEES :
UNION, CHAPTER 161 :
:
Charging Party :

. . . .

Amy L. Schwartz, Esquire
For the Respondent

Cecile O'Connor
For the General Counsel

Michael J. Wolf
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint, as amended at the hearing, alleges that since on or about August 29, 1984, the Respondent has failed and refused to comply with the provisions of 5 U.S.C. § 7122 of the Statute by failing and refusing to comply with an arbitrator's award; and further, that by reason of the foregoing, the Respondent committed unfair labor practices in violation of Sections 7116(a)(1) and (8) of the Statute.[1]

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[1] Section 7122 of the Statute, as amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, 4, 98 Stat. 47, 48 (1984), provides:

> § 7122. Exceptions to arbitral awards
>
> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds the award is deficient --
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30 day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided in section 5596 of this title).

Sections 7116(a)(1) and (8) provide:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency --
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

The Respondent contends that compliance with the award would be contrary to the provisions of the Back Pay Act, 5 U.S.C. § 5596, and the Anti-Deficiency Act, 31 U.S.C. § 1341; that the award is unenforceable under these circumstances; and that the complaint should be dismissed.

Based upon the entire record herein, including the stipulation of facts, stipulated exhibits, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The facts in this case are not in dispute. A stipulation of facts filed by the parties disclosed the following:

1. On or about March 25, 1984, Arbitrator Monroe Berkowitz issued an arbitration award in FMCS Case No. 83K/29308, a case involving the Respondent and the Charging Party.[2]

2. Arbitrator Berkowitz found that the Respondent improperly transferred Customs Inspector Robert Alvardo from Perth Amboy, New Jersey to Newark, New Jersey in November of 1982.

3. The award provides that, "[t]he reassignment of Robert Alvardo from Perth Amboy to Newark in November, 1982, was improper and in violation of the terms of the national agreement between the parties. Mr. Alvardo shall return forthwith to his former duties at the Port of Perth Amboy. He shall be furnished at the usual government rates for the extra mileage, 40 miles per day, which he has driven since his reassignment to Newark."

4. Exceptions to the arbitration award were filed with the Authority by the Respondent on or about April 24, 1984.

5. By letter dated April 27, 1984, the Federal Labor Relations Authority acknowledged receipt of Respondent's exceptions and assigned Case No. 0-AR-758 to the proceedings.

6. On or about June 12, 1984, an opposition to Respondent's exceptions was filed with the Authority by the Charging Party.

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[2] The record reflects that the award was signed by Arbitrator Berkowitz on March 26, 1984 (Exhibit 6).

7. By decision dated August 29, 1984, the Authority denied Respondent's exceptions in Case No. 0-AR-758 on the ground that the United States Customs Service "failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in Section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal Courts in private sector labor-management relations." The award then became final and binding.

8. In or around September, 1984, the Charging Party requested that the Respondent comply with the arbitration award issued in FMCS Case No. 83K/29308 by transferring Customs Inspector Robert Alvardo back to the Perth Amboy Port of Entry and compensating him for extra travel costs incurred as a result of the improper assignment.

9. On or about October 29, 1984, Respondent, through Benjamin Jefferson, Area Director, Newark, Port of Entry, U.S. Customs Service, informed the Charging Party that the Respondent would not pay travel expenses as ordered in the arbitration award.

10. On or about November 6, 1984, Respondent complied with, and implemented the arbitration award referred to above only with respect to the reassignment of Customs Inspector Alvardo from Newark to the Perth Amboy Port of Entry.

11. Since on or about August 29, 1984, Respondent has refused, and at all times thereafter has continued to refuse, to reimburse Customs Inspector Alvardo for travel costs as required by the arbitrator's award in FMCS Case No. 83K/29308.

12. The determination not to compensate Customs Inspector Alvardo for extra travel costs was made by the Respondent.

13. The determination not to compensate Customs Inspector Alvardo was based on Respondent's opinion that compensation of Customs Inspector Alvardo for travel expenses would be in direct violation of the Back Pay Act, 5 U.S.C. § 5596 (1976), and on holdings in *Morris* v. *United States*, 595 F.2d 591 (Ct. of Cl. 1979) and *Hurley* v. *United States*, 624 F.2d 93 (10th Cir. 1980).

14. The Respondent did not raise the argument of illegality of the travel expense payment as set forth in Paragraph 13 above as a timely exception to the arbitrator's award issued in FMCS Case No. 83K/29308.

Discussion and Conclusions

In U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26 (1984), 15 FLRA 139,[3] the Authority made it clear that the language of Section 7122 of the Statute requires an agency to take actions required by an arbitrator's award when the award becomes "final and binding." In this case the Authority held that an arbitrator's award becomes final and binding when timely exceptions are not filed in accordance with the provisions of Section 7122(a), or when timely filed exceptions have been denied by the Authority. The Authority used the following language to explain the meaning of Section 7122:

> The language of section 7122(b) makes it clear that an agency must take the actions required by an arbitrator's award once the award has become final, and defines a final and binding arbitrator's award as one to which no exceptions are filed during the prescribed time following the service date of such award. Accordingly, where no timely exceptions to an arbitrator's award have been filed under section 7122(a) of the Statute, an agency's subsequent failure or refusal to implement the award has been found to constitute a violation of section 7116(a)(1) and (8) of the Statute. See U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA No. 133 (1982). Similarly, once an agency's timely filed exceptions to an arbitrator's award have been denied by the Authority, the agency must implement such award, and therefore a subsequent failure or refusal to do so also constitutes a violation of section 7116(a)(1) and (8) of the Statute. See United States Marshals Service, 13 FLRA No. 60 (1983), appeal docketed, No. 83-7973 (9th Cir. Dec. 30, 1983). Such conclusion is consistent with the intent of Congress with respect to the finality of arbitrators' awards, as expressed by the Committee on Conference in its Report which accompanied the bill ultimately enacted and signed into law: (footnote omitted)
>
> The House provides that if no exception to an arbitrator's award is filed with the Authority,

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[3] Appeal docketed, No. 84-1439 (D.C. Cir. August 24, 1984, reconsideration denied by the Authority on September 20, 1984, Report of Case Decisions, Number 264, October 4, 1984.

> the award "shall be final and binding" (section 7122(b)). The Senate contained no comparable provision. The conferees adopted the House provision. The intent of the House in adopting this provision was to make it clear that the awards of arbitrators, when they become final, are not subject to further review by any other authority or administrative body, including the Comptroller General. (Emphasis added.)

The concept was further elaborated in United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA No. 27 (1984), 15 FLRA 151, at 153, where the Authority stated:

> [W]here a party seeks to challenge the propriety of an arbitration award, the appropriate mechanism for doing so, as Congress clearly intended, is through the filing of exceptions to that award under the provisions of Section 7122(a) of the Statute.

It is clear from the facts in this case that Arbitrator Berkowitz's March 26, 1984 arbitration award became final and binding within the meaning of Section 7122 of the Statute, when the Authority denied Respondent's exceptions. This occurred on August 29, 1984. On this date the Respondent was under a legal obligation to comply fully with the arbitration award. The fact that the Respondent did not raise certain legal defenses during appeal of the arbitration award would not operate to subject the Authority's decision to collateral attack in this forum. United States Marshals Service, 13 FLRA No. 60 (1983), 13 FLRA 351, at 358 footnote 6, appeal docketed, No. 83-7973 (9th Cir., Dec. 30, 1983).[4]

In a series of analogous cases involving failure of agencies to interpose timely appeals in arbitration cases, the Authority has held that any contention that an arbitrator's award is deficient because it is contrary to any law, rule or regulation must be made by invoking the procedures established by Congress in Section 7122(a) of the Statute. Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA No. 137 (1984), 15 FLRA 686; Veterans Administration Medical Center, Phoenix, Arizona, 15 FLRA No. 138 (1984), 15 FLRA 706; Department of Health and Human Services, Region II, 15 FLRA No. 139 (1984), 15 FLRA 710; Department of Justice, U.S. Immigration and Naturalization Service, Washington, D.C., 16 FLRA No. 118 (1984), 16 FLRA 840.

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[4] However, it should be noted that administrative law judge decisions are subject to review by the Authority, and that Authority decisions relating to unfair labor practices are subject to review by an appropriate United States court of appeals.

In view of the foregoing it must be concluded that the Respondent violated Sections 7116(a)(1) and (8) of the Statute by failing to comply fully with the arbitration award under consideration herein.

Having found that the Respondent violated Sections 7116(a)(1) and (8) of the Statute, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Treasury, United States Customs Service, New York Region, New York, New York, shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by failing and refusing to compensate Customs Inspector Robert Alvardo for travel expenses as required by the award.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply with the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by compensating Customs Inspector Robert Alvardo for travel expenses as required by the award.

(b) Post at its New York, New York Regional Office facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, United States Customs Service, New York Region, New York, New York, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo

LOUIS SCALZO
Administrative Law Judge

Dated: June 18, 1985
Washington, DC

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to fully implement the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by failing and refusing to compensate Customs Inspector Robert Alvardo for travel expenses as required by the award.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the March 26, 1984 arbitration award issued in FMCS Case No. 83K/29308 by compensating Customs Inspector Robert Alvardo for travel expenses as required by the award.

____
(Agency or Activity)

Dated: ________________ **By:** ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

9/Case 368

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 368 REPORT OF CASE DECISIONS May 29, 1986

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NEGOTIABILITY CASES

21 FLRA No. 121 (May 29, 1986)

American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO and Department of Justice, Case No. 0-NG-943

21 FLRA No. 122 (May 29, 1986)

American Federation of Government Employees, Local 644 and U.S. Department of Labor, Mine Safety and Health Administration, Case No. 0-NG-977

21 FLRA No. 123 (May 29, 1986)

National Treasury Employees Union and Department of the Treasury, Case No. 0-NG-1170

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 120 (May 29, 1986)

Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia and American Federation of Government Employees, AFL-CIO, Local 987, Case No. 4-CA-40120

21 FLRA No. 124 (May 30, 1986)

Adjutant General, State of Ohio, Ohio Air National Guard Worthington, Ohio and American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, Case Nos. 5-CA-20338, 5-CA-30091 and 5-CA-30118

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**Federal
Labor Relations
Authority**

21 FLRA No. 120

Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, GA and AFGE, Local 987, Case No. 4-CA-40120 (Decided May 29, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY	7116(a)(1) and (5)
4500 Refusal to Negotiate	7103(a)(14)(C)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Procedures and Appropriate Arrangements Concerning
      Standard for Evaluating Employees' Travel Expense Claims
 Remedy
    Status Quo Ante
      Procedures and Appropriate Arrangements

DIGEST NOTES

An agency is required to bargain prior to changing the established standard for determining disbursements to employees' for actual travel expense claims. Under Federal Travel Regulation 1-8.3b, an agency is authorized to make a determination of reasonableness of actual subsistence expenses and to issue written guidelines to serve as a basis for an appropriate review of employee's expenses. The authority of an agency's dispursing official to issue guidelines pursuant to this regulation prior to issuance of an agency-wide policy has been sustained by the Comptroller General. Since an agency clearly has discretion to issue guidelines to serve as a basis for review of the reasonableness of an employee's expenses, such matter is, therefore, not specifically provided for by federal statute within the meaning of § 7103(a)(14)(C) or otherwise outside the duty to bargain. Thus, an agency is required to bargain to the extent of its discretion prior to establishing and implementing a change in the guidelines used for review of employee actual travel expense claims. Here, the agency's Accounting and Finance Officers (AFOs), who are responsible for dispursing public monies

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for the agency's expenditures, without any notice to the union, changed the guidelines used to evaluate travel vouchers for expenses incurred by employees. Thus, the Authority concluded, in agreement with the Judge, that the Respondent, by its failure to bargain over the impact and the implementation of the change in evaluating employees' travel vouchers, violated § 7116(a)(1) and (5).

The Judge also rejected the agency's contention that the actions of the Accounting and Finance Officers (AFOs) that resulted in the change here was not attributable to the Respondent. In this respect, the judge concluded that while the AFOs were responsible for the submission of official signatures to the Treasury of the United States and the assignment by the Treasury, at the request of higher command, of a disbursing station symbol number, those acts were ministerial in nature and merely connected with setting up the agency's account with the Treasury. There was no evidence that the Treasury Department controlled how the agency's funds held in the Treasury's repository were used or at any time attempted to control the use of Respondent's funds in the travel area. Further, there was no link between the Treasury and the actions of the AFOs on or about October 21, 1983 in changing the guidelines by which reimbursement of travel claims would be determined.

The Authority also agreed with the Judge that a status quo ante remedy was warranted with additional rational. In reaching this determination, the Authority noted that the Respondent had established and implemented the new method and guidelines for evaluating certain travel vouchers without any prior notice or an opportunity to request bargaining by the union. The Respondent's unilateral action, although without apparent willfulness, resulted in the disallowance of some portion of actual expenses claimed on 106 of 111 vouchers submitted by bargaining unit employees, whereas no claimed actual expenses for such travel were disallowed prior to the change. A total of $60,561 was disallowed and at least three employees received admonishments regarding disallowances. Moreover, there was no evidence in the record, nor did the Respondent assert, that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of Respondent's operations. The Authority revised the Judge's recommended order, as requested by the General Counsel, to provide that the status quo ante remedy would require the Respondent to reexamine vouchers submitted after October 21, 1983, for travel to a HGRA prior to February 5, 1984, pursuant to guidelines used prior to October 21, 1983, and remunerate employees accordingly, consistent with applicable law and regulation; to reestablish and apply the guidelines in effect prior to October 21, 1983, until modified in accordance with the requirements of the Statute; and to expunge any record of admonishments for disallowed travel expenses which would have been allowed under the preexisting guidelines.

Federal Labor Relations Authority

21 FLRA No. 121

AFSCME, Local 2830 and
Dep't of Justice, Case No.
0-NG-943 (Decided May 29,
1986)

DIGEST HEADINGS

	STATUTE
2000 NEGOTIABILITY	7105(a)(2)(E)
2600 Conditions for Review	7106(a)(2)(C)
2602 Proposal Inconsistent with	7106(b)(3)
Government-wide Regulation	7117(a)(1)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Inconsistent with Government-wide Regulation
      FPM ch. 335, subch. 1-4, Requirement 4
      5 C.F.R. § 335.104 (1985)
  Positions, Filling of
    From Any Appropriate Source [FPM ch. 335, subch. 1-4, Req. 4]
    Mandatory Selection of Repromotion Eligible Employee
    "Qualified" Applicant [FPM ch. 335, § 1-2h]
  Promotion
    Career Ladder Promotions
      Based Solely on Overall Satisfactory Performance Appraisal

DIGEST NOTES

A proposal is nonnegotiable that requires the automatic selection of an employee to the first vacancy for which the employee qualifies and which the agency decides to fill. The proposal is limited to "qualified" candidates. Such candidates must meet the minimum qualifications requirements established by the Office of Personnel Management (OPM) for the particular position as supplemented by any selective factors such as the knowledge, skills or abilities essential to the successful completion of the job which are added by the agency involved. See FPM ch. 335, § 1-2h. As a result, the proposal would preserve management's discretion to determine the qualification requirements of the position involved and the discretion to determine whether the repromotion eligible candidates under consideration are qualified. Therefore the proposal is an appropriate arrangement under § 7106(b)(3) for employees who had been demoted without personal cause. However, the proposal is not negotiable because it is contrary to a Government-wide regulation within the meaning of § 7117(a)(1). Requirement 4 of subchapter 1-4, chapter 335 of the FPM permits agencies to make selections from any appropriate source whereas the proposal would limit the agency's selection to those employees who were affected by a reduction-in-force action involving demotion. (1st disputed sentence)

A proposal is nonnegotiable that requires a career ladder promotion for certain employees on the basis of an overall satisfactory performance appraisal without regard to whether the employee was appraised fully successful on critical elements that are also critical to performance at the next higher grade of the career ladder. This requirement is inconsistent with 5 C.F.R. § 335.104, which is a Government-wide regulation within the meaning of § 7117(a)(1). (2nd disputed sentence)

Federal
Labor Relations
Authority

21 FLRA No. 122

AFGE, Local 644 and Dep't of Labor, Mine Safety and Health Administration, Case No. 0-NG-977 (Decided May 29, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2201 Subjects of Bargaining at the Election of the Agency
    2201.05 Technology of Performing Work
  2700 Petition for Review
    2707 Absence of Proposal: Specificity

STATUTE

7101(b)
7105(a)(2)(D) and (E)
7106(a) and (b)(1)
7117(a)(1)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Mandatory Subjects of Bargaining
    Technology of Performing Work
      Parking - Government and Private Vehicles
      Sufficient Telephones to Conduct Government Business
  Collective Bargaining
    Election to Bargain on a Elective Management Right
      Withdrawal of
  Health and Safety
    Joint Labor-Management Health and Safety Committee
  Parking - Number of Parking Spaces
  Procedure
    Lack of Specificity
  Telephones - Sufficient to Conduct Government Business

DIGEST NOTES

A proposal is nonnegotiable that requires sufficient telephones for the conduct of Government business be provided at a new office location. The proposal concerns the technology of performing work which is an elective management right under § 7106(b)(1). The agency declined to bargain on the matter. The fact that the agency may have initially bargained over the matter does not oblige the agency to continue bargaining. An agency may withdraw from bargaining on a matter within the coverage of § 7106(b)(1) at any time prior to reaching final agreement. (proposal 1)

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A proposal is nonnegotiable that requires the agency to provide adequate parking for both government and private automobiles. The adequacy of parking, i.e. the number of parking spaces for government vehicles, concerns the method and means and technology of performing work within the meaning of § 7106(b)(1) which provides for elective management rights. The agency did not elect to bargain over the proposal. (proposal 2)

A proposal concerning a joint labor-management health and safety committee was not sufficiently specific and delimited in content to enable a negotiability determination to be made. The Authority has found previous proposals concerning the establishment of local health and safety committees to be within the duty to bargain. On the other hand, the Authority has found proposals to be nonnegotiable which interject the union into the agency decision-making process through which management exercises its reserved rights under the Statute. (proposal 3)

Federal
Labor Relations
Authority

21 FLRA No. 123

NTEU and Dep't of the Treasury, Case No. 0-NG-1170 (Decided May 29, 1986)

DIGEST HEADINGS

- 2000 NEGOTIABILITY
  - 2150 Management Rights
    - 2152.05 Assign Employees
    - 2152.10 Direct Employees
    - 2152.40 Assign Work
  - 2700 Petition for Review
    - 2703 Service
    - 2705 Moot

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7114(c) and (c)(3)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Employees
      - Details to Lower-Graded Positions
      - Rotation of Employees on Temporary Assignments
    - Assign Work
      - Number of Rating Levels for Performance Appraisals
      - To Particular Employee
        - Performance Appraisals
        - Prohibiting Selecting Official from Being on Ranking Panel
      - Rotation of Employees on Temporarily Assignments
    - Direct Employees
      - Number of Rating Levels for Performance Appraisals
    - Generally - Qualifying Language that is Restrictive
      - "To An Absolute Minimum"
  - Performance Appraisal System
    - Critical Elements - Number of Rating Levels
    - Designation of Particular Individual do the Evaluation
    - Performance Appraisals for Overall Performance
      - Number of Rating Levels
    - Ranking Panels
      - Prohibition Against Selecting Official's Membership on Panel
  - Promotion - Temporary Promotion - Rotation of Employees
  - Procedure
    - Allegation of Nonnegotiability
      - Agency's Head Disapproval of a Provision in an Agreement
        - Service of Allegation on Union's Receptionist at HQ
      - Provision Not Alleged to be Nonnegotiable
    - Moot - Provision Appealed Not Alleged to be Nonnegotiable

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DIGEST NOTES

Where the agency served the union's receptionist at its headquarters with its memorandum disapproving an agreement provision, instead of union officials who were out of town, within the 30 day time period prescribed by § 7114(c)(3), the disapproval was timely served on the union. (footnote *)

Where the agreement provision in a petition for review to the Authority was not the same provision disapproved by the agency, the Authority concluded that the petition for review on the provision was moot and would not be considered. (provision 1)

Provisions that seek to designate a particular individual within an agency who would evaluate an employee's work performance are nonnegotiable. Such provisions interfere with management's right to assign work under § 7106(a)(2)(B). (provisions 2, 3, 4 and 5)

A provision is nonnegotiable that establishes the number of rating levels for the appraisal of an employee's performance in each critical element and also for rating overall performance. The proposal violates management's right to direct employees and assign work under § 7106(a)(2)(A) and (B). (provision 6)

A provision that prohibits the selecting official from serving on the ranking panel is nonnegotiable because it interferes with management's right to assign work under § 7106(a)(2)(B). The proposal would restrict the agency in designating certain supervisory personnel to evaluate employees. (provision 7)

A provision is nonnegotiable that precludes the agency from rotating assignments of employees, who are temporarily assigned to higher graded positions, solely to avoid compensating them at a higher rate. The proposal substantially restricts the agency's right to assign employees under § 7106(a)(2)(A). (provision 8)

A provisions is nonnegotiable that would restrict the detailing of employees to lower-graded positions. The provision would allow management to detail employees under certain limited circumstances but would require management to keep such action "to an absolute minimum." Such qualifying language in a provision results in a substantial interference with management's rights. The provision would subject management's decisions to detail employees to arbitral review with an arbitrator substituting his or her judgment for that of management as to the necessity of the detail, thus, substantively interfering with management's right to assign employees under § 7106(a)(2)(A). (provision 9)

21 FLRA No. 124

Federal Labor Relations Authority

Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio and AFGE, Ohio Council of Air National Guard Locals, Council 127, Case Nos. 5-CA-20338, 5-CA-30091 and 5-CA-30118 (Decided May 30, 1986)

DIGEST HEADINGS **STATUTE**

4000. UNFAIR LABOR PRACTICE: AGENCY
7106(b)(1)
    4500 Refusal to Negotiate 7116(a)(1), (5) & (8)
    4800 Otherwise Refuse to Comply
7118
    with the Statute 7121
7131(a)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Grievance/Arbitration Proceedings - Scope
    Adverse Actions of National Guard Technicians Excluded
Unfair labor Practice
  Agency Violations
    Refusal To Negotiate
      Repudiation of Contract
      Travel and Per Diem Expense for Union Negotiators
      Where Proposal Later Found to be Nonnegotiable
    Otherwise Refuse to Comply with the Statute
      § 7131(a)
  Clothing
    Military Uniforms
  Collective Bargaining Agreement
    Expired Agreement Pending Renegotiations
      Elective Management Rights [§ 7106(b)(1)] Provision
    Memorandum of Understanding
National Guard Technicians
  Adverse Action Appeals [§ 709(e) of the Technicians Act]
Negotiability
  Subjects of Bargaining, At the Election of the Agency
    Methods and Means of Performing Work
      Military Uniforms

DIGEST NOTES

A provision in the parties agreement providing for payment of travel and per diem expenses to employees while using official time continued in effect following expiration of the agreement. Although § 7131(a) does not require the payment of travel and per

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

diem expenses, parties may negotiate on such payments. The agency had agreed to the payment of travel and per diem expenses to employees on official time in the previous agreement. Upon the agreement's expiration, the agency signed a memorandum of understanding extending the terms of the agreement pending negotiation of a new agreement. Thus, when the agency unilaterally terminated payment of travel and per diem expenses, it violated § 7116(a)(1) and (5). However, the same actions did not constitute an independent violation of § 7116(a)(8).

The agency did not violate § 7116(a)(1) and (5) when, upon expiration of the parties' agreement, it refused to negotiate concerning a proposal that permitted some civilian technicians the option of wearing attire other than the required military uniform. The requirement that civilian technicians wear military uniforms rather than civilian attire involves the methods and means of performing work within the meaning of § 7106(b)(1) and therefore is a permissive rather than a mandatory subject of bargaining. Although the previous agreement had a provision concerning civilian attire, an agency may unilaterally change, upon the termination of an agreement, a term and condition of employment embodied in the expired agreement which involves a permissive subject of bargaining.

While an agency acts at its peril when it refuses to negotiate on proposals similar to proposals previously found negotiable by the Authority, an unfair labor practice will not be found negotiable by the Authority where subsequently established law supports the agency's position.

Section 709(e) of the Technicians Act is the exclusive procedure for dealing with a matter involving an adverse personnel action against a National Guard technician. Such matters may not be included within the scope of the negotiated grievance procedures. Thus the Authority held that the agency did not violate § 7116(a)(1) and (5) and the agency was within its rights when it asserted that upon termination of the parties' agreement, the processing of all grievances and all disciplinary and adverse actions would have to be consistent with applicable National Guard regulations.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WARNER ROBINS AIR LOGISTICS CENTER
(AFLC), ROBINS AIR FORCE BASE, GEORGIA

Respondent

and

Case No. 4-CA-40120

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel and by the Respondent. The General Counsel also filed a brief in opposition to the Respondent's exceptions. The case concerns whether, as found by the Judge, the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) based on its failure to give the Union prior notice and an opportunity to request bargaining with regard to procedures and appropriate arrangements for unit employees adversely affected by its decision to change the guidelines used for review of employees' travel expense claims.

II. Background

The facts, more fully set forth in the Judge's Decision, indicate that on or about October 21, 1983, Warner Robins Air Logistics Center (Respondent), without any notice to the Union, established and implemented a new method and guidelines to evaluate travel vouchers for expenses incurred by employees while performing temporary duty in high rate geographic areas (HRGA). Essentially this change involved the application of stricter standards regarding whether or not such expenses were necessary or prudent. The stricter standards for review had not been exercised by the Respondent prior to October 21, 1983, and there had been no disallowances of any travel claims submitted by unit employees who had been in a travel status within a HRGA prior to that date. The parties stipulated that the change to a stricter standard of review or closer scrutiny of employee travel vouchers resulted in disallowances of some portion of actual expenses claimed on 106 of 111 vouchers submitted by unit employees between October 21, 1983, and February 5, 1984[1] amounting to $60,561.71. Additionally, at least three employees received admonishments regarding these disallowances.

III. Judge's Decision

The Judge found that the Respondent had established and implemented the new method and guidelines for evaluating travel vouchers without giving the Union notice or an opportunity to bargain about procedures and appropriate arrangements for employees adversely affected by the change, thereby violating section 7116(a)(1) and (5) of the Statute. The Judge determined that a status quo ante remedy would be appropriate in that all employees who traveled during the period from October 21, 1983, to February 5, 1984, when a new standard was implemented, were entitled to have their travel claims considered under the standards in effect prior to October 21. However, the Judge declined to order that all disallowed expenses automatically be paid or that all admonishments automatically be expunged.

IV. Positions of the Parties

The General Counsel excepts to the wording of the Judge's Decision regarding the "make whole" remedy for employees whose claimed expenses were denied. The General Counsel asserts that, as currently written, the language in the Judge's Decision may be misconstrued so as not to include any travel expense claim disallowances for travel incurred prior to October 21, 1983, and included in the travel claims submitted by employees after October 20, 1983. The General Counsel argues that, to be consistent with the Judge's findings, the remedy should include all travel claims submitted to the Respondent after October 20, 1983, concerning travel to an HRGA prior to February 5, 1984.

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[1] The record reveals that on February 5, 1984, a "flat rate per diem" test was begun within the Department of the Air Force, including the Warner Robins Air Logistics Center, and that as of that date the unilaterally imposed guidelines and method of evaluation which gave rise to the complaint in this case were discontinued. Thus, the Judge found the new guidelines and method were not applied to claims for actual travel expenses after that date.

The Respondent excepts to the Judge's conclusions that the actions of its Accounting and Finance Officer (AFO) in denying claims are attributable to the Respondent; that the AFO's determinations concerning travel expense claims constitute a condition of employment within the meaning of section 7103(a)(14) of the Statute; that there was a change in past practice regarding the scrutiny of claims; and that Respondent violated section 7116(a)(1) and (5) of the Statute.

V. Analysis

All of the issues raised in the Respondent's exceptions were considered fully by the Judge in his Decision. In agreement with the Judge, and for the reasons he stated, the Authority finds that the Respondent violated section 7116(a)(1) and (5) of the Statute by its failure to give the Union prior notice and an opportunity to request bargaining with regard to procedures and appropriate arrangements for unit employees adversely affected by its decision to change the guidelines used for review of employees' actual expense claims for travel in high rate geographical areas (HRGA).

The Authority also agrees that a status quo ante remedy is warranted. This conclusion is based upon a careful balancing and consideration of the specific factors enumerated in Federal Correctional Institution, 8 FLRA 604 (1982). More specifically, the Respondent established and implemented the new method and guidelines for evaluating certain travel vouchers without any prior notice to the Union. In these circumstances, the Union had no opportunity to request bargaining. The Respondent's unilateral action, although without apparent willfulness, resulted in the disallowance of some portion of actual expenses claimed on 106 of 111 vouchers submitted by bargaining unit employees, whereas no claimed actual expenses for such travel were disallowed prior to the change. A total of $60,561 was disallowed and at least three employees received admonishments regarding disallowances. Moreover, there is no evidence in the record, nor did the Respondent assert, that a status quo ante remedy would disrupt or impair the efficiency and effectiveness of Respondent's operations.

Under all of the foregoing circumstances, the Authority concludes that a status quo ante remedy is warranted in order to best effectuate the purposes and policies of the Statute. Such status quo ante remedy would require the Respondent to reexamine vouchers submitted after October 21, 1983, for travel to a HRGA prior to February 5, 1984, pursuant to guidelines used prior to October 21, 1983, and remunerate employees accordingly, consistent with applicable law and regulation; to reestablish and apply the guidelines in effect prior to October 21, 1983, until modified in accordance with the requirements of the Statute; and to expunge any record of admonishments for disallowed travel expenses which would have been allowed under the preexisting guidelines.[2]

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings and conclusions, with the additional rationale for the status quo ante remedy as noted, and revises his recommended Order to clarify the language and avoid any ambiguity noted by the General Counsel in his exceptions. Therefore the Authority finds that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged in the complaint and shall order that it take appropriate action to remedy the violation.

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[2] As stated by the Judge, there is no indication in the record that the prior standards for review were illegal or resulted in disbursements which violated applicable regulations.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia shall:

1. Cease and desist from:

(a) Changing the guidelines for review of employee actual travel expense claims without first affording the American Federation of Government Employees, AFL-CIO, Local 987, the designated agent of the exclusive representative of the affected employees, notice and an opportunity to bargain, consonant with the obligations imposed by the Statute, concerning the procedures for implementing such changes and appropriate arrangements for employees adversely affected by such changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reinstate the guidelines for examination of vouchers for travel to high rate geographical areas in effect prior to October 21, 1983.

(b) Notify the American Federation of Government Employees, AFL-CIO, Local 987, of any proposed change in the guidelines used for review of employee actual travel expense claims and, upon request, negotiate with the exclusive representative, to the extent consonant with the obligations imposed by the Statute, concerning appropriate arrangements for employees adversely affected by such changes.

(c) Examine under the guidelines in effect prior to October 21, 1983, each appropriate voucher involving travel to a high rate geographical area submitted to the Warner Robins Air Logistics Center Accounting and Finance Office after October 20, 1983, concerning travel prior to February 5, 1984, on which date the unilaterally imposed guidelines and method for evaluating such vouchers were discontinued, by any employee represented by the American

Federation of Government Employees, AFL-CIO, Local 987, and make whole said employees accordingly, consistent with applicable law and regulation.

(d) Expunge any recorded admonishment for disallowed expenses which would have been allowed under the standards and guidelines in effect prior to October 21, 1983, and notify the employee accordingly.

(e) Post at Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the guidelines for review of employee actual travel expense claims without first affording the American Federation of Government Employees, AFL-CIO, Local 987, the designated agent of the exclusive representative of the affected employees, notice and an opportunity to bargain, consonant with the obligations imposed by the Statute, concerning the procedures for implementing such changes and appropriate arrangements for employees adversely affected by such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reinstate the guidelines for examination of vouchers for travel to high rate geographical areas in effect prior to October 21, 1983.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 987, of any proposed change in the guidelines used for review of employee actual travel expense claims and, upon request, negotiate with the exclusive representative, to the extent consonant with the obligations imposed by the Statute, concerning appropriate arrangements for employees adversely affected by such changes.

WE WILL examine under guidelines in effect prior to October 21, 1983, each appropriate voucher involving travel to a high rate geographical area submitted to the Warner Robins Air Logistics Center Accounting and Finance Office after October 20, 1983, concerning travel prior to February 5, 1984, on which date the unilaterally imposed guidelines and method for evaluating such vouchers were discontinued, by any employee represented by the American Federation of Government Employees, AFL-CIO, Local 987, and make whole said employees accordingly, consistent with applicable law and regulation.

WE WILL expunge any recorded admonishment for disallowed expenses which would have been allowed under the standards and guidelines in effect prior to October 21, 1983, and notify the employee accordingly.

____
(Agency or Activity)

Dated:________________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, NE, Suite 736, Atlanta, Georgia 30367, and whose telephone number is: (404) 347-2324.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

WARNER ROBINS AIR LOGISTICS CENTER
(AFLC), ROBINS AIR FORCE BASE,
GEORGIA

Respondent

and Case No. 4-CA-40120

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Charging Party

. . . .

Major Ralph J. Lee, Esquire
C. R. Swint, Jr., Esquire
For the Respondent

Ms. Nedra Bradley
For the Charging Party

James R. Puhger, Esquire
Edward P. Nichols, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region IV, Federal Labor Relations Authority, Atlanta, Georgia, against the Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia (Respondent or WR-ALC) based on a charge filed by the American Federation of Government Employees, AFL-CIO, Local 987 (Charging Party, Union, or AFGE). The complaint alleged, in substance, that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), in that on or about October 21, 1983, the Respondent discontinued reimbursement to employees the maximum amounts allowable pursuant to the Joint Travel Regulations (JTR) for travel expenses incurred by employees performing temporary duty (TDY) in high rate geographical area (HRGA) locations and instead the Respondent provided reimbursement at rates less than the maximum amounts allowable pursuant t the JTR without first notifying AFGE and providing it an opportunity to bargain collectively concerning the procedures to be utilized in implementing such change and the impact of such change on adversely affected employees.

Respondent's answer denied that the acts and conduct complained of regarding such reimbursements constituted an unfair labor practice under the Statute. Among other things, Respondent asserted that the determination of rates approved or paid were not made on behalf of Respondent, but rather were approved or paid by an agent of the U.S. Treasury Department.

A hearing was held at Warner Robins, Georgia. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record,[1/] including the stipulations offered and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The WR-ALC is one of five air logistics centers of the Air Force Logistics Command, located at Wright-Patterson Air Force Base, Dayton, Ohio. (Tr. 16). The WR-ALC Accounting and Finance Office is a part of the WR-ALC base complex and is serviced by other WR-ALC service organizations. (Tr. 18-19). There are approximately 225 to 250 civilian employees in the Accounting and Finance Office. (Tr. 21 and 57). The Accounting and Finance Office consists of a number of branches including the Pay and Travel Branch whose mission, in pertinent part, is to process travel voucher expense claims (travel claims), submitted by, *inter alios*, Union bargaining unit employees. (Tr. 20)[2/] Lieutenant Colonel Michael Wilder is the WR-ALC Accounting and Finance Officer (AFO), in command of

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[1/] Counsel for the General Counsel's unopposed motion to correct the transcript is granted; the transcript is hereby corrected as set forth therein.

[2/] At all times material herein, the American Federation of Government Employees, hereinafter referred to as the AFGE, was the exclusive representative of certain employees of Respondent in an ALC wide consolidated bargaining unit described in a collective bargaining agreement between AFGE, Council 214 and the ALC. (G.C. Exhs. 1(c) and (d); Joint Exh. 2, paragraph 1, Attachment 1).

the Accounting and Finance Office. (Tr. 16 and 55). Lieutenant Colonel Wilder's second in command is Edward G. Hilliard who is the Deputy AFO. (Tr. 15 and 23).

The AFO and Deputy AFO are subject to the direction and control of the Respondent in connection with managing the accounting and finance programs and operations. With respect to these matters as well as the disbursement of funds, their work is guided by a large variety of laws, regulations, policy directives and procedural manuals issued by higher headquarters and precedent decisions by specialized agencies.

Pursuant to 31 U.S.C. § 3321(c) the head of each of the military Departments of the Department of Defense designates personnel of the agency as disbursing officials to disburse public money available for expenditure by the agency. Air Force Regulation 177-101(c2), Chapter 6 provides for the appointment of an AFO by a deputy commander for resource management or base commander and for actions that must be taken before the AFO takes up disbursing duties. These include the submission of official signatures to the Treasurer of the United States and the assignment by the Treasury Department, at the request of the Air Force Accounting and Finance Center, of a disbursing station symbol number. (Joint Exh. 1, Att. 2). The AFOs in this matter assumed the status of disbursing officials in this manner. (Joint Exh. 1, Att. 8-11; Jt. Exhs. 4-6).

Air Force Regulation 177-101, para. 6-13(b) provides that the AFO "is an agent of the U.S. Treasury Department in the receipt, safeguarding, and disbursing of cash and issuance of checks; and of the Federal Reserve System in the receipt, safeguarding, and issuance of U.S. savings bonds." This regulation states that "AFOs legally remain pecuniarily liable to the U.S. for all public funds entrusted to their accounts and for any erroneous or illegal payments they make." (Joint Exh. 1, Att. 2). Relief from liability for illegal, improper, or incorrect payments is available to a disbursing official of an agency only on the initiative of the Comptroller General or written recommendation of the head of the agency, and only when the Comptroller General decides that the payment was not the result of bad faith or lack of reasonable care by the official. 31 U.S.C. § 3527(c). Losses or deficiencies within the Air Force are investigated and recommendations for relief are initially considered within the Air Force command structure. (Joint Exh. 1, Att. 2, Chapter 11). AFO's receive broad, general guidelines from the Air Logistics Command, the Air Force Accounting and Finance Center, and the Inspector General.3/ However, in determining the propriety of any specific payment, no one in

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3/ Lt. Col. Wilder also testified that he received guidance from the Treasury Department. (Tr. 58). However, unlike the case of the other sources cited, there is no relevant documentary evidence or testimony to corroborate Lt. Col. Wilder's self-serving declaration concerning the alleged Department of Treasury guidance.

the chain of command can direct them to make a payment of over $25.00 which they do not feel is proper. AFOs may request a decision from the Comptroller General on a question involving a voucher presented for payment. 31 U.S.C. § 3529. The request is submitted through Air Force channels. Reviewing authority may disagree with the propriety of submitting the request, but if the reasons given are not acceptable to the AFO, the AFO cannot be deprived of the right to submit the question to the Comptroller General where the amount involves $25.00 or more. Where the amount involves $25.00 or less, decision on the request is made by the Air Force Accounting and Finance Center and need not be submitted to the Comptroller General for decision. (Joint Exh. 1, Att. 2 and 3, Chapter 12 and 16; Tr. 19; see B-192246, January 8, 1979).

The Joint Travel Regulation (JTR) and various Air Force Regulations (AFR's), pertain to the processing of travel claims. (Joint Exh. 1, p. 1, Att. 1, 2 and 3). Among these regulations is JTR, par. C1058-1 which provides, in pertinent part, as follows:

> A traveler on official business (permanent duty travel or temporary duty travel) will exercise the same care in incurring expenses and accomplishing a mission that a person would exercise if traveling on personal business. Excess costs, circuitous routes, delays or luxurious accommodations unnecessary or unjustified in the performance of a mission are not considered acceptable as exercising prudence. (Joint Exh. 1, p. 2).

This "prudent and necessary standard" is the source of authority upon which the AFO and/or Deputy AFO review the reasonableness of travel claims submitted by bargaining unit employees involving M&IE which do not otherwise exceed the limits for particular cities established in the JTR at Appendix E. The AFO and Deputy AFO are personally responsible for the approval, disapproval, or other determinations concerning the payment of travel claims. However, in processing travel claims, the application of the prudent and necessary standard has been ministerially delegated to subordinate staff personnel in the WR-ALC Accounting and Finance Office. The discretion used in applying the standard is exercised only by the AFO and the Deputy AFO. With regard to travel voucher expense claims resulting in a disallowance of actual expenses by the AFO and/or the Deputy AFO, WR-ALC employees, including Union bargaining unit employees, have the right to appeal any disallowance determination to higher command levels for recommendation and ultimately to the Comptroller General for a decision; said appeal procedure is commonly referred to as the "doubtful claims" procedure. (Joint Exh. 1, p. 2-3).

The Air Logistics Center (ALC) and the Air Force Accounting and Finance Center (AFAFC), Lowry Air Force Base, Colorado, periodically issue messages to Air Force AFO's including the WR-ALC AFO concerning the application of the prudent and necessary standard. (Joint Exh. 2, p. 3, 4 and 2, Att. 3, 4 and 5). In fact, the prudent and necessary standard was the focus of attention within the Air Force as a part of the Air Force campaign against fraud, waste and abuse. (Joint Exh. 2, p. 2, 3, 4 and 7, Att. 2, 3, 4 and 7; and 3; Tr. 48-49). Specifically, Air Force AFO's within the ALC including the WR-ALC AFO and Deputy AFO, were encouraged by both the ALC and the AFAFC to more closely monitor the application of the prudent and necessary standard as a means to comply with the campaign. For example, as early as January 7, 1983, the ALC Chief of Staff, Major General William J. Kelly sent a memorandum to the WR-ALC stating, *inter alia*, that "administration of travel allowances is a Command responsibility" and further encouraging the closer scrutiny of travel claims. The memorandum ordered all travel orders issuing/approving officials to review and sign travel vouchers prior to submission to the AFO for final payment. A travel claim review guide was attached to facilitate the review process. The four page guide offered broad guidelines on all expense items. It stated, "The reviewer should be concerned with the *reasonableness* of amounts claimed. Accounting and Finance personnel will make determinations concerning propriety of payment." (Joint Exh. 3; Tr. 24). Also, the WR-ALC Accounting and Finance Office received a message from the AFAFC dated September 8, 1983, encouraging the recognition of abuses in expending Government funds and offering general guidelines for use in establishing the reasonableness of travel claims. General guidelines were offered for examining meal, lodging, transportation, and miscellaneous expense claims. (Joint Exh. 2, p. 3, Att. 3).

On or about October 11, 1983, the WR-ALC AFO received another message from AFAFC. The message stated that specific guidelines for determining the reasonableness of expenses would not be issued; that AFOs were expected to operate under the present broad guidelines; and that the facts of each case should be analyzed and additional clarification or advice should be sought from the traveler, supervisor, staff judge advocate, or higher command as needed. (Joint Exh. 2, Att. 4).

As a result of this Air Force campaign to combat fraud, waste and abuse, including the correspondence received by the WR-ALC Accounting and Finance Office through Air Force channels, and as a result of talks with WR-ALC subordinates, the AFO and/or Deputy AFO determined, in or about early October 1983, that it had to have some guidelines, some kind of procedures to follow in determining what is reasonable and prudent. The AFO secured what it thought was a good guide, the *Runzheimer Meal-Lodging Cost Index* and decided to begin a process of stricter scrutiny of travel claims to WRGA for all employees, including Union bargaining unit employees. (Joint Exh. 1, par. 4; Tr. 48-50). Thus, on or about October 7, 1983, Colonel Gary Bowman, WR-ALC Comptroller, issued a memorandum to all WR-ALC "Directors, Staff officers, and Tenant Commanders" announcing this action. (Joint Exh. 2, p. 2, Att. 2; Tr. 62). There is no record evidence that this memorandum was sent to the Union.

On or about October 21, 1983, the AFO and/or the Deputy AFO at WR-ALC with regard to the application of the "prudent and necessary" standard, implemented the decision and began a process of stricter scrutiny of HRGA travel voucher actual expense claims submitted by WR-ALC employees, including Union bargaining unit employees. Respondent did not notify any representative of either AFGE Local 987, AFGE Council 214 or the National Office AFGE prior to these actions. (Joint Exh. 1).

Prior to the actions of the AFO and/or the Deputy AFO at WR-ALC on or about October 21, 1983, there are no travel voucher actual expense claims involving a Union bargaining unit employee on travel to a HRGA wherein a claimed actual expense was disallowed, as the process of the application of stricter scrutiny pursuant to the prudent and necessary standard described above, was not exercised by the AFO and/or Deputy AFO prior to on or about October 21, 1983 (Joint Exh. 1). Travelers prior to, and on and after October 21, 1983, were required to certify that their claimed expenses were actual and necessary. (Joint Exh. 7, DD Form 1351-3). The voucher was subject to organizational review by travel approving officials. The voucher was then examined by the AFO and/or Deputy AFO to determine that the claim was properly supported by documentation and was legal and valid in accordance with the JTR and other regulations. More or less what the travelers were claiming was what was being paid.4/ (Tr. 47-48).

As part of the stricter scrutiny process, on or about October 21, 1983, the AFO and/or Deputy AFO, with regard to travel claims of, *inter alios*, Union bargaining unit employees, began using a standard reimbursement rate or limit to be applied to all travel claims involving HRGA based on the *Runzheimer Meal-Lodging Cost Index*. Runzheimer's, in general, sets forth average meal (breakfast, lunch and dinner) and lodging costs for U.S. cities. This initial use of Runzheimer's, for the first time, as an absolute standard reimbursement rate, resulted in the disallowance of portions of claims submitted by Union bargaining unit employees. (Tr. 24-25 and 45-46, 49; Joint Exh. 2, p. 12, Att. 12).

Shortly after the implementation of this change involving the utilization of Runzheimer's, however, the WR-ALC Labor Relations Officer and a representative from the WR-ALC Staff Judge Advocates Office, visited the Deputy AFO and told him that it was their opinion he could not use Runzheimer's in the manner he was using it, i.e. setting standard reimbursement rates per city. Thereafter, the Deputy AFO discussed the

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4/ For the approximate two year period prior to October 21, 1983, there were about 66,424 vouchers submitted by bargaining unit employees at WR-ALC involving travel to both HRGA and non-HRGA. There were about 12,062 such vouchers filed in the four month period prior to October 21, 1983.

use of Runzheimer's with ALC and AFAFC personnel. They then discontinued the use of Runzheimer's in the manner in which he had been applying the index since on or about October 21, 1983.[5] This initial use of Runzheimer's, according to the uncontested testimony of the Deputy AFO, lasted a very short time to about a week. (Tr. 24-27).

After the AFO and Deputy AFO discontinued using Runzheimer's as an absolute limit for reimbursements, they began using Runzheimer as only a guide as part of the process of giving stricter scrutiny to travel claims. Other sources also considered as guides in making these determinations as to those expenses which would be deemed reasonable in certain locations were area menus, discussions with travelers, and discussions with commanders in the various locations. (Tr. 40-41, 45-47). They continued as before to also examine the voucher in light of the documentation provided and the applicable policies and regulations. (Tr. 47-48). Upon discontinuance of the use of Runzheimer's in the initial manner in which it had been used, the travel claims of bargaining unit employees who had been reviewed pursuant to Runzheimer's were recomputed by the AFO and/or Deputy AFO. This resulted in some lesser disallowances than had been determined under the previous manner in which the Runzheimer index had been used. (Tr. 24-26).

Subsequent to October 21, 1983, there were 111 travel voucher actual expense claims submitted by bargaining unit employees to which the following occurred: The AFO and/or Deputy AFO applied the stricter scrutiny review process described above. There were 5 travel vouchers where no actual expense claims were disallowed. There were 106 travel vouchers where actual expense claims were disallowed. Subsequent to the disallowance of certain actual expense claims, 22 Union bargaining unit employees filed a request with the AFO and/or the Deputy AFO to reconsider the disallowed actual expense claim pursuant to the "doubtful claim" procedures. As a result, 6 filings were subsequently withdrawn, 5 filings resulted in a reduction of the initial disallowance by the AFO and/or the Deputy AFO, and 11 filings resulted in the AFO and/or Deputy AFO upholding his initial disallowance determination. Of the 11 filings which resulted in the initial disallowance of the AFO and/or Deputy AFO being upheld by the AFO and/or Deputy AFO, all the 11 filings were sent to the AFAFC recommended by the AFAFC with regard to the AFO's and/or Deputy AFO's determination. None of the doubtful claims have been appealed by the 11 employees to the Comptroller General for decision.

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[5] Subsequently, by message dated January 9, 1984 the AFAFC advised, inter alia, the WR-ALC/AAFO that the use by some AFOs of Runzheimer's Index and possibly other publications as the basis for determining and limiting meal and laundry reimbursement rates was in direct violation of the JTRs and must be discontinued. AFAFC stated that Runzheimer's may only be used as a guide in determining the reasonableness of claimed expenses, and that AFOs may not arbitrarily set a standard reimbursement rate to be applied against all vouchers. (J. Exh. 2, Att. 5).

The total amount of actual expenses claimed involving the 111 travel vouchers was $490,414.34. The total amount of disallowed actual expenses claimed in the 106 travel vouchers which involved an initial disallowance by the AFO and/or Deputy AFO was $60,804.61. The total amount of disallowed actual expenses claimed in the 5 travel vouchers which involved a reduction in the initial disallowance by the AFO and/or Deputy AFO pursuant to the doubtful claims procedure was $242.90. Therefore, the net total amount disallowed was $60,561.71.

With regard to the Union bargaining unit employees who were disallowed actual expense claims, notification of these disallowance determinations was sent by the office of the AFO and/or the Deputy AFO to the WR-ALC duty organization management and/or supervisory officials of some of the employees whose claims were disallowed. As a result of these notifications, some of the management and/or supervisory officials made independent inquiries into the circumstances of the disallowances and as a result at least three bargaining unit employees received oral admonishments which were annotated in the employees' AF Form 971 (a supervisor's record of an employee).

For an approximate four month period subsequent to October 21, 1983, there were about 10,752 vouchers submitted by bargaining unit employees at WR-ALC involving travel to both HRGA and non-HRGA.

As of February 5, 1984, and until September 30, 1985, a "flat rate per diem" test experiment is being conducted within the Department of the Air Force, including WR-ALC. As a result of this experiment, with regard to travel to HRGA incurred by WR-ALC employees, including Union bargaining unit employees, after February 5, 1984, the prudent and necessary standard, pursuant to an amendment to the JTR, is not applicable to claims for actual travel expenses. Thus, with regard to travel incurred by WR-ALC employees, including Union bargaining unit employees, after February 5, 1984, set forth in travel voucher expense claims processed by the office of the AFO and/or the Deputy AFO at WR-ALC after February 5, 1984, the stricter scrutiny application of the prudent and necessary standard has not been applied to actual expenses. However, with regard to travel incurred by WR-ALC employees, including Union bargaining unit employees, prior to February 5, 1984, set forth in travel voucher expense claims processed by the office of the AFO and/or the Deputy AFO at WR-ALC after February 5, 1984, the stricter scrutiny application of the prudent and necessary standard is applied to Union bargaining unit employees.

Discussion, Conclusions, and Recommendations

The General Counsel contends that the actions of the WR-ALC AFO and/or Deputy AFO in changing the method of reviewing travel claims affecting bargaining unit employees without prior notice to the exclusive representative violated sections 7116(a)(1) and (5) of the Statute. The General Counsel asserts that the AFO and Deputy AFO are agents of Respondent, and that the subject travel expense claims are not excluded from those matters subject to collective bargaining pursuant to section 7103(a)(14)(c) as being "specifically provided for by Federal statute."

Respondent defends on the basis that the actions of the AFOs resulting in the application of stricter scrutiny and the concomitant disallowances of actual travel expense claims submitted to them by employees are not attributable to Respondent. Respondent claims that the AFOs in this capacity answer only to the Department of the Treasury and to the Comptroller General and not to the Respondent agency. Respondent also asserts that matters involving the approval, disapproval, or other determinations regarding disbursements to employees for actual travel expense claims are not a condition of employment within the meaning of section 7103(a)(14) as such matters are specifically provided for by Federal statute and, therefore, do not form a basis for invoking the right to engage in collective bargaining. Finally, Respondent contends that the actions of the AFOs was not a change requiring bargaining as the agency has always been obligated to make case-by-case determinations in each instance under the same standard, and the only change was in the AFOs ability to make more precise determinations.

The change established and implemented by the AFOs in October 1983, was not merely more precise determinations of what actual expense claims were "prudent and necessary" on a case-by-case basis as contended by Respondent. Rather, the record reflects that the change was in the AFOs establishment and implementation of overall guidelines by which "prudent and necessary" would be determined in each case. First, the AFOs adopted Runzheimer's Meal-Lodging Cost Index as an absolute limit for reimbursements. Then, when Runzheimer's was abandoned as the absolute limit for reimbursements after about a week, Runzheimer's was used along with area menus, discussions with travelers, and discussions with area commanders in various locations as guidelines for determining whether such claims were "prudent and necessary." The change resulted in an impact and a reasonably foreseeable impact on bargaining unit employees inasmuch as out of 111 actual expense claims submitted thereafter, 106 had actual expense claims disallowed whereas no claimed actual expenses for travel to HMGA were disallowed under the "prudent and necessary" standard of review used prior to the change. There is no suggestion, either prior to or after the change, that the actual expenses claimed were not actually incurred by employees. As noted, the change was in the guidelines used and the evaluation thereunder, the method of review, of whether such incurred expenses were "prudent and necessary." This strict scrutiny of travel claims under the process outlined represented a significant shift from past practice. Cf. New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, 4 A/SLMR 176 (1974).

The actions of the AFOs in this case are attributable to Respondent and not to the Department of the Treasury and the Comptroller General, a contended by Respondent. The AFOs were appointed as disbursing officers by the Respondent pursuant to 31 U.S.C. § 3321 and Air Force Regulation 177-101. The submission of official signatures to the Treasury of the United States and the assignment by the Treasury Department, at the request of higher command, of a disbursing station symbol number were ministerial acts connected with the setting up of the account with the Treasury. It permitted the AFOs to disburse public money by cash or chec available for expenditure by the agency and held by the Treasury Department as the repository of funds. There is no evidence that the Treasury Department controls how the funds are used, or, at any time, attempted to control the use of Respondent's funds in the travel area. There is no link between the Department of the Treasury and the actions o the AFOs on or about October 11, 1983 in changing the guidelines by which reimbursement of travel claims would be determined.

The AFOs undertook the change at issue as a result of higher command encouragement to combat fraud, waste, and abuse. In fact, as discussed i more detail *infra*, paragraph 1 - 8.3b of the Federal Travel Regulations requires that "[a]gencies shall assure that travel on an actual subsistence basis is properly administered and shall take necessary actio to prevent abuse." The AFOs, in changing the guidelines by which reimbursement of travel claims would be determined, were acting as management officials within the meaning of section 7103(a)(11) of the Statute and as agents of Respondent. It is also noted that Respondent, through the comptroller, sanctioned the change by issuing a memorandum, drafted by the AFOs, to all directors, staff officers, and tenant commanders on the base.

The next issue is Respondent's contention that a determination regarding disbursements to employees for actual travel expense claims is not a condition of employment within the meaning of section 7103(a)(14) of the Statute[6/] as such matters are specifically provided by Federal statute and, therefore, do not form a basis for collective bargaining. It is noted that under § 5 U.S.C. § 5702(c) the Administrator of General

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[6/] Section 7103(a)(14) provides as follows:

"(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters --"

Services may prescribe conditions by regulations under which an employee may be reimbursed for "actual and necessary expenses" for travel to a highrate geographical areas in an amount not to exceed the maximum rate prescribed. Within that maximum, a Department of Defense employee's reimbursement is subject to the "prudent and necessary" general limitations set out in the Joint Travel Regulations, par. C1030-1. See also Federal Travel Regulations (FTR) para. 1-1.3. The agency's responsibility for the authorization and reimbursement of actual subsistence expenses is outlined in paragraph 1-8.3b of the FTR as follows:

> b. Review and administrative controls. Heads of agencies shall establish necessary administrative arrangements for an appropriate review of the justification for travel on the actual subsistence expense basis and of the expenses claimed by a traveler to determine whether they are allowable subsistence expenses and were necessarily incurred in connection with the specific travel assignment. Agencies shall ensure that travel on an actual subsistence expense basis is properly administered and shall take necessary action to prevent abuses.

The Comptroller General has held that this regulation serves a dual function. It requires an agency determination of reasonableness of actual subsistence expenses[7] and it gives the agency authority to issue written guidelines to serve as a basis for an appropriate review of an employee's expenses. Matter of Davis, B-197576, September 8, 1980 and Matter of Kephart, B-186078, October 12, 1976. The Comptroller General has observed that such guidelines can benefit both the traveler and the approving official. The authority of an APO to issue guidelines pursuant to this regulation prior to issuance of an agency-wide policy has also been sustained. Matter of R. Edward Palmer, B-203762, 62 Comp. Gen. 88 (1982).

Accordingly, since the Respondent clearly has discretion to issue guidelines for the benefit of both the traveler and the approving official to serve as a basis for review of the reasonableness of an employee's expenses, the matter at issue is not specifically provided by federal statute. See Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess., Committee Print No. 96-7(1979), p. 956-957.

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[7] The Comptroller General has held that he will overturn the agency's initial determination of reasonableness only where the evidence results in a finding that the agency's determination was clearly erroneous, arbitrary, or capricious. Matter of Charles B. Boucher, B-213021 (May 2, 1984).

Respondent was required to bargain to the extent of its discretion prior to establishing and implementing a change in the guidelines used for review of employee actual travel expense claims. Cf. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1982); March Air Force Base, Riverside, California, 13 FLRA No. 44, 13 FLRA 255 (1983) at 260; Boston District Recruiting Command, Boston, Massachusetts, 15 FLRA No. 142, 15 FLRA 720 (1984) at 723-724. See also National Treasury Employees Union and NTEU, Chapter 208, 13 FLRA No. 13, 13 FLRA 60 (1983)(proposal concerning travel status which would not require disbursements which would be inconsistent with applicable regulations would be within the duty to bargain). The General Counsel alleged a failure to bargain on the impact and implementation of such change. Respondent's failure to do so in the circumstances of this case violated section 7116(a)(1) and (5) of the Statute, as alleged. Internal Revenue Service, Washington, D.C., 4 FLRA 488 (1980); Department of Health and Human Services, Social Security Administration, Region VI, 10 FLRA 26 (1982); U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C., Case No. 3-CA-2751, ALJDR 20 (1983).

The General Counsel requests as an appropriate remedy that employees suffering disallowances be made whole, that any recorded admonishments emanating from the disallowances be expunged, a return to the status quo with regard to the processing of any travel claims for travel during the period from October 21, 1983 to February 5, 1984, and the posting of an appropriate notice.

It would not be appropriate to order that all disallowed expenses automatically be paid or that all admonishments automatically be expunged. Disbursements must be made consistent with applicable regulations and in accordance with the advice/appeal rights of both employees and the AFOs. However, balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by a status quo ante remedy, and taking into consideration the various factors set forth in Federal Correctional Institution, 8 FLRA No. 111 (1982), it is concluded that the status quo ante remedy requested will best effectuate the purposes and policies of the Statute. All bargaining unit employees who traveled during the period from October 21, 1983 to February 5, 1984, are entitled to have their travel claims considered under the standards existing prior to October 21, 1983 and without regard to the additional guidelines implemented at that time. There is no indication in the record that the prior standards for review were illegal or resulted in disbursements which violated applicable regulations. However, in the event there is any question that incurred expenses were not allowable under the standards then in effect, both the AFOs and the employees will be able to exercise any advice/appeal rights consistent with applicable law or regulation.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

Order

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Warner Robins Air Logistics Center (AFLC), Robins Air Force Base, Georgia shall:

1. Cease and desist from:

(a) Changing the guidelines for review of employee actual travel expense claims without first affording the American Federation of Government Employees, AFL-CIO, Local 987, notice and an opportunity to bargain consonant with the obligations imposed by the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 987, of any proposed change in the guidelines used for review of employee actual travel expense claims and, upon request, negotiate in good faith on the proposal to the extent consonant with the obligations imposed by the Statute.

(b) Examine each appropriate voucher submitted by any employee represented by the American Federation of Government Employees, AFL-CIO, Local 987, for actual expenses incurred for travel to high rate geographical areas during the period from October 21, 1983 to February 5, 1984, under the standards and guidelines in effect prior to October 21, 1983, and remunerate said employee accordingly consistent with applicable law and regulation. In the event any employee was given a recorded admonishment for disallowed expenses which should have been allowed under the standards and guidelines in effect prior to October 21, 1983, expunge any such admonishment and notify the employee accordingly.

(c) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, or covered by any other material.

(d) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region IV, Federal Labor Relations Authority, Atlanta, Georgia, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 18, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the guidelines for review of employee actual travel expense claims without first affording the American Federation of Government Employees, AFL-CIO, Local 987, notice and an opportunity to bargain consonant with the obligations imposed by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 987, of any proposed change in the guidelines used for review of employee actual travel expense claims and, upon request, negotiate in good faith on the proposal to the extent consonant with the obligations imposed by the Statute.

WE WILL examine each appropriate voucher submitted by any employee represented by the American Federation of Government Employees, AFL-CIO, Local 987, for actual expenses incurred for travel to high rate geographical areas during the period from October 21, 1983 to February 5, 1984, under the standards and guidelines in effect prior to October 21, 1983, and remunerate said employee accordingly consistent with applicable law and regulation. In the event any employee was given a recorded admonishment for disallowed expenses which should have been allowed under the standards and guidelines in effect prior to October 21, 1983, we will expunge any such admonishment and notify the employee accordingly.

(Agency or Activity)

Dated: ______________________ By: ______________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, N.W., Suite 501, North Wing, Atlanta, Georgia 30309 and whose telephone number is: (404) 881-2324, FTS: 8-257-2324.

21 FLRA No. 121

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2830, AFL-CIO
Union

and

Case No. 0-NG-943

DEPARTMENT OF JUSTICE
Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the two underscored sentences of the following Union proposal.

> Repromotions. Special consideration for repromotion is extended to an employee who has been demoted in the unit without personal cause (that is, without misconduct or performance failure and not at the employee's request). Such consideration is extended for three years following the effective date of the demotion. This employee shall be selected for the first available vacancy for which he or she qualifies and which the Employer determines to fill. Such demoted employees who have been placed in career ladder positions shall be promoted therein annually provided their overall performance remains satisfactory until he or she has regained his or her original grade level.

Based on the positions of the parties in this case each disputed sentence is treated separately in this decision.

II. First Disputed Sentence

> This employee shall be selected for the first available vacancy for which he or she qualifies and which the Employer determines to fill.

A. Positions of the Parties

The Agency contends that:

1. By requiring the automatic selection of a repromotion eligible this sentence interferes with management's right to make selections from any appropriate source under section 7106(a)(2)(C) of the Statute and a Government-wide regulation, namely, Requirement 4, subchapter 1-4, chapter 335 of the Federal Personnel Manual (FPM);

2. because it is not limited to filling positions at or below the level from which the employee was demoted and would apply to employees only minimally qualified it is an inappropriate arrangement and inconsistent with the mandate of an effective and efficient government under section 7101(b) of the Statute;

3. because it would apply to employees voluntarily demoted section 7106(b)(3) is inapplicable;

4. because it would apply to employees demoted for cause it would prevent management from acting at all with regard to effecting performance based or conduct based adverse actions; and,

5. it does not concern conditions of employment of bargaining unit employees to the extent it applies to individuals separated from employment or to nonbargaining unit employees or positions.

According to the Union this sentence was intended to be limited to employees involuntarily demoted without personal cause and did not contemplate employees being selected for managerial positions. Further, in support of its position that the disputed sentence is negotiable as an appropriate arrangement under section 7106(b)(3), the Union cites the decision of the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government

Employees, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

B. Analysis

1. Meaning of First Disputed Sentence

The portion of the Union's proposal which is not in dispute expressly limits application of the first disputed sentence to employees involuntarily demoted without personal cause to positions in the unit. Thus, the Agency's arguments to the contrary are without merit and cannot be sustained. In addition, the Agency does not support its claim that the sentence would require the filling of positions at grade levels above the demoted employee's former grade or require the filling of nonbargaining unit positions.

2. Appropriate arrangements within the meaning of section 7106(b)(3) of the Statute

The first disputed sentence expressly limits the selection of demoted employees for vacancies which the Agency decides to fill to demoted employees who are "qualified." The term "qualified" is not defined in the record. We therefore adopt for the purpose of this decision the meaning accorded to it in the FPM: Meeting the minimum qualifications requirements established by the Office of Personnel Management (OPM) for the particular position as supplemented by any "selective factors" such as the knowledge, skills or abilities essential to the successful completion of the job which are added by the agency involved. *See* FPM chapter 335, section 1-2h. As a result, the first disputed sentence would preserve management's discretion to determine the qualifications requirements of the position involved and the discretion to determine whether the repromotion eligible candidates under consideration are qualified. Further, the first disputed sentence would not require management to fill a vacant position. Hence, the Authority finds that the first disputed sentence in this case has the same effect as the proposal in the Authority's Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984). In that case the Authority concluded that the proposal constituted a negotiable appropriate arrangement under section 7106(b)(3) of the Statute notwithstanding its limitation on management's discretion to determine the relative qualifications of repromotion eligibles.1/ Accordingly, the Authority finds, for the reasons stated more fully in that decision, that the first disputed sentence here does not excessively interfere with management's rights and, therefore, constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.

3. Interference with Government-wide Rule or Regulation

The Authority also concluded in its Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census that while the proposal constituted an appropriate arrangement under section 7106(b)(3), it nevertheless was outside the duty to bargain under section 7117(a)(1) of the Statute because it was inconsistent with a Government-wide regulation, that is, Requirement 4 of subchapter 1-4, chapter 335 of the FPM, which would permit agencies to fill positions by making selections from any appropriate source. The first disputed sentence at issue in this case would require the Agency to select for vacancies which it has decided to fill only those employees who are affected by reduction-in-force actions involving demotion. It would, therefore, have the same effect as the proposal in AFGE, Local 2782 and Bureau of the Census, that is, it would prevent the Agency from making selections from any appropriate source. Thus, for the reasons stated more fully in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, the first disputed sentence in this case also violates Requirement 4 of subchapter 1-4, chapter 335 of the FPM, a Government-wide regulation, and is outside the duty to bargain.

C. Conclusion

We find that the first disputed sentence would not excessively interfere with management's rights and, thus,

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[1/] Subsequent to the filings in this case the Authority issued National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), in which we specifically adopted the rationale of the District of Columbia Circuit in AFGE, Local 2782. Thus, as we stated in the Kansas Army National Guard decision, we will henceforth determine whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute by determining whether the proposal excessively interferes with the exercise of management's rights.

that it constitutes an appropriate arrangement for employees adversely affected by the exercise of such rights, within the meaning of section 7106(b)(3) of the Statute. However, we also hold, based upon the analysis provided in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), affirmed in the Authority's Decision and Order on Motion for Reconsideration (July 11, 1985), petition for review filed, No. 85-1562 (D.C. Cir. September 6, 1985), that the sentence conflicts with FPM, chapter 335, subchapter 1-4, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute.

III. Second Disputed Sentence

> Such demoted employees who have been placed in career ladder positions shall be promoted annually provided their overall performance remains satisfactory until he or she has regained his or her original grade level.

A. Positions of the Parties

The Agency argues that:

1. By making career ladder promotions automatic based only on an overall satisfactory performance rating it interferes with management's right to make selections for promotions under section 7106(a)(2)(C) of the Statute, it is inconsistent with Government-wide regulations, namely, Requirement 4, subchapter 1-4, chapter 335 of the FPM and subchapter 1-5, chapter 335 of the FPM, it is inconsistent with classification requirements established in law and the FPM, and it is inconsistent with 5 U.S.C. §§ 4303 and 7512;

2. because it would in certain circumstances require promotions above the journeyman levels of the career ladder it interferes with management's rights to assign work under section 7106(a)(2)(B), to make selections for promotions under section 7106(a)(2)(C) and to determine numbers, types and grades of employees assigned under section 7106(b)(1); and,

3. it does not concern working conditions of bargaining unit employees to the extent it applies to nonbargaining unit employees and positions.

According to the Union the proposal is limited to employees involuntarily demoted without personal cause and did not contemplate employees being selected for managerial positions. The Union further argues that it does not intend the proposal to require employees to be promoted to positions at a level above the one from which they had been demoted or to positions outside the bargaining unit.

In support of its position, the Union cites American Federation of Government Employees, Local 2782, 702 F.2d 1183 (D.C. Cir. 1983).

B. Analysis

It is generally understood that when a Federal employee is placed in a career ladder position that employee is placed at a grade level less than the full performance or journeyman grade level with the express intention to prepare that employee for advancement by noncompetitive promotions through intermediary grade levels to the full performance grade level. See FPM chapter 335, subchapter 1-5. Although not discussed by the parties, such noncompetitive career ladder promotions are governed by 5 C.F.R. § 335.104 (1985).

This regulation provides as follows:

> § 335.104 Eligibility for career ladder promotion.
>
> (a) No employee shall receive a career ladder promotion unless his or her most recent summary rating under Part 430 of this chapter is "Fully Successful" or higher. In addition, no employee may receive a career ladder promotion who has a rating below "Fully Successful" on a critical element that is also critical to performance at the next higher grade of the career ladder.

The second disputed sentence, however, expressly requires a career ladder promotion solely on the basis of an overall satisfactory performance appraisal without regard to whether the employee was appraised fully successful on critical elements that are also critical to performance at the next higher grade of the career ladder. This requirement is inconsistent with 5 CFR § 335.104, which is a Government-wide regulation within the meaning of section 7117(a)(1) of the Statute. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 755 (1980).

In view of our decision that this sentence violates a Government-wide regulation we find it unnecessary to address the Agency's additional contentions that the proposal would improperly require noncompetitive promotions in various hypothetical circumstances.

C. Conclusion

We hold that the second disputed sentence conflicts with 5 CFR § 353.104 and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute. In view of this holding, section 7106(b)(3) is inapplicable.[2/]

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[2/] See American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop California, 19 FLRA 1016, 1019 (1985), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 1546 v. FLRA, No. 85-1689 (D.C. Cir. Oct. 21, 1985) wherein the Authority held that section 7106(b)(2) and (3) are not applicable where a determination is made that a proposal conflicts with a Government-wide rule or regulation.

21 FLRA No. 122

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 644

Union

and

Case No. O-NG-977

U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of three Union proposals made in connection with an office relocation.

II. Threshold Issue

The Agency contends that it has no duty to bargain any of the three proposals because the office relocation does not substantially or materially affect any condition of employment. It also claims as to Union Proposal 2 that it has no duty to bargain based on bargaining history and the coverage of the parties' existing agreement.

The Authority has consistently held that we will only decide in a negotiability appeal issues which are before us under section 7105(a)(2)(D) and (E) of the Statute. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

III. Union Proposal 1

> Management shall provide sufficient telephones necessary to conduct government business.

A. Positions of the Parties

The Agency contends that the proposal is bargainable only at the election of the Agency under section 7106(b)(1) because it concerns the technology, methods, and means of performing work *i.e.*, the Agency will determine the number of telephone instruments necessary for the conduct of its business. The Agency also maintains that there is no obligation to bargain on the proposal because it is inconsistent with the requirement under section 7101(b) of the Statute that the Statute be interpreted in a manner consistent with an effective and efficient Government.

The Union contends that the proposal is negotiable because the employees in the effected office are Mine Safety and Health Inspectors who have a critical need for the use of a telephone to perform their official duties and because the Agency signed a Memorandum of Understanding with the Union in which the Agency did in fact bargain over telephones and thus established a past practice of bargaining over the matter.

B. Analysis and Conclusion

Union Proposal 1, by requiring that sufficient telephones "for the conduct of Government business" be furnished, concerns the "technology of performing work" within the meaning of section 7106(b)(1) of the Statute. *American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia*, 15 FLRA No. 170 (1984) (Union Proposal 3), *citing American Federation of Government Employees, AFL-CIO, Local 3760 and Social Security Administration, Disability Analysis Branch, Field Assessment Office*, 11 FLRA 576 (1983) and cases cited therein. Under section 7106(b)(1), such matters are negotiable at the Agency's election. Also, it is well established that an agency may withdraw from bargaining on a matter within the coverage of section 7106(b)(1) of the Statute at any time prior to reaching final agreement on such matter. *See National Federation of Federal Employees, Local 1979 and U.S. Forest Service, San Dimas Equipment Development Center*, 16 FLRA No. 60 (1984) (Provisions 2-3); *American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and*

Department of Justice, Immigration and Naturalization Service, 8 FLRA 347 (1982) (Union Proposal 15), rev'd on other grounds sub nom. United States Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983). Since the Agency has declined to bargain on the proposal, we conclude that Union Proposal 1 is not within the duty to bargain. We therefore need not address the Agency's additional claim that bargaining over the proposal would be inconsistent with section 7101(b).

IV. Union Proposal 2

> Adequate parking shall be provided for both government and private automobiles.

A. Positions of the Parties

The Agency argues that the proposal conflicts with government-wide regulations pertaining to parking and is inconsistent with section 7106(a) and (b)(1) of the Statute because it relates to the assignment of work.

The Union contends that the proposal is negotiable because it deals only with maintaining the adequacy of parking for bargaining unit employees.

B. Analysis and Conclusion

The Government-wide regulations relied upon by the Agency are the same as those involved in American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Occupational Safety and Health Administration, 21 FLRA No. 84 (1986) (Union Proposals 6 and 11). In that case we found that the regulations were not a bar to negotiation of a proposal to provide parking for private and government vehicles. For the reasons stated in that decision, we reach the same result in the present case. As to whether the proposal is inconsistent with management rights under section 7106, however, an issue which was not presented in U.S. Department of Labor, OSHA, we find that Union Proposal 2 by requiring the Agency to negotiate over the adequacy of parking i.e., number of spaces, for government vehicles concerns the method, means and technology of performing work within the meaning of section 7106(b)(1) of the Statute. The proposal would require the Agency to acquire parking spaces for government vehicles used in connection with an employee's performance of official duties. Matters relating to the use of government vehicles, including parking for them, constitute methods, means and technology of performing the agency's work. Compare, American Federation of Government Employees, AFL-CIO, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA No. 170 (1984) (Union Proposal 3) (matters pertaining to use of telephone for government business within purview of 7106(b)(1) of the Statute). As such, the proposal violates section 7106(b)(1). Since the Agency has not elected to bargain on the matter, the Authority concludes that the proposal is not within the duty to bargain.

V. Union Proposal 3

> Prior to occupancy, a complete Safety and Health inspection shall be made of the building and office space provided. Before occupancy, all conditions observed shall be corrected. The Union shall be a part of the inspection team.

A. Positions of the Parties

The Agency argues that: (1) the proposal is inconsistent with the requirement under section 7101(b) of the Statute that the Statute be interpreted in a manner consistent with an effective and efficient Government; and (2) the Union waived its right under the parties' agreement to bargain on the proposal by virtue of the bargaining history of the agreement.

The Union contends that: (1) the parties' agreement does not address pre-occupancy inspections of facilities; and (2) the proposal does materially affect conditions of employment pertaining to safety and health because it is the Union's obligation to insure that employees will be moving into a hazard-free work environment from the hazard-free environment they currently enjoy.

B. Analysis and Conclusion

The proposal is not sufficiently specific and delimited in content to enable a negotiability determination to be made. From the proposal and the parties' statements it is unclear: (1) whether the committee itself will correct deficiencies based upon its findings and/or whether its findings are binding upon management; and (2) the relative weight of the Union's participation--whether it is intended to be an equal, minority or majority role. The Authority has found proposals concerning the establishment of local health and safety committees to be within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Council of Prison Locals and Department of Justice, Bureau of Prisons, 11 FLRA 286 (1983) (Provision 2). Of course, proposals including those concerning joint labor-management committees which interject the union into the agency decision-making process through which management exercises its reserved rights under the Statute, are outside the duty to bargain. Such proposals, in effect, place the union "inside" management's decision-making process, giving the union information about and access to the discussions and deliberations of management officials concerning protected management decisions and actions. See National Federation of Federal Employees, Local 1421 and Veterans Administration Medical Center, East Orange, New Jersey, 9 FLRA 998 (1982) and National Federation of Federal Employees, Local 1001 and Department of the Air Force, Vandenberg Air Force Base, California, 15 FLRA 804 (1984) (Provisions 2 and 3). Union Proposal 3 does not in any event set forth sufficient specific information to enable us to reach a reasoned decision. Thus it does not meet the conditions for review set forth in section 7117(a)(1) of the Statute and section 2424.1 of the Authority's Rules and Regulations, and is dismissed. Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina, 12 FLRA 519, 527 (1983).

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 123

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION
Union

and Case No. 0-NG-1170

DEPARTMENT OF THE TREASURY
Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of nine provisions of an agreement which were disapproved by the Agency head pursuant to section 7114(c) of the Statute.*/

II. Procedural Issues

Provision 1

Article 7, Section 2G:

> The Employer shall provide the employee with a prompt written final decision. When a

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*/ The Union in its petition for review dated August 15, 1985 asserts that the Agency did not fulfill the 30 day requirement for disapproval under section 7114(c)(3) of the Statute because the Agency left the memorandum of disapproval with the Union's receptionist at its headquarters at a time when most Union officials were out of town. The Agency in an affidavit submitted by one of its employees, the contents of which the Union did not dispute, states that the memorandum of disapproval was served on the Union at its headquarters within the 30 day time period. Consequently, the Union has not established that the Agency did not meet the requirements set forth in section 7114(c)(3) of the Statute.

> negative determination is sustained after reconsideration, an employee shall be informed in writing of the reasons for the decision and of his/her right to submit the decision, with the consent of the Union, to binding arbitration.

The provision quoted above submitted in the Union's petition for review is not contended by the Agency to be outside the duty to bargain under the Statute. Rather, it appears from the record that the Agency's basis for holding a provision originally executed by the local parties nonnegotiable was an additional phrase which is not contained in the above provision. The Union, therefore, has not appealed the Agency head's disapproval of the original provision. Since Provision 1 as submitted in the petition for review has never been alleged by the Agency to be nonnegotiable, the Authority concludes that the petition for review as to the issue is moot and will not be considered further. See American Federation of Government Employees, AFL-CIO, Local 32 and U.S. Office of Personnel Management, 8 FLRA 420 (1982) (Proposal 2) and case cited therein.

III. Provisions 2, 3, 4, and 5

Article 8, Section 5(A):

> Immediate supervisors, at least once a year, must provide each employee with an appraisal of their performance on ATF F 2430.7, Performance Appraisal for Bargaining Unit Employees, and on ATF F 2430.8, Performance Appraisal for Bargaining Unit Employees--Continuation Sheet. In addition, supervisors, during the course of the year, must advise employees as to their performance and must document such counselling sessions. [Only the underlined portion of the provision is in dispute.]

Article 8, Section 6:

> If the immediate supervisor is an acting supervisor or a supervisor who has not been supervising the employee for at least ninety (90) days, the appraisal will be made by the next higher level supervisor. Employees in new positions will be evaluated ninety (90) days after entering the new positions, regardless of the effective date of their

performance appraisal. [Only the underlined portions of the provision are in dispute.]

Article 8, Section 7:

The following provisions will apply to employees on detail:

1. When an employee has been on detail for less than three (3) months at the time a performance appraisal due date occurs, the employee's regular supervisor will prepare the official performance appraisal.

2. When the employee has been on detail for more than three (3) months, the supervisor controlling the detailed employee's activities will prepare a written performance appraisal at the time of the performance appraisal due date and state whether the employee's work performance is or is not fully acceptable. The written statement will be forwarded to the regular supervisor, who will endorse or supplement the statement and issue the rating.

3. When the employee has been on detail for the entire appraisal period, the written performance appraisal of the supervisor controlling the activities of the detailed employee establishes the performance appraisal. This appraisal is used by the regular supervisor to certify that the employee has been rated for the specific appraisal period.

4. Where it is known that the detail is for the entire appraisal period, the supervisor of the position to which an employee is detailed will verify whether standards of performance and critical elements have been established for the position to which detailed. If standards and critical elements exist for either the position to which detailed or for identical positions within the Bureau, those will be applied in evaluating the detailee's performance. The supervisor

> will initially explain the standards of performance and critical elements of the position to the detailee. In situations involving details to positions for which no standards of performance or critical elements exists, the supervisor evaluating the employee will follow the procedures in this article. [Only the underlined portions of the provision are in dispute.]

Article 8, Section 8(C):

> Prior to issuing a notice of proposed action based on unacceptable performance, the Employer, generally through the immediate supervisor, will meet with the employee, fully discuss the performance problems, and provide him/her the following in writing:
>
> 1. identification of the critical elements and performance standards for which the performance is unacceptable;
> 2. advice as to what the employee must do to bring the performance above the unacceptable level;
> 3. notification that the employee will be afforded a reasonable period of time (specified in calendar days) in which to bring performance above the unacceptable level,
> 4. identification of training and/or developmental activities which would assist the employer in attaining performance above the unacceptable performance level, and a description of what the Employer will do to assist the employee to improve the unacceptable performance during the opportunity period. [Only the underlined portion of the provision is in dispute.]

A. Positions of the Parties

The Agency contends that by specifying which supervisor will complete an annual appraisal, Provisions 2, 3, 4, and 5 impermissibly interfere with its management right under section 7106(a)(2)(B) of the Statute. The Union maintains that the above provisions are negotiable because: Provision 2 provides each employee with an appraisal at least once a year; the intent of Provision 3 is clear on its face; Provision 4 insures the parties that the performance of employees on details will be evaluated by people who are in a position to observe the performance; and Provision 5 requires the Agency to meet with an employee who is having performance problems and provide a written document containing the items listed in subsections 1-4.

B. Analysis and Conclusion

The disputed portions of Provisions 2, 3, 4, and 5 seek to designate a particular individual within the Agency who would evaluate an employee's work performance. The Authority has consistently held that such proposals are inconsistent with the agency's right to assign work under section 7106(a)(2)(B) of the Statute. *National Federation of Federal Employees, Local 943, and Department of the Air Force, Keesler Air Force Base, Mississippi*, 16 FLRA 313,316 (1984) citing *American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone Arsenal, Alabama*, 10 FLRA 440 (1982) and *Congressional Research Employees Association and the Library of Congress*, 3 FLRA 737 (1980). Therefore, for the reasons more fully set forth in *Keesler Air Force Base* and the cases cited therein, Provisions 2, 3, 4 and 5 are not within the duty to bargain under the Statute because they violate the Agency's right to assign work under section 7106(a)(2)(B).

IV. Provision 6

Article 8, Section 9:

> In appraising employees on ATF Form 2430.7, supervisors must:
>
> A. Describe actual performance for each critical element in terms of a comparison between actual performance and the performance standards.
>
> B. Assign rating for each element of Outstanding, Commendable, Fully Acceptable, Partially Acceptable, and Unacceptable. In assigning these ratings, supervisors should take into account the following:

1. A rating of Outstanding (O) means that the actual performance meets the level of outstanding performance specified for that job.

2. A rating of Commendable (C) means that the actual performance exceeds the fully acceptable standard of performance in the job element but the performance does not meet the standard established for outstanding performance.

3. A rating of Fully Acceptable (FA) means that the actual performance of the employee in all respects meets the level of performance required under the fully acceptable standard for that element.

4. A rating of Partially Acceptable (PA) means that employee's actual performance does meet the requirements of the fully acceptable standard but, similarly, does not constitute unacceptable as described in the unacceptable performance standard.

5. A rating of Unacceptable (U) means that the employee's actual performance is at or below the performance described in the unacceptable performance standard.

C. Assign a rating for overall performance of critical elements based on the following criteria:

1. Outstanding (O). Indicates performance substantially exceeds fully acceptable performance in all of the critical elements.

2. Commendable (C). Indicates performance that exceeds fully acceptable, but which is below the outstanding level, in all of the critical elements.

3. Fully Acceptable (FA). Indicates performance which is fully successfully and meets the acceptable level of competence in all critical elements.

4. Partially Acceptable (PA). Indicates performance in one critical element

> falls below the fully acceptable level but does not constitute unacceptable performance. An overall rating of partially acceptable shall be a basis for denial of a within-grade increase.
>
> 5. Unacceptable (U). Indicates performance which fails to meet the established performance standard in one or more critical elements. Unacceptable performance shall be the basis for denial of a within-grade increase, and may be a basis for reassignment, demotion, or removal from the Bureau.

A. Positions of the Parties

The Agency asserts that the provision is nonnegotiable because it interferes with its rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. The Union contends that the provision is negotiable because it only requires the Agency to provide certain information on the employees' appraisal forms.

B. Analysis and Conclusion

Provision 6 would establish the number of rating levels for the appraisal of an employee's performance in each critical element and also for rating overall performance. It has essentially the same effect as the Union Proposal in American Federation of State, County and Municipal Employees, AFL-CIO, Council 26 and U.S. Department of Justice, 13 FLRA 578 (1984), which also established the number of rating levels for the appraisal of an employee's performance in each critical element and for rating overall performance and therefore violated the agency's right to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute. For the reasons more fully set forth in U.S. Department of Justice, therefore, Provision 6 is outside the duty to bargain because it violates section 7106(a)(2)(A) and (B) of the Statute.

V. Provision 7

Article 9, Section 4A:

> The employer will appoint a ranking panel consisting of three voting members, all of whom must be at or above the grade of the position to be filled. The selecting official

> may not serve as a member of the panel. [Only the underlined portion of the provision is in dispute.]

A. Positions of the Parties

The Agency contends that the provision interferes with its right to assign work by placing a restriction on the selecting official. The Union contends that based on the explicit language of the provision, it is within the duty to bargain under the Statute.

B. Analysis and Conclusion

The provision would preclude the Agency from using certain supervisory personnel, i.e., the selecting official, on a ranking panel which conducts an evaluation of employees. As was stated previously with reference to Provisions 2-5, the Authority has held in Kessler Air Force Base, 16 FLRA 313 (1984), that proposals which designate a particular individual within the agency who would evaluate an employee's work performance are inconsistent with the agency's right to assign work under section 7106(a)(2)(B) of the Statute. Similarly, the Authority has consistently held that provisions which restrict management in the designation of particular employees to perform particular duties are likewise violative of management's right to assign work. See, e.g., American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 19 FLRA No. 9 (1985) (Union Proposal 5). The Authority finds that Provision 7 constitutes an improper infringement on the Agency's right to assign work under section 7106(a)(2)(B) because the provision would restrict the Agency in designating certain supervisory personnel to evaluate employees. Consequently, Provision 7 is not within the duty to bargain.

VI. Provision 8

Article 10, Section 1:

> The Employer agrees that an employee who is assigned to a position of higher grade for more that thirty (30) consecutive calendar days will be temporarily promoted and receive the rate of pay for the position to which he/she is temporarily promoted. The Employer further agrees to refrain from rotating assignments of employees solely to avoid

compensation at the higher level. [Only the underlined portion of the provision is in dispute.]

A. Positions of the Parties

The Agency contends that this provision violates its right to assign employees by preventing management from freely assigning employees to details. The Union maintains that the provision would only prohibit rotating assignments solely to avoid compensation at the higher grade level and therefore is within the duty to bargain under the Statute.

B. Analysis and Conclusion

This provision would preclude the Agency from rotating assignments of employees solely to avoid compensation at the higher level. It is to the same effect as Provision 2 in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 14 FLRA 243 (1984) which also precluded the agency from rotating assignments of employees solely to avoid compensation at the higher level. The Authority determined that the provision violated the agency's right to assign employees under section 7106(a)(2)(A) of the Statute because, by barring management from rotating assignments for the purpose of avoiding the temporary promotion of employees, it would substantively restrict management's exercise of its right to assign those employees. Therefore, for the reasons more fully set forth in Internal Revenue Service, Provision 8 is also outside the duty to bargain under section 7106(a)(2)(A) of the Statute.

VII. Provision 9

Article 9, Section 2:

> The detailing of personnel to lower-graded positions is considered to be inconsistent with sound planning and management and will be kept to an absolute minimum. However, the Employer may use details under circumstances such as the following:
>
> 1. when a temporary shortage of personnel exists;
>
> 2. where an exceptional volume of work suddenly develops and seriously interrupts the work schedule;

3. to fill temporarily the positions of employees on extended leave with or without pay; or

4. other conditions of a special and temporary nature.

A. Positions of the Parties

The Agency asserts that the provision, by placing limitations on the Agency's decision to detail employees, is inconsistent with its right to assign employees. The Union contends that the provision is within the duty to bargain because it contains examples of occasions where detailing an employee to a lower graded position would not evidence poor planning or management.

B. Analysis and Conclusion

The provision would require that the Agency restrict the detailing of employees to lower-graded positions. The Authority has consistently held that provisions which restrict management's assigning employees to details are violative of section 7106(a)(2)(A). *See*, for example, *American Federation of Government Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma*, 7 FLRA 292 (1981) (Provisions 1 and 2). We find that this provision violates section 7106(a)(2)(A) noting that the provision would allow management to detail under certain limited circumstances but would require management to keep such action "to an absolute minimum." The Authority has found proposals which contain similar qualifying language to be outside the duty to bargain because such language substantively interferes with management rights. *See American Federation of Federal Employees, AFL-CIO, National Border Patrol Council and Department of Justice, Immigration and Naturalization Service*, 16 FLRA 251 (1984) (Union Proposal 1) (in which the Authority determined that the inclusion of the qualifying phrase "[t]o the maximum extent possible" in an assignment of work proposal would subject management's right to assign work to arbitral review on the basis of whether the language of that qualifying phrase had been adhered to and therefore violated the agency's right to assign work under section 7106(a)(2)(A)) and *American Federation of Federal Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office*, 13 FLRA 446 (1983) (Union Proposal 3) (in which the Authority determined that the inclusion of the qualifying phrase "[t]o the extent practicable" in a proposal concerning assignment of work and direction of employees would subject those management rights to arbitral review on the basis of whether the language of that qualifying phrase had been adhered to and therefore violated the agency's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute). The provision here would subject management's decisions to detail employees to arbitral review with an arbitrator substituting his or her judgment for that of management as to the necessity of the detail, thus, substantively interfering with management's right to assign employees under section 7106(a)(2)(A). Therefore, Provision 9 is outside the duty to bargain.

VIII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ADJUTANT GENERAL, STATE OF OHIO
OHIO AIR NATIONAL GUARD
WORTHINGTON, OHIO

Respondent

and

Case Nos. 5-CA-20338
5-CA-30091
5-CA-30118

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, OHIO COUNCIL OF AIR
NATIONAL GUARD LOCALS, COUNCIL 127
AFL-CIO

Charging Party

DECISION AND ORDER

Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed to the attached Decision of the Administrative Law Judge. The Judge found that the Respondent had engaged in certain of the unfair labor practices as alleged in the complaints in Case Nos. 5-CA-30118 and 5-CA-30091, and recommended that the Authority issue an appropriate order directing the Respondent to cease and desist from the unfair labor practices. The Judge further found that the Respondent had not engaged in the unfair labor practices alleged in the complaint in Case No. 5-CA-20338, or in certain of the unfair labor practices alleged in the complaint in Case No. 5-CA-30091, and he recommended dismissal of the complaint in Case No. 5-CA-20338 and of those portions of the complaint in Case No. 5-CA-30091. The Respondent filed exceptions to the violations found by the Judge, and the General Counsel and the Charging Party (the Union) filed exceptions to those portions of the Judge's decision in which he recommended a dismissal. The Respondent filed an opposition to the General Counsel's exceptions and the Union filed an opposition to the Respondent's exceptions.

This proceeding involves three separate complaints which were consolidated solely for the purpose of the hearing. The Authority will consider separately the issues raised by the three complaints, in the order considered by the Judge.

Case No. 5-CA-30118

I. The Issue

The complaint in this case alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by unilaterally deciding to discontinue the payment of travel and per diem expenses to employees serving as Union negotiators while they were engaged in the negotiation of a new agreement between the parties.

II. Background

The Respondent and the Union were parties to a negotiated agreement whose term ended on June 21, 1981. The agreement also provided, however, that it would remain in full force and effect for up to one additional year from the time the parties signed off on ground rules covering the negotiation of a new agreement. On October 6, 1981, the parties executed a Memorandum of Understanding (MOU) setting forth the ground rules for their negotiation of a new agreement. The MOU provided that the MOU and the parties' existing agreement would continue for one full year, until October 6, 1982. In part, the MOU provided for the payment by the Respondent of the travel and per diem expenses of employees serving as the Union's negotiators. The Respondent contends that it had agreed to provide travel and per diem expenses for Union negotiators only because it was required to do so by the Authority's decision in Interpretation and Guidance, 2 FLRA 265 (1979). On August 26, 1982, the Respondent advised the Union that it would withhold any further payment of travel and per diem expenses for Union negotiators because decisions in the United States Court of Appeals for the Second (involving a National Guard unit) and Eighth Circuits had put in question the validity of the Authority's position in Interpretation and Guidance, noted above.

III. The Judge's Decision

When the Judge wrote his decision, he had the benefit of the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983).

The Judge found that the Supreme Court had held in BATF that section 7131(a) of the Statute does not require the payment of travel and per diem expenses for union negotiators, and therefore concluded that the Respondent's discontinuance of such payments did not violate section 7116(a)(8) of the Statute. However, he also noted that the Supreme Court had additionally stated that Federal agencies were not precluded from making such payments, and had recognized that parties in the Federal sector may negotiate for the payment of travel and per diem expenses for union negotiators, citing 464 U.S. at 107, n. 17. He concluded that, as travel and per diem payments were bargained for and included in the parties' MOU, the Respondent could not unilaterally terminate such payments during the course of the agreement. He therefore concluded that the unilateral decision by the Respondent in this case to terminate the payment of travel and per diem expenses to Union negotiators pursuant to the MOU constituted a complete and unlawful rejection of the MOU in violation of section 7116(a)(1) and (5) of the Statute.

IV. Positions of the Parties

The positions of the parties, as set forth in their exceptions and oppositions, essentially constitute disagreements as to whether the Judge correctly stated the findings of the Supreme Court's decision in BATF. The Respondent argues that the Supreme Court's statement with regard to bargaining on travel and per diem expenses was not a finding of the court because it was not an issue before the court. Further, it argues that, as the Respondent had initially agreed to pay such expenses only on the basis of the Authority's decision in Interpretation and Guidance, supra, which is no longer valid as a matter of law, the Respondent cannot be bound by the agreement it made in this regard. The Union, in its opposition to the Respondent's exceptions, argues that the Judge's interpretation and explanation of the Supreme Court's holding in BATF is essentially sound, and that his resulting conclusion is correct.

V. Analysis

Following the Supreme Court's BATF decision, the Authority recently decided in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 22, 1986), that a union proposal which would require an agency to pay the travel and per diem expenses incurred by employees while using official time pursuant to the parties' agreement concerned a condition of employment which is within the agency's administrative discretion, is not inconsistent with Federal law or Government-wide rules or regulations (including the Federal Travel Regulations), and therefore is within the duty to bargain. Since the parties' MOU in this case, insofar as it provided for the payment of travel and per diem expenses for Union representatives engaged in the negotiation of a renewed contract between the parties, similarly concerned a negotiable condition of employment, the Authority adopts the Judge's conclusion that the Respondent violated section 7116(a)(1) and (5) of the Statute when it unilaterally terminated and repudiated that agreement. See American Federation of Government Employees, Local 1923, AFL-CIO, 20 FLRA No. 88 (1985) and Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982).

VI. Conclusion

The Authority concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally repudiating its contract with the Union insofar as it provided for the payment of travel and per diem expenses for Union negotiators engaged in the negotiation of the parties' new collective bargaining agreement.

Case No. 5-CA-20338

I. The Issue

The complaint in this case alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by declaring nonnegotiable and refusing to negotiate about a Union proposal to provide an alternative to the standard military uniform generally required to be worn by National Guard civilian technicians.

II. Background

The alleged violation in this case took place during the course of the parties' negotiations for a renewed contract (see "Background," under Case No. 5-CA-30118, above). The parties' expiring agreement provided that the Respondent's civilian technician employees might wear agreed upon standardized civilian attire if they received permission to do so by following a procedure set forth in the agreement. During the course of their negotiations for a new agreement (and during the year that the parties' contract was being kept in force and effect by the parties' MOU), the Union proposed that the clause in their expiring agreement which provided for the wearing of civilian attire be retained. The Respondent declared the subject nonnegotiable, and refused to consider the proposal on the basis that it involved a nonmandatory or "permissive" subject of bargaining. The Respondent recognized that Authority precedent at the time was to the contrary, but argued that, in view of pending cases before various courts of appeals calling that precedent into question, it was justified in such position.

III. The Judge's Decision

The Judge noted precedent which clearly held that proposals substantially identical to the one here are mandatorily negotiable. He found, however, that the Respondent had presented arguments in its post-hearing brief to support its position (ones not addressed in the Authority's decisions) that the wearing of the military uniform by civilian technicians is a matter of "internal security" under section 7106(a)(1) of the Statute, and a matter pertaining to the "technology, methods and means of performing work" under section 7106(b)(1) so as to permit the Respondent to refuse to bargain on the matter. He agreed with the Respondent's contentions that the wearing of the military uniform by civilian technicians involves internal security matters and the technology, methods, and means of performing work. He therefore concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute when, upon the expiration of the parties' then current agreement, it declared the Union's proposal concerning the wearing of the military uniform nonnegotiable and refused to bargain about it. Therefore, he recommended dismissal of the complaint.

IV. Positions of the Parties

With respect to the Judge's findings and conclusions regarding the issue of internal security, the Respondent argues generally in support of the Judge. The General Counsel and the Union question whether the Judge was correct to consider the Respondent's arguments concerning internal security at all, as they contend that those arguments were raised for the first time in the Respondent's brief to the Judge. However, assuming that the matter was properly before the Judge, the General Counsel and the Union take issue with the Judge's finding that the facts presented by the Respondent support its position on the internal security matter, and they disagree with the legal conclusion the Judge reaches even if the facts were accurate. With respect to the Judge's findings and conclusions regarding the "technology, methods and means of performing work," the General Counsel argued that there was no evidence that the attire of these employees is not directly or integrally related to the accomplishment of their duties.

V. Analysis

After the Judge issued his Decision in this case, the Authority, on remand from the U.S. Court of Appeals for the Second Circuit, issued the first in a series of new determinations with regard to the negotiability of proposals concerning the wearing of civilian attire by National Guard civilian technicians. In *Division of Military and Naval Affairs, State of New York, Albany, New York*, 15 FLRA 288 (1984), *affirmed sub nom. New York Council, Association of Civilian Technicians v. Federal Labor Relations Authority*, 757 F.2d 502 (2nd Cir. 1985), *cert. denied*, 106 S. Ct. 137 (Oct. 7, 1985), the Authority held that the requirement that civilian technicians wear military uniforms rather than civilian attire involves the methods and means of performing work within the meaning of section 7106(b)(1) of the Statute and therefore is a permissive rather than a mandatory subject of bargaining; that is, a subject which may be bargained, but only at the election of the agency. Further, the Authority has held that, while an agency acts at its peril when it refuses to negotiate on proposals similar to proposals previously found negotiable by the Authority, an unfair labor practice will not be found where subsequently established law supports the agency's position. *See, for example*, *Department of Defense, Department of the Army, Headquarters XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 20 FLRA No. 101 (1985) and *Office of Personnel Management*, 17 FLRA 302 (1985).

VI. Conclusion

The Authority adopts the Judge's conclusion, consistent with its decisions and rationale in the above cited cases, that the Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged, by exercising its option under section 7106(b)(1) of the Statute and refusing to negotiate concerning the Union's proposal which would have extended the terms of the parties' expiring agreement that had permitted some civilian technicians the option of wearing other than the required military uniform. We shall therefore dismiss the complaint in this case. We also find, in view of this conclusion, that it is unnecessary to pass upon whether the Judge properly considered the Respondent's position with regard to internal security, or whether he was correct in his resolution of the factual disputes of the parties in this regard.

Case No. 5-CA-30091

I. The Issue

The complaint in this case alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally terminating certain terms and conditions of employment incorporated in the parties' negotiated agreement when the then current agreement between the parties expired on October 6, 1982. Specifically, the complaint alleged that the Respondent violated the Statute by declaring that it (1) would no longer abide by the contractual procedure allowing civilian technicians the option of wearing standardized civilian attire, and (2) that in the future the processing of grievances and all disciplinary and adverse actions would have to be consistent with applicable National Guard regulations.

II. Background

As noted in the discussion of the prior two cases, the parties' then current contract was scheduled to expire on October 6, 1982. On August 26, 1982, the Respondent notified the Union that, in the event negotiations toward a new contract were not consummated by October 6, 1982, the Respondent would consider the then current agreement as having expired, and that employees would have to comply with all appropriate National Guard regulations. On September 30, 1982, the Respondent advised the Union that the specific areas in which National Guard regulations would supersede the parties' agreement included the wearing of the military uniform by civilian technicians, disciplinary and adverse actions, and grievance procedures. On October 7, 1982, the contract was terminated by the Respondent. The parties stipulated that 46 grievances concerning the wearing of civilian attire, all filed prior to October 6, 1982, were processed under the procedures of the expired agreement.

The parties stipulated that the expired agreement had specifically excluded from the grievance procedure those matters which could be heard under section 709(e) of the National Guard Technicians Act, and that the practice of the parties during the term of the agreement had been to exclude such matters. Section 709(e)(4) of the Technicians Act defines the coverage of 709(e) matters as including "a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation."

III. The Judge's Decision

The Judge noted Authority precedent holding that the terms and conditions of a collective bargaining agreement continue in full force and effect after the expiration of the agreement unless the parties mutually agree to do otherwise. He also noted Authority precedent holding that an agency may unilaterally change, upon the termination of an agreement, a term and condition of employment embodied in the expired agreement which involves a permissive subject of bargaining. He concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute when it refused to continue to adhere to the provisions of the parties' expired agreement dealing with the grievance procedure and the processing of disciplinary and adverse actions. However, he concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute when it unilaterally required a return to adherence to National Guard regulations concerning the wearing of military uniforms, as he had concluded in Case No. 5-CA-20338 (above) that this involved a permissive subject of bargaining and therefore the Respondent was within its rights to make such a change at the termination of the parties' agreement.

IV. Positions of the Parties

The Respondent contends that the only condition of employment it changed on October 6, 1982, was the uniform wearing requirement. It asserts that the parties' then current agreement excluded by its own terms those matters which were subject to the disciplinary and adverse action procedures set forth in section 709(e) of the Technicians Act, and that grievances concerning subject matters which might properly have been filed pursuant to the grievance procedure contained in the parties' negotiated grievance procedure could still be resolved through that mechanism after the termination of the agreement. In support of that contention, the Respondent points out that the 46 grievances concerning uniform wearing, mentioned above, were processed subsequent to the cancellation of the agreement pursuant to the terms of the agreement, and that there is no evidence that any grievances properly subject to the negotiated procedure were or would have been refused proper processing.

In opposition to the Respondent, the Union contends that Congress intended, by virtue of section 7121 of the Statute, to offer employees a choice of alternative dispute mechanisms--either through a broad scope negotiated grievance procedure or through the procedure delineated in section 709(e) of the Technicians Act. It further contends that the Judge, relying on earlier Authority decisions, properly held that disciplinary actions should be subject to the negotiated grievance procedure. In essence, the Union argues that the parties' contractual provision excluding those matters subject to resolution pursuant to section 709(e) was meant only to exclude section 709(e) matters which were processed exclusively under that section, but was not meant to apply to such matters if initiated and pursued under the parties' contractual grievance procedure.

V. Analysis

As the Judge correctly found, the Authority has held that terms and conditions of employment which concern mandatory subjects of bargaining which are embodied in a collective bargaining agreement continue following the expiration of the agreement. The Authority has also held, since the issuance of the Judge's Decision, that once an agreement has expired, either party may elect to no longer be bound by provisions therein concerning "permissive" subjects of bargaining, but instead may reassert the right not to negotiate with regard to such permissive subjects of bargaining. See, for example, United States Department of Defense, Department of the Army, McAlester Army Ammunition Plant, 20 FLRA No. 73 (1985), petition for review filed sub nom. American Federation of Government Employees, Local 2815, AFL-CIO v. FLRA, No. 86-1004 (D.C. Cir. Jan. 3, 1986), and the cases cited therein.

As noted in the discussion of Case No. 5-CA-20338 above, subsequent to the issuance of the Judge's Decision, the Authority has held that the requirement that civilian technicians wear military uniforms rather than civilian attire is a permissive rather than a mandatory subject of bargaining. Accordingly, the Respondent was within its rights in notifying the Union that civilian technicians would be required to wear the military uniform upon the expiration of the parties' agreement. This conclusion is also consistent with the Authority's decision in an arbitration appeal involving the same parties which arose from the same facts and circumstances that led to the unfair labor practice allegations in this case. In *The Adjutant General, State of Ohio and American Federation of Government Employees, AFL-CIO, Ohio Council of Air National Guard Locals No. 127, Local 3470*, 17 FLRA 957 (1985), the Authority upheld the arbitrator's finding that the technicians who had exercised their option to choose to wear standardized civilian attire prior to the expiration of the parties' agreement were entitled to continue to do so for the one year period provided for in the parties' agreement, but that the technicians who had submitted declarations electing to wear civilian attire after the agreement expired did not have such a right. In so concluding, the Authority noted that the requirement that civilian technicians wear military uniforms is a permissive rather than a mandatory subject of bargaining, and therefore could be terminated by either party after the agreement expired.

Also subsequent to the issuance of the Judge's decision, the Authority, in *Department of Defense, Illinois Air National Guard, 182nd Tactical Air Support Group, Peoria, Illinois*, 19 FLRA No. 11 (1985), *petition for review filed sub nom. Illinois Air Chapter 34, Association of Civilian Technicians, Inc. v. FLRA*, No. 85-1579 (D.C. Cir. Sept. 12, 1985), held that section 709(e) of the Technicians Act was the exclusive procedure for dealing with a matter involving an adverse personnel action against a National Guard technician. The Authority cited and relied upon the opinions of several Courts of Appeals to the effect that the Technicians Act was meant to be the exclusive procedure for all matters enumerated in and susceptible to resolution through the procedures outlined in section 709(e).

The General Counsel has not shown that the Respondent actually terminated any of the provisions of the parties' expired agreement pertaining to their grievance procedure or the processing of disciplinary and adverse actions under it. It appears rather that management was only reaffirming its own past view as to what matters with regard to the grievance/arbitration provisions of the parties' agreement had been excluded because of the exclusion of section 709(e) matters. In any event, as noted above, the Authority has held that such matters may not be included within the scope of a negotiated grievance procedure, and therefore the Respondent would not have committed an unfair labor practice by insisting that they be excluded even if they had been included in the past.

VI. Conclusion

The Authority concludes, consistent with its decision in McAlester Army Ammunition Plant, that the Respondent was within its rights under the Statute when it asserted, at the termination of the parties' then current agreement, that it would no longer be bound by the provision in the agreement that its civilian technician employees had the option of wearing standardized civilian attire and that such employees would henceforth be required to abide by National Guard regulations requiring the wearing of the military uniform. Therefore, the Respondent's actions in this regard did not violate section 7116(a)(1) and (5), as alleged, and we shall dismiss that allegation of the complaint.

The Authority also concludes, consistent with its decisions in Illinois Air National Guard and State of Ohio, above, that the Respondent was within its rights when it asserted that upon termination of the parties' agreement, the processing of all grievances and all disciplinary and adverse actions would have to be consistent with applicable National Guard regulations. Therefore, the Respondent's actions in this regard did not violate section 7116(a)(1) and (5) of the Statute, as alleged, and we shall dismiss these allegations.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio, shall:

1. Cease and desist from:

(a) Terminating and repudiating the terms of an October 6, 1982 Memorandum of Understanding under which it had agreed to pay travel and per diem expenses, consistent with applicable Federal Travel Regulations, to the authorized representatives of the American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, who were engaged in negotiating a new collective bargaining agreement between the parties covering the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Pay travel and per diem expenses consistent with applicable Federal Travel Regulations to the authorized representatives of the American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, who were engaged in negotiating a collective bargaining agreement pursuant to the parties' October 6, 1982 Memorandum of Understanding and make whole any representatives from whom such payments have been withheld.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Adjutant General, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that the complaint in Case No. 5-CA-30118, insofar as it alleges any other violations of the Statute, be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the complaints in Case No. 5-CA-20338 and Case No. 5-CA-30091 be, and they hereby are, dismissed in their entirety.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate and repudiate the terms of our October 6, 1982 Memorandum of Understanding under which we had agreed to pay travel and per diem expenses, consistent with applicable Federal Travel Regulations, to the authorized representatives of the American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, who were engaged in negotiating a new collective bargaining agreement covering a unit of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL pay travel and per diem expenses consistent with applicable Federal Travel Regulations to the authorized representatives of the American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, who were engaged in negotiating a collective bargaining agreement pursuant to the parties' October 6, 1982 Memorandum of Understanding and make whole any representatives from whom such payments have been withheld.

____
(Activity)

Dated:______________ By:______________________________
(Signature) (Title)

[21 FLRA No. 124]

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

ADJUTANT GENERAL, STATE OF OHIO
OHIO AIR NATIONAL GUARD
WORTHINGTON, OHIO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, OHIO COUNCIL OF AIR
NATIONAL GUARD LOCALS, COUNCIL 127,
AFL-CIO

Charging Party

Case Nos. 5-CA-20338
5-CA-30091
5-CA-30118

. . . .

Major Robert D. Doane, Esquire
For the Respondent

Ronald Liwo
For the Charging Party

Arlander Keys, Esquire
For the General Counsel,
Federal Labor Relations Authority

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. @ 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

On September 27, 1982 American Federation of Government Employees, Ohio Council of Air National Guards Locals, Council 127, AFL-CIO (hereinafter called the Union or AFGE Council 127) filed a charge in Case No. 5-CA-20338, alleging that Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio (hereinafter called Respondent or Ohio National Guard) had violated Sections 7116(a)(1), (5) and (8) of the Statute by declaring a Union proposal concerning the wearing of the military uniform by civilian technicians non-negotiable, after such proposal had been previously found negotiable by the FLRA.

On December 9, 1982 the Union filed a charge in Case No. 5-CA-30091, alleging that Ohio Air National Guard had violated Sections 7116(a)(1) and (5) of the Statute by unilaterally changing terms and conditions of employment of civilian employees by requiring them to wear the military uniform and to adhere to National Guard Regulations concerning the processing of grievances and disciplinary and adverse actions.

On December 30, 1982 the Union filed a charge in Case No. 5-CA-30118, alleging that Respondent had violated Sections 7116(a)(1) and (7) of the Statute by discontinuing to pay travel and per diem expenses of Union negotiators while they were engaged in negotiating a collective bargaining agreement with Respondent, thereby repudiating a Memorandum of Understanding in which Respondent had agreed to pay such expenses. On January 19, 1983 the Union filed an amended charge in Case No. 5-CA-30118, in which it deleted the Section 7116(a)(7) allegation and alleged the stated facts therein to be violations of Sections 7116(a)(1), (5) and (8) of the Statute.

On November 24, 1982, January 11, 1983 and February 15, 1983, Complaints and Notices of Hearing issued in Case Nos. 5-CA-20338, 5-CA-30091, and 5-CA-30118, respectively, alleging the violations alleged in said charges. Respondent filed Answers to the Complaints in Case Nos. 5-CA-20338, 5-CA-30091, and 5-CA-30118, denying that it had violated the Statute.[1] By Order dated February 16, 1983, these cases were consolidated for purpose of hearing.

A hearing in this matter was conducted before the undersigned in Columbus, Ohio. The Ohio Air National Guard, AFGE Council 127 and the General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The parties entered into extensive stipulations of fact. Post hearing briefs were filed and have been fully considered.

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[1] On January 11, 1983 and February 4, 1983, Counsel for the General Counsel filed Motions for Summary Judgments in Case Nos. 5-CA-20338, 5-CA-30091, respectively. On February 11, 1983 Respondent filed a Response to the Motion for Summary Judgment in Case Nos. 5-CA-30091. By Orders dated February 2, 1983 and March 1, 1983 Counsel for the General Counsel's Motions for Summary Judgment were denied in Case Nos. 5-CA-20338 and 5-CA-30091, respectively.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the follwing:

Findings of Fact

In July 1971, the Union became the exclusive collective bargaining representative for a unit composed of all general schedule and wage board employees, including civilian technicians, of the Ohio Air National Guard, with certain exclusions, not here relevant. The Respondent and the Union became parties to a collective bargaining agreement covering civilian technicians, which expired in 1975 and then to a subsequent one which, by its terms, expired on June 21, 1981. This latter agreement provided that it would remain in full force and effect, during renegotiation of the agreement, for up to one additional year after the ground rules were signed.

On October 6, 1981 Respondent and AFGE Council 127 signed a Memorandum of Understanding, setting forth the ground rules for the negotiation of the new collective bargaining agreement and the parties agreed that the existing collective bargaining agreement would expire on October 6, 1982. The ground rules provided that official time and travel and per diem expenses would be authorized by Respondent for the members of the Union's negotiating committee during such times as they were engaged in negotiating the new collective bargaining agreement.

On March 17, 1981 the National Guard Bureau issued regulation TPR 302.7-6, Wearing of the Military Uniform, which provides that civilian technicians are to wear the military uniform while performing civilian technician duties, unless otherwise specifically excluded by a negotiated labor agreement. During the course of contract negotiations, the Union submitted the following proposal relative to the wearing of standardized civilian attire:

> ARTICLE XXVI. UNIFORMS
>
> Section 1. a. Ohio Air National Guard Technicians who are members of the Bargaining Unit, while performing their day-to-day duties shall have the option of wearing either: (1) The Miltiary Uniform; or (2) an agreed upon standardized civilian attire, without the display of military rank.

b. For those individuals electing to wear the standardized civilian attire, it is the individual's responsibility to procure, maintain, and pay for any and all expenses incurred for his attire.

c. Either attire must be clean, neat and good [sic] condition on a daily basis.

This proposal is identical to the provision contained in the expired collective bargaining agreement with respect to the wearing of standardized civilian attire. Prior to this most recently expired collective bargaining agreement the civilian technicians had always worn the miltiary uniform while performing day-to-day technician duties.

By letter dated August 26, 1982 the Adjutant General of Ohio advised AFGE Council 127, that if the parties had not concluded a contract by October 6, 1982 there would be no contract in effect on October 7, 1982 and that, accordingly, "all appropriate National Guard regulations shall be complied with during the remaining period of negotiation. This will include the return of all technicians to the wear of the military uniform." By Memorandum dated September 16, 1982 Respondent declared the Union's proposal, Article XXVI, Uniforms, non-negotiable, asserting that the wearing of the uniform by civilian technicians is not a proper subject for negotiation. Since September 16, 1982 Respondent has refused to negotiate concerning the Union's uniform proposal.

As of October 7, 1982 the Adjutant General of Ohio, Major General James C. Clem, ordered that all technicians comply with the uniform regulations, TPR 302.7-6 and that the processing of grievances and all disciplinary and adverse actions be in accordance with Air Force and National Guard regulations. Since October 7, 1982 Respondent has not permitted the filing of grievances under the contract grievance procedure.[2] On September 30, 1982 Respondent notified its supervisors and the Union that, effective October 7, 1982, the collective bargaining agreement would no longer be in effect and that the wearing of the military uniform by civilian technicans and the administering of all grievances and disciplinary and adverse actions would be in accordance with applicable Air Force and National Guard regulations.

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[2] The parties stipulates:

Since October 6, 1982, the Ohio Air National Guard has accepted 46 grievances on the option of wear of standardized civilian attire which have resulted in two (2) arbitrations now in the process of resolution. The 46 grievances referred to above, all of which were filed on or before October 6, 1982, allege that Respondent violated Article XXIV, Section 2 of the collective bargaining agreement by refusing to continue to honor the written selections of individual employees to wear the military uniform or civilian attire which selections had not been in effect for the required one year period as of October 6, 1982.

Pursuant to the National Guard regulations, implemented on October 7, 1982 employees are required to wear the military uniform at all times while performing their civilian duties.

The Air Force and National Guard regulations so implemented do not provide for arbitration or advisory arbitration, as did the expired collective bargaining agreement. Rather the regulations provide that the final authority in the processing of a grievance is the Adjutant General.

By letter dated August 26, 1982, Respondent, by Major General James C. Clem, notified the Union that, in view of the denial of enforcement of FLRA Orders in two United States Courts of Appeals concerning the payment of travel and per diem expenses to Union negotiators. Respondent proposed to hold in abeyance any further payment of such expenses pending a decision by the United States Supreme Court on the issue. This proposal was not accepted by the Union.

Since August 26, 1982, Respondent has accepted and recorded, but has not processed and paid the travel vouchers submitted by Union negotiators for travel and per diem expenses arising out of their having negotiated with Respondent on the new collective bargaining agreement.

The primary mission of the Ohio Air National Guard is to provide trained, qualified, combat-ready forces in support of the active duty Air Force.

The military uniform involves safety shoes, wet weather gear, and non-static jackets and material and is therefore related to the safety of civilian technicians.

There is a 35 man base defense team that would be called in immediately for the security of the base. A person in uniform may reasonably be deemed more effective than a person in civilian attire, in enforcing security orders vis-a-vis a civilian non-employee.

Some aircraft were blown up at a facility controlled by the Puerto Rican Air National Guard.

Conclusions of Law and Discussion

The parties hereto stipulated that the issues raised herein are as follows:

Case No. 5-CA-20338

> Whether Respondent, in view of the pendency of requests for review of Authority Orders concerning the issue of the negotiability of the wearing of the military uniform before several United States Courts of Appeals, violated 5 USC 7116(a)(1) and (5), when it declared the Union's bargaining proposal, described above in paragraph 12, as non-negotiable and thereafter refused to bargain concerning said proposal by alleging it to be a permissive Management right and thus subject to withdrawal from the bargaining process.

Case No. 5-CA-30091

> Whether Respondent, upon the termination of the collective bargaining agreement on October 6, 1982, violated 5 USC 7116(a)(1) and (5) by declaring the uniform to be a permissive subject of bargaining and not an appropriate subject of bargaining and by thereafter refusing to adhere to the provisions of said agreement concerning the wearing of the military uniform, the grievance procedure and the processing of disciplinary and adverse actions.

Case No. 5-CA-30118

> Whether Respondent, by refusing to process and pay travel and per diem for the Union's duly designated negotiators for expenses arising out of their negotiations with Respondent toward a new collective bargaining agreement, thereby breached the Memorandum of Understanding described above in paragraph 10 and/or failed to comply with 5 USC 7121(a), in violation of 5 USC 7116(a)(1), (5) and (8) even, though the exact issue is now pending before the United States Supreme Court.

A. Case No. 5-CA-30118

The FLRA has held that Section 7131(a) of the Statute requires an agency to pay employee representatives of an exclusive collective bargaining representative engaged in contract negotiations, the travel and per diem expenses of such representatives for the time engaged in negotiations. Interpretation and Guidance, 2 FLRA 265 (1979); Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, 4 FLRA 288 (1980), enforced sub nom. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 672 F.2d 732 (9th Cir. 1982), enforcement denied and case reversed 52 USLW 4013, No. 82-799 (U.S. November 29, 1983) and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra. But see, Division of Military and Naval Affairs, State of New York, Albany, New York, 7 FLRA 458 (1981), reversed sub nom. Division of Military and Naval Affairs v. Federal Labor Relations Authority, 683 F.2d 45 (2d Cir. 1982), U.S. Department of Agriculture, Science and Education Administration, Agricultural Research, North Central Region, Dakotas-Alaska Area, 6 FLRA 265 (1981), reversed sub nom. United States Department of Agriculture v. Federal Labor Relations Authority, 691 F.2d 1242 (8th Cir. 1982); and Florida National Guard, 5 FLRA 365 (1981) reversed sub nom. Florida National Guard and Department of Defense, v. Federal Labor Relations Authority, 699 F.2d (11th Cir., 1983). The United States Supreme Court in the Bureau of Alcohol, Tobacco and Firearms, v. FLRA, supra, in reversing the FLRA held that the Section 7131(a) of the Statute does not require the payment of travel and per diem expenses to Union negotiators. Accordingly, I conclude Respondent did not, in this respect violate Section 7116(a)(8) of the Statute.

In the instant case, however, Respondent, in the ground rules, agreed to pay travel and per diem for the Union negotiators on official time. Such conduct by Respondent constituted a patent breach of a collective bargaining agreement and thus was in violation of Section 7116(a)(1) and (5) of the Statute. Cf. Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982) and Internal Revenue Service, OALJ 81-37 (July 21, 1982). The subject case does not involve a dispute as to the meaning of the ground rules but rather a total rejection by Respondent of the ground rules term requiring payment of travel and per diem expenses. In this regard the Supreme Court specifically stated that Section 7131(a) of the Statute does not preclude an agency from paying the travel and per diem expenses and recognized that a Union and agency can negotiate and contract for such payments. Bureau of Alcohol, Tobacco and Firearms v. FLRA, supra, foonote 17. Such a case is the instant one.

B. Case No. 5-CA-30338

Respondent contends that the Adjutant General of Ohio is permitted to declare the wearing of a military uniform non-negotiable pursuant to

Section 7106(a)(1)[3] of the Statute which provides that any management official may "determine the mission . . . internal security practices of the agency" and pursuant to 7106(b)(1) of the Statute which provides that nothing shall preclude any agency and any labor organization from negotiating . . . (1) at the election of the agency, . . . on the technology, methods and means of performing the work; . . ." Respondent contends that the Adjutant General of Ohio has determined that the use of a military uniform is necessary to carry out the mission of the agency and for internal security.

Respondent "urges that the military uniform, in a military facility, worn by personnel working on military equipment, when those personnel have a definite mission of defense of those facilities and equipment is well within the internal security practices to be determined by the Adjutant General."[4]

The Ohio Air National Guard's mission is to provide trained, qualified, combat-ready forces in support of the active duty Air Force, including the maintenance of aircraft, etc. It may be reasonably concluded that internal security would be enhanced, improved or better maintained if all civilian technicians were required to wear military uniforms while on duty. Such civilian employees would be easily identifiable, internal security forces can be more quickly mobilized and such civilian technicians, when in military uniform, would be more readily obeyed by civilians.

The General Counsel of the FLRA points out that, when various State National Guards have refused to comply with FSIP awards, the FLRA has ordered parties to adopt union proposals containing nearly identical to the language involved herein. See State of Nevada National Guard, 7 FLRA 245 (1981); Puerto Rico Air National Guard, 8 FLRA 480 (1982); Division of Military and Naval Affairs, State of New York, 8 FLRA 158 (1982), remanded sub nom. State of New York, Division of Military and Naval Affairs, (Albany, New York) and Department of Defense v. Federal Labor Relations Authority, 696 F.2d 202 (CA. 202, 1982); Florida National Guard, 9 FLRA 347 (1982). Further once a determination of negotiability has been made by the FLRA concerning a proposal a subsequent declaration of non-negotiability by another party with respect to a similar proposal constitutes a refusal to bargain in good faith unfair labor practice, so long as no meaningful differences can be found between the two proposals. See Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981); Veterans Administration, Veterans Administration Regional Office, Buffalo, New York, 10 FLRA 167 (1982); Veterans Administration Medical Center, Northport, New York, 10 FLRA 675 (1982).

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[3] Respondent's counsel specifically stated at the hearing that Respondent was arguing that the uniform issue was a permissive subject for bargaining under Section 7106(b)(1) not that it is forbidden to bargain about it under Section 7106(a) of the Statute. Tr. pp. 13-14. Respondent has apparently changed its position in its brief.

[4] See page 36 of Respondent's brief.

The FLRA, however, has never specifically addressed the question of whether the wearing of the military uniform by civilian technicians is a subject covered by Section 7106(a)(1) of the Statute dealing with internal security or covered by Section 7106(b)(1) of the Statute dealing with the technology and means of performing work. The General Counsel of the FLRA submits that it is implicit in the FLRA's findings of violation when National Guards have refused to adopt the work attire language ordered by FSIP, that work attire is a mandatory subject of bargaining. This argument is rejected. The decisions of the FLRA dealing with the FSIP, work attire awards did not discuss whether, in the circumstances and facts of those cases, the wearing of the uniforms was a matter within the purview of Section 7106(a) and (b) of the Statute and there is absolutely nothing in those decisions to indicate that the respondent National Guards made such a contention. Accordingly, these FLRA decisions are not dispositive of the questions presented herein.

It must be determined herein, therefore, whether the wearing of a military uniform by the civilians is a matter of "internal security" under Section 7106(a)(1) of the Statute or "technology, methods and means of performing work" under Section 7106(b)(1) of the Statute so as to permit Respondent to refuse to bargain about such matter.

Protecting its facilities and equipment, including planes, is clearly a responsibility of Respondent. It is noted that planes of the Puerto Rico National Guard have been destroyed. In such circumstances, a requirement that all civilian technicians must wear military uniforms can not be said to be an unreasonable security precaution. When wearing military uniforms, civilian technicians are easily identifiable, quickly mobilized for security purposes and more readily obeyed by non-employee civilians. Thus it is a reasonable internal security practice and Respondent is privileged under a Section 7106(a)(1) of the Statute, to require the wearing of military uniforms by civilian technicians and to refuse to bargain about such determination. Cf. American Federation of Government Employees, Local 15, and Department of the Treasury, Internal Revenue Service, 2 FLRA 874 (1980).

Similarly, Respondent contends that the wearing of the military uniform involves the technology and method of performing the work. In this regard, Respondent states the use of safety shoes and non-static jackets and clothes are required for safety considerations and that military uniforms meet these requirements. A determination concerning appropriate safety equipment, assuming such determination is not totally unreasonable, comes within the purview of "the technology, methods, and means of performing work" as set forth in Section 7106(b)(1) of the Statute. Accordingly, it is concluded that the wearing of the military uniform by civilian technicians is a safety determination by Respondent, pursuant to Section 7106(b)(1) of the Statute, about which at its own election, Respondent is not required to bargain.5/

It can be argued, with respect to both the internal security and "technology, methods and means of performing work" considerations, that how these considerations can be met or best accomplished should be negotiable. The entire thrust of Section 7106(a)(1) of the Statute is that once a matter is determined6/ to be an internal security practice it is *not* negotiable, even though the Union might reasonably contend that the same end can be better achieved by utilizing other means. Similarly the thrust of Section 7106(b)(1) of the Statute is that, once a matter is determined to be the "technology, methods, and means of performing work" Respondent, at its own election, need not negotiate concerning such matter, even though the Union might reasonably contend that the same objective could be better achieved by utilizing other means.7/

In light of all the foregoing, it is concluded that Respondent did not violate Sections 7116(a)(1) and (5) of the Statute when, upon expiration of the then existing collective bargaining agreement, it declared the Union's proposal concerning the wearing of the military uniform non-negotiable and refused to bargain about it.

C. Case No. 5-CA-30091

This case deals with the contention that, after the termination of the collective bargaining agreement, Respondent violated Sections 7116(a)(1) and (5) of the Statute by refusing to continue to adhere to

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5/ This, of course does not mean Respondent is not required to bargain about the impact and implementation of such a determination. See Section 7106(b)(2) and (3) of the Statute.

6/ Of course such determinations must be reasonably related to internal security. An assertion that a matter is related to internal security, where such assertion is frivolous, would not invoke the operation of Section 7106(a)(1) of the Statute.

7/ Of course such determination must be reasonably related to the technology of doing the work. A mere assertion of such, where frivolous, would not invoke the operation of Section 7106(b)(1) of the Statute.

those provisions of the agreement concerning the wearing of civilian "uniform" by civilian technicians, the grievance procedure and the processing of disciplinary and adverse actions. It is contended that Respondent thereby unilaterally changed the terms and conditions of employment.

The FLRA holds that terms and conditions of employment, established by a collective bargaining agreement, continue in force and effect after the expiration of the agreement, unless the parties mutually agree otherwise. Cf. Department of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, California, 4 FLRA 22 (1980), hereinafter called the George Air Force Base case; Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 4 FLRA 760 (1980) and U.S. Nuclear Regulatory Commission, 6 FLRA 18 (1981). In the George Air Force Base case, supra, FLRA specifically held that "negotiated grievance and arbitration procedures must continue as established upon the expiration of a negotiated agreement, absent express agreement by the parties to the contrary . . . ." An agency, may upon the expiration of a collective bargaining agreement, however, change provisions of the agreement concerning permissive subjects of bargaining. U.S. Naval Station, Mayport, Florida, 6 FLRA 133 (1981).

In light of the foregoing and having already determined that the determination that civilian technicians must wear military uniforms is covered by Sections 7106(a) and (b) of the Statute, it is concluded that Respondent was permitted, at the termination of the agreement, to unilaterally change the agreement's provisions and to unilaterally require civilian technicians to wear military uniforms. Accordingly, it is concluded, in this respect that Respondent did not violate Sections 7116(a)(1) and (5) of the Statute. Cf. U.S. Naval Station, Mayport, Florida, supra.

Respondent argues that, with respect to the grievance procedure or the procedure for the processing of disciplinary and adverse actions, the National Guard Technicians Act of 1968, Public Law 90-486, 32 U.S.C. 709, the Adjutant General is the final authority with respect to adverse actions affecting civilian technicians and is not, in this area, subject to the provisions of the Statute. Respondent relies upon New Jersey Air National Guard v. Federal Labor Relations Authority, 677 F.2d 276 (3rd Cir. 1982); cert denied 103 S. Ct. 343 (1982).8/ The FLRA in dealing with the relationship of the Statute and the National Guard Technicians Act of 1968, however, specifically rejected the contention that Section

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8/ American Federation of Government Employees, AFL-CIO, Local 3486 and New Jersey Air National Guard, 177th Fighter Interceptor Group, Pamora, New Jersey, 5 FLRA 209 (1981); reversed sub nom. New Jersey Air National Guard v. Federal Labor Relations Authority, 677 F.2d 276 (3th Cir. 1982); cert denied 103 S. Ct. 343 (1982).

709(e) of the National Guard Technicians Act of 1968 requires the specific exclusion of adverse actions involving technicians from coverage under negotiated grievance procedures. Michigan Army National Guard, Lansing, Michigan, 11 FLRA 365 (1983), foonote on page 365 and the cases cited therein. See also NAGE Local R12-132 and California National Guard, 5 FLRA 201 (1981), reversed sub nom. California National Guard, v. Federal Labor Relations Authority, 697 F.2d 874 ((9th Cir. 1983). I am constrained to follow the decisions of the FLRA and accordingly reject Respondent's contention that Section 709(e) of the National Guard Technicians Act of 1968 specifically reserves adverse actions to the Adjutant General and that in the case of adverse actions the Statute's mandates concerning negotiated grievance procedures and bargaining do not apply.

I therefore conclude that Respondent violated Sections 7116(a)(1) and (5) of the Statute when, at the termination of the collective bargaining agreement, it refused to continue to adhere to those provisions of the agreement dealing with the grievance procedure and the processing of disciplinary and adverse actions.

Having found and concluded that Respondent violated Sections 7116(a)(1) and (5) of the Statute, I recommend the Authority issue the following:

ORDER

Pursuant to Section 2423.23 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, it is hereby ordered that the Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio shall:

1. Cease and desist from:

   (a) Failing and refusing to give effect to the agreement between American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, which sets forth the collective bargaining ground rules and which provides payment of travel and per diem expenses to representatives designated by the Union for the time spent in collective bargaining negotiations.

   (b) Unilaterally changing the grievance procedure and the procedure for the processing of disciplinary and adverse actions or any other condition of employment without first notifying AFGE Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, and giving it an opportunity to bargain about any such change.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide representatives designated by American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, with necessary travel and per diem expenses, for the time spent in contract negotiations, in compliance with the ground rules and make whole representatives for such travel and per diem expenses which they have not been paid.

(b) Reinstate the grievance procedure and the procedure for processing disciplinary and adverse actions as provided in the expired collective bargaining agreement with American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO.

(c) Post at its various installations of the Ohio Air National Guard wherein unit employees are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations AUthority. Upon receipt of such forms, they shall be signed by an authorized representative of the Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced or covered by any other materials.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED, that the complaints in all other aspects are hereby dismissed.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: December 20, 1983
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to give effect to the agreement between American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, which sets forth the collective bargaining ground rules and which provides payment of travel and per diem expenses to representatives designated by the Union for the time spent in collective bargaining negotiations.

WE WILL NOT unilaterally change the grievance procedure and the procedure for the processing of disciplinary and adverse actions or any other condition of employment without first notifying AFGE Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, and giving it an opportunity to bargain about any such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL provide representatives designated by American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO, with necessary travel and per diem expenses, for the time spent in contract negotiations, in compliance with our ground rules and make such representatives whole for such travel and per diem expenses which they have not been paid.

WE WILL reinstate the grievance procedure and the procedure for processing disciplinary and adverse actions as provided in the expired collective bargaining agreement with American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 127, AFL-CIO.

____
(Agency or Activity)

Dated: ____________________ BY: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to give effect to the agreement between American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 177, AFL-CIO, which sets forth the collective bargaining ground rules and which provides payment of travel and per diem expenses to representatives designated by the Union for the time spent in collective bargaining negotiations.

WE WILL NOT unilaterally change the grievance procedure and the procedure for the processing of disciplinary and adverse actions or any other condition of employment without first notifying AFGE Ohio Council of Air National Guard Locals, Council 177, AFL-CIO, and giving it an opportunity to bargain about any such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL provide representatives designated by American Federation of Government Employees, Ohio Council of Air National Guard Locals, Council 177, AFL-CIO, with necessary travel and per diem expenses, for the time spent in contract negotiations, in compliance with the ground rules and make such representatives whole for such travel and per diem expenses which they have not been paid.

WE WILL reinstate the grievance procedure and the procedure for processing disciplinary and adverse actions as provided in the expired

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PUEBLO DEPOT ACTIVITY
PUEBLO, COLORADO

Activity

and

Case Nos. 7-CU-40016
7-CU-40020

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-5

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority pursuant to the Union's request for reconsideration of the Authority's Order of March 6, 1985, dismissing the Union's application for review of the Regional Director's Decision and Order on Petitions for Clarification of Unit. For the reason set forth below, the Union's request must be denied.

The Regional Director's Decision and Order in this case was dated and issued on December 31, 1984. Therefore, under section 2422.17(a) of the Authority's Rules and Regulations, and as stated in the Regional Director's Decision and Order, the application for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on March 1, 1985. However, the application for review was not filed until March 4, 1985, and was dismissed as untimely.

In its request for reconsideration, the Union recognizes that its application for review was untimely filed under the Statute and the Authority's Rules and Regulations. However, it requests reconsideration of the dismissal action on the ground that its application was deposited with the U.S. Postal Service on February 28, 1985, for guaranteed next day delivery to the Authority by Express Mail. The Union asserts that it should not be penalized because of the failure of the Postal Service to deliver the application as promised.

While the Union's arguments are well-taken, the Authority has previously held that the date a document is deposited with the U.S. Postal Service is not controlling in timeliness determinations under the Authority's existing Rules and Regulations. While the Union may have had reason to believe that is application for review would be timely delivered by the Postal Service, the Authority has also previously held that the failure of the Postal Service to deliver a document by a certain date is not an "extraordinary circumstance" within the meaning of section 2429.17 of the Authority's Rules and Regulations. *See*, *for example*, *American Federation of Government Employees, AFL-CIO, Local 3896 and U.S. Department of Education, Region V, Chicago, Illinois*, 11 FLRA 89 (1983), request for reconsideration denied, 12 FLRA 756 (1983); and *Bremerton Metal Trades Council, United Association, Local 631 and Puget Sound Naval Shipyard*, 7 FLRA 787 (1982), request for reconsideration denied, 9 FLRA 1094 (1982). Further, in spite of the Union's equitable argument, the Authority has determined in sections 2422.17 and 2429.23(d) of its regulations that the time limit involved in this case may not be waived, and we are without authority to modify our existing Rules and Regulations by merely issuing a decision. *See* 2 K. Davis, *Administrative Law Treatise*, § 7.29, at 155-156 (2d Ed. 1979).

In this case the Union's application was not timely filed, and in view of applicable regulations */ and clear Authority precedent, the Authority must conclude that the Union has failed to establish an extraordinary circumstance warranting reconsideration of the Authority's Order of dismissal dated March 6, 1985. Accordingly, the Union's request is hereby denied.

Issued, Washington, D.C., May 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ It is a general principle that an agency is to be held to the terms of its regulations. 1 C. Koch, *Administrative Law and Practice*, § 3.74 (1985); *U.S. v. Coleman*, 478 F.2d 1371, 1374 (9th Cir. 1973).

9/case no. 369

Federal Labor Relations Authority

Washington, D.C. 20424

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NEGOTIABILITY CASES

21 FLRA No. 126 (May 30, 1986)

National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, Case No. 0-NG-1013

21 FLRA No. 127 (May 30, 1986)

National Federation of Federal Employees and U.S. Department of the Interior, U.S. Geological Survey, Eastern Mapping Agency, Case Nos. 0-NG-746 and 0-NG-748

21 FLRA No. 128 (May 30, 1986)

National Treasury Employees Union, Chapter 153 and Department of the Treasury, U.S. Customs Service, Case No. 0-NG-814

21 FLRA No. 129 (May 30, 1986)

American Federation of Government Employees, AFL-CIO, Local 12 and Department of Labor, Case No. 0-NG-938

UNFAIR LABOR PRACTICE CASE

21 FLRA No. 125 (May 30, 1986)

Department of Defense Dependents Schools System and Overseas Education Association, Case No. 31 FLRA 40176

Y3.F31/21-3:

REPRESENTATION CASE

*Case No. 2-CU-60002 (Order Denying Application for Review) (May 30, 1986)

Equal Employment Opportunity Commission, Philadelphia District Office and American Federation of Government Employees, Local 3614, AFL-CIO,

ARBITRATION CASES

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

May 30, 1986

0-AR-1121 0-AR-1120 0-AR-1126

Federal
Labor Relations
Authority

21 FLRA No. 125

Dep't of Defense Dependents Schools System and Overseas Education Association, Case No. 31-CA-40176 (Decided May 30, 1986)

DIGEST HEADINGS	STATUTE
4000 UNFAIR LABOR PRACTICE: AGENCY 4500 Refusal to Negotiate	7116(a)(1) and (5) 7131(a)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Repudiation of Collective Bargaining Agreement
        - Travel and Per Diem
  - Official Time
    - Travel and Per Diem
  - Procedure
    - Authority's Jurisdiction
      - Travel and Per Diem [Travel Expense Act, 5 U.S.C. §§ 5701 et seq.]
    - Forums
      - Interpretation of Collective Bargaining Agreement
      - Repudiation of Collective Bargaining Agreement
  - Remedy
    - Comply with Travel and Per Diem CBA Provisions
    - Make Whole Employees for Loss of Travel and Per Diem

DIGEST NOTES

The agency violated § 7116(a)(1) and (5) when, contrary to a valid provision in the parties existing agreement, the agency unilaterally ceased payment of travel and per diem expenses to union representatives on official time. The agency initiated its action based on an apparent misinterpretation of the requirements of the Travel Expense Act [5 U.S.C. § 5701 et seq.]. Because the Travel Expense Act does not specifically address payment of travel expenses incurred by employees engaged in labor-management activity, the Authority found that it has jurisdiction to consider the issues raised in the complaint. Moreover, since the matter involves an alleged repudiation of the parties' collective

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bargaining agreement, unfair labor practice proceedings are appropriate. While § 7131(a) does not entitle employees on official time to the payment of travel and per diem expenses, parties may mutually decide what labor relations activities are sufficiently within the interest of the United States so that payment of travel and per diem expenses may be made. Since provisions authorizing the payment of travel and per diem expenses had been negotiated by the parties and incorporated into the terms of their agreement, the parties were obligated to adhere to those provisions.

Federal Labor Relations Authority

21 FLRA No. 126

NTEU and Dep't of the Treasury, IRS, Case No. 0-NG-1013 (Decided May 30, 1986)

DIGEST HEADINGS

2000. NEGOTIABILITY
    2011 Conditions of Employment
7500 OFFICIAL TIME

STATUTE

7103(a)(14)
7105(a)(2)(E)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem for Union Officials on Official Time
5 U.S.C. §§ 5701 et seq.
41 C.F.R. Part 101-7

DIGEST NOTES

A proposal is within the duty to bargain that would pay travel and per diem for all union employee negotiators on official time. The proposal concerns a condition of employment within the meaning of § 7103(a)(14) and is not contrary to the Travel Expense Act [5 U.S.C. §§ 5701 et seq.] or the Federal Travel Regulations [41 C.F.R. Part 101-7].

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Federal
Labor Relations
Authority

21 FLRA No. 127

NFFE and Dep't of the Interior, U.S. Geological Survey, Eastern Mapping Agency, Case Nos. 0-NG-746 and 0-NG-748 (Decided May 30, 1986)

DIGEST HEADINGS

2000 NEGOTIABILITY
  2150 Management Rights
    2151.05 Budget
    2152.05 Assign Employee
    2152.10 Direct Employee
    2152.25 Suspend or Remove
    2152.40 Assign Work
7500 OFFICIAL TIME

STATUTE

7105(a)(2)(D) and (E)
7106(a)(2)(A) and (B)
7106(b)(2) and (3)
7114(c)

SUBJECT MATTER INDEX ENTRIES

Federal Travel Act
Federal Travel Regulations
FPM Ch. 300, Subch. 8-3.a
Negotiability
  Administrative Leave - Mandatory Granting of
  Discipline
    Effective and Efficient Government
      10 Day Advance Notice of Removal of Employee
  Management Rights
    Assign Employees - Details - Limitations
    Assign Work
      Details - Limitations
      10 Day Advance Notice of Removal of Employee
    Budget - Travel and Per Diem
    Direct Employee
      10 Day Advance Notice of Removal of Employee
    Layoff Employees
    Remove Employee
      10 Day Advance Notice of Removal of Employee
Official Time - Travel and Per Diem
5 U.S.C. § 7105(a)(2)(D)
5 U.S.C. § 7513(a) and (b)(1)

DIGEST NOTES

A provision is nonnegotiable that requires the agency to grant employees 10 days advance notice in writing of a disciplinary action resulting in removal of the employee. Under 5 U.S.C. § 7513(b)(1), the usual thirty-day advance notice of an intent to take an action against an employee is suspended when there is reasonable cause to believe that employee has committed a crime punishable by imprisonment. In such circumstances the agency may immediately remove that employee. The failure of the proposal to acknowledge management's authority in this situation substantively interferes with management's rights to take appropriate disciplinary action, and to remove employees under § 7106(a)(2)(A). Moreover, during the prescribed ten additional workdays, management has no effective method of holding those employees accountable for their failure or refusal to carry out assigned work. Thus the provision interferes with management's rights to direct employees and assign work under § 7106(a)(2)(A). Finally, since such employees could refuse, with impunity, to carry out their assignments, there is an adverse affect on the effective and efficient conduct of Government operations. That is, employees involved are to be separated for "such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), yet the provision requires their retention in a paid status for ten addition days after the termination decision has been reached. (provision 1)

A provision is nonnegotiable that lists situations in which employees may be detailed. FPM Ch. 300, Subch. 8-3.a authorizes details in other circumstances than those included on the list. Because the proposal is intended to circumvent management's ability to detail employees, the provision is inconsistent with management's right to assign employees and assign work under § 7106(a)(2)(A) and (B). (provision 2)

A provision authorizing travel and per diem payments to union representatives engaged in labor-management relations activities is negotiable. Such provisions concern conditions of employment and are consistent with the Travel Expense Act and the Federal Travel Regulations. Also, because the agency did not substantially demonstrate that the provision would result in a significant and unavoidable increase in costs, not offset by compensating benefits, the Authority did not sustain the agency's argument that the provision would interfere with its right to determine its budget under § 7106(a)(2)(A). (provision 3)

A provision is negotiable that requires the granting of administrative leave or excused absences after the agency has decided to close temporarily the installation for circumstances beyond the its control such as snow storms, floods, lack of heat or electricity. The provision does not apply to circumstances where laying off employees would be the appropriate course of action in accordance with applicable regulatory requirements. Nor would the provision require that employees be excused from work. Accordingly, the provision does not interfere with management's rights to layoff, assign, or direct employees under § 7106(a)(2)(A). (provision 4)

Federal Labor Relations Authority

21 FLRA No. 128

NTEU, Chapter 153 and Dep't of the Treasury, U.S. Customs Service, Case No. 0-NG-814 (Decided May 30, 1986)

DIGEST HEADINGS

- 2000 NEGOTIABILITY
  - 2150 Management Rights
    - 2152.40 Assign Work
  - 2200 Subjects of Bargaining
    - 2201 At Election of the Agency
      - 2201.01 Numbers, Types and Grades of Employees
      - 2201.05 Technology of Performing Work
      - 2201.10 Methods and Means of Performing Work
  - 2210 Mandatory Subjects of Bargaining
    - 2210.01 Procedures
  - 2700 Petition for Review
    - 2703 Service
    - 2709 Contents of Petition

STATUTE

7105(a)(2)(D) and (E)
7106(a)(2)(A) and (B)
7106(b)(1) and (2)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Hours of Work
    - Clean Up Time
    - Meal Periods
    - Shifts
      - Lunch Periods
      - Negotiations on Establishment of Staffing with Volunteers
  - Management Rights - Assign Work - Clean Up Time
  - Subjects of Bargaining
    - At the Election of the Agency
      - Methods and Means of Performing Work
        - Government Vehicle to Travel Between Work Sites
      - Number, Types and Grades of Employees - New Shift
      - Technology of Performing Work
        - Government Vehicle to Travel Between Work Sites
    - Mandatory Subjects of Bargaining
      - Procedures - Volunteers for New Shift
  - Procedure
    - Service
    - Statement of Proposal's Meaning
  - Vehicle - Government Vehicle to Travel Between Work Sites

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ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

Where the union provided a satisfactory statement of the proposals' meaning in the completion of its appeal which was served on the agency head, the petition for review was not deficient.

Disputes of factual issues are not properly appealed to the Authority under its negotiability procedures and § 7105(a)(2)(D) and (E); rather such issues should be resolved in other appropriate proceedings. Thus the Authority did not consider in its negotiability proceedings issues concerning whether or not there was a duty to bargain (1) based on the applicability of provisions in an expired national agreement which had not been renegotiated; (2) based on a dispute of whether or not a proposal relates to a change in working conditions; (3) based on the agency's allegation that there was not a change in working conditions relating to a proposal.

Proposals are nonnegotiable that effectively nullify management's decision to establish a new tour of duty. The proposal interfere with management's elective right under § 7106(b)(1) to determined the "number, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty". (proposals 1 and 4)

A proposal that seeks to staff a new tour of duty established by the agency with volunteers, is a negotiable procedure under 7106(b)(2). (proposal 2)

A proposal is negotiable that sets out the time frame within the hours of a new shift established by management, in which employees will take their unpaid half-hour lunch break. (proposal 5)

A proposal is negotiable that requires the agency to provide government vehicles to employees who are required to travel from one work site to another during their established tours of duty. The proposed transportation is unrelated to the performance of the agency's work and therefore does not concern the technology, methods or means of performing work within the meaning of § 7106(b)(1). (proposal 6)

A proposal is nonnegotiable that requires the agency to give employees time during their hours of duty to clean up and change uniforms prior to starting work. The proposal interferes with management's right to assign work under § 7106(a)(2)(B) because it would preclude the assignment of other types of work during the specified period. (proposal 7)

Federal
Labor Relations
Authority

21 FLRA No. 129

AFGE, Local 12 and Dep't of Labor, Case No. 0-NG-938
(Decided May 30, 1986)

DIGEST HEADINGS	STATUTE
2000 NEGOTIABILITY	7101(b)
2011 Conditions of Employment	7105(a)(2)(E)
2150 Management Rights	7106(a)(2)(A) and (B)
2152.10 Direct Employees	7106(b)(1)
2152.40 Assign Work	7117(c)
2700 Petition for Review	
2710 Statement of Position	

SUBJECT MATTER INDEX ENTRIES

- Federal Property Management Regulations (FPMR)
  - Temporary Regulation D-68
  - Temporary Regulation D-71 [41 C.F.R. § 101-17 (1985)]
- Negotiability
  - Conditions of Employment
    - Furniture
    - Space (Reduction, Allocation, Arrangement, etc.)
  - Management Rights
    - Assign Work
      - Performance Standards
    - Direct Employees
      - Performance Standards
  - Performance Standards
    - Contents
  - Procedure
    - Burden of Creating a Record Upon Which the Authority Can Make a Negotiability Determination

DIGEST NOTES

Proposals concerning reductions in space; space allocation; the arrangement of space; the furniture and equipment to be utilized by employees, are matters that principally relate to conditions of employment. The agency did not allege that any of these proposals were contrary to applicable law, rule or regulation and, hence, were nonnegotiable. Rather, the agency's

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

sole contention was that the implementation of GSA space reduction regulation [FPMR Temporary Reg. D-71, 41 C.F.R. § 101-17 (1985) at 333] would have no material effect or substantial impact on conditions of employment of bargaining unit employees. The effect of the agency's actions on conditions of employment is a factual matter. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in specific circumstances of the case, such issues should be raised in other appropriate proceedings. As to the negotiability of the proposals, the parties have the burden of creating a record upon which the Authority can make a negotiability determination. Since the agency did not claim that the proposals were contrary to applicable law, rule or regulation, and it is not otherwise apparent, the Authority found the proposals to be within the duty to bargain. (proposals 1-16, 18, 19 and 21-24)

Proposals are nonnegotiable that require adjustments to performance standards as a result of the adverse impact on performance by a reduction in space. Proposals directly addressing the content of performance standards interfere with management's right to assign work and direct employees under § 7106(a)(2)(A) and (B). (proposals 17 and 20)

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21 FLRA No. 125

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS SYSTEM

Respondent

and Case No. 31-CA-40176

OVERSEAS EDUCATION ASSOCIATION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority based on the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations. The complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by repudiating the parties' collective bargaining agreement which provides for payment of certain travel and per diem expenses, thereby failing to bargain in good faith with the Charging Party.

II. Background

The parties' collective bargaining agreement, which was negotiated in 1977 and continues in full force and effect, contains the following provisions relating to the payment of travel and per diem expenses which are the subject of this case:

> Article 10 - Association Management Deliberations
>
> The (Union's) Area Director shall be in duty status during such deliberations in accordance with Article 8, Section 2 and shall receive transportation and per diem at government expense in accordance with the JTR. The

Area Director may be accompanied and assisted for such deliberations by no more than three teachers in duty status and receiving transportation and per diem at government expense in accordance with the JTR.

Article 13 - Grievance Procedure[1]

All participants, including witnesses, in the hearing shall be in a duty status and, in the event the hearing is not held at a site within commuting distance, participants, including witnesses, shall be provided transportation in accordance with the JTR, Vol. II.

Under these provisions, the Respondent paid the travel and per diem expenses of its employees who were the Charging Party's representatives at deliberations and of bargaining unit employees at arbitration hearings. This practice existed since at least 1977. On February 21, 1984, the Respondent notified the Charging Party that effective on March 10, 1984, it would no longer make the payments for travel and per diem expenses required by Articles 10 and 13 of the parties' agreement. This action was based upon the Respondent's view that Articles 10 and 13 were not in compliance with law and that decisions concerning whether or not to pay travel and per diem expenses would be made solely by management.

III. Positions of the Parties

The Respondent argues that the Authority lacks jurisdiction to resolve the issues raised in the complaint because reimbursement for travel and per diem expenses is covered by § 5702 of the Travel Expense Act, 5 U.S.C. §§ 5701, et seq., not the Statute; that implementation of the United States Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), on the matter of payment for travel and per diem expenses, as applicable to this case, is subject to the parties' contractual grievance procedure and not to the unfair labor practice procedures of the Statute; and that there can be no repudiation of contractual rights or privileges where none exist,/which is the case here. The

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[1] This provision addresses attendance at arbitration hearings. Although it does not specifically reference payment of per diem expenses, the parties' stipulation indicates that such payment is encompassed by the provision.

Respondent further argues that the mere announcement of an intention to no longer pay travel and per diem expenses without any actual denial of such payments is not a violation of the Statute, and that it did not unlawfully refuse to bargain.

The General Counsel's position, as set forth in the complaint, is that the Respondent unilaterally repudiated the parties' collective bargaining agreement and thereby failed and refused to negotiate in good faith with the Charging Party.[2]

IV. Analysis

As to the Respondent's first contention to the effect that the Authority lacks jurisdiction under the Statute to address payment of travel and per diem expenses, the Authority notes its recent decision in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986). In that case, the Authority found that the Travel Expense Act, 5 U.S.C. §§ 5701, et seq., does not specifically address payment of travel expenses incurred by employees engaged in labor-management activity. Therefore, the Respondent's contention that the Authority lacks jurisdiction to resolve the issues raised in the complaint because they are covered by the Travel Expense Act is without merit.

The answer to the Respondent's second contention, that the issues raised in this case are subject to the parties' contractual grievance procedure rather than to the unfair labor practice procedures of the Statute, is that we are here presented with an alleged repudiation of the agreement rather than with differing and arguable interpretations of that agreement. It is entirely appropriate to resolve this issue in an unfair labor practice proceeding. See, for example, American Federation of Government Employees, Local 1923, AFL-CIO, 20 FLRA No. 88 (1985). As to the substantive issues raised by the complaint and the Respondent's further contentions addressing those issues, the Authority concludes that the announced intention to no longer make payments of travel and per diem expenses was an unlawful repudiation of the parties' agreement, as explained below.

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[2] The General Counsel's brief was untimely filed and therefore has not been considered.

As already noted, the parties had negotiated for the payment of travel and per diem expenses and had included those provisions in their collective bargaining agreement. Under these provisions, payment of travel and per diem expenses was made by the Respondent for its employees who represented the Charging Party at deliberations with Agency management, as well as for bargaining unit employees at arbitration hearings. At the time that the Respondent notified the Charging Party that the payments would no longer be made under the terms of the agreement but would be based solely upon a decision by management, the United States Supreme Court had rendered its decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), finding that section 7131(a) of the Statute did not entitle employees on official time to the payment of travel and per diem expenses. However, the Court added in footnote 17 of its decision that "unions may presumably negotiate for such payments in collective bargaining as they do in the private sector." 464 U.S. at 107. Following that decision, the Authority decided in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, supra, that a union's proposal which would require an agency to pay travel and per diem expenses incurred by employees using official time, while not an entitlement under the Statute, is within the duty to bargain as it is not inconsistent with law or Government-wide regulation. In reaching its decision, the Authority found that agencies have discretion to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds and, further, that the exercise of such discretion is subject to negotiation. Therefore, parties may mutually decide what labor relations activities are sufficiently within the interest of the United States so that payment of travel and per diem expenses may be made. Within these negotiated parameters, however, determinations as to the appropriateness of specific travel and per diem expenses which are necessary and proper under law and governing regulation would have to be made on a case-by-case basis.[3]

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[3] See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), slip op. at pp. 6-7; see also American Federation of

(Continued)

In this case, the provisions authorizing the payment of travel and per diem expenses had been negotiated by the parties and incorporated into the terms of their agreement. The parties therefore were obligated to adhere to those provisions during the term of their agreement which, as previously noted, the parties stipulated has continued in full force and effect. *Internal Revenue Service*, 17 FLRA 731, 734 (1985), *petition for review filed sub nom. National Treasury Employees Union v. FLRA*, No. 85-1361 (D.C. Cir. June 14, 1985). The Respondent has not shown that the provisions of Articles 10 and 13 are inconsistent with law and regulation; rather, we note that payment for travel and per diem expenses is within the duty to bargain. The Respondent's announced intention to no longer make payments for travel and per diem expenses in accordance with the contractually agreed-upon provisions therefore constituted a repudiation of the agreement which was inconsistent with the Respondent's good-faith bargaining obligation in violation of the Statute. *See Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio*, 21 FLRA No. 124 (1986).

V. Conclusion

The Authority finds that the Respondent repudiated the parties' collective bargaining agreement providing for payment of travel and per diem expenses, and thereby failed to bargain in good faith with the Charging Party in violation of section 7116(a)(1) and (5) of the Statute. To remedy this unfair labor practice, we shall order the Respondent to abide by the terms of the 1977 agreement and to pay travel and per diem expenses to all bargaining unit employees who submit or previously submitted appropriate claims for such payments under the terms of Articles 10 and 13 of the parties' collective bargaining agreement. Of course, such payments must be consistent not only with the terms of the parties'

(Continued)

Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986) and *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 21 FLRA No. 19 (1986), in which the Authority found proposals authorizing payment of various travel and per diem expenses to be within the duty to bargain.

collective bargaining agreement,4/ but also with law and regulation, including the Federal Travel Regulations.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of Defense Dependents Schools System shall:

1. Cease and desist from:

(a) Repudiating the terms of Articles 10 and 13 of the 1977 collective bargaining agreement negotiated with the Overseas Education Association, the exclusive representative of its employees, which provides for the payment of travel and per diem expenses, thereby failing and refusing to bargain in good faith with the Overseas Education Association.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the 1977 collective bargaining agreement negotiated with the Overseas Education Association, which provides in Articles 10 and 13 for the payment of travel and per diem expenses to representatives of the Overseas Education Association at deliberations, and unit employees at arbitration hearings.

(b) Pay travel and per diem expenses to all bargaining unit employees who submit or previously submitted appropriate claims for such payments under the terms of Articles 10 and 13 of the 1977 collective bargaining agreement, to the extent that such payments are consistent with the terms of the collective bargaining agreement and law and regulation, including the Federal Travel Regulations.

4/ We note in this regard that the language of Articles 10 and 13 reference that payment will be in accordance with the Joint Travel Regulations.

(c) Post at its facilities where bargaining unit employees represented by the Overseas Education Association are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT repudiate the terms of Articles 10 and 13 of the 1977 collective bargaining agreement negotiated with the Overseas Education Association, the exclusive representative of our employees, which provides for the payment of travel and per diem expenses, thereby failing and refusing to bargain in good faith with the Overseas Education Association.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the 1977 collective bargaining agreement negotiated with the Overseas Education Association, which provides in Articles 10 and 13 for the payment of travel and per diem expenses to representatives of the Overseas Education Association at deliberations, and unit employees at arbitration hearings.

WE WILL pay travel and per diem expenses to all bargaining unit employees who submit or previously submitted appropriate claims for such payments under the terms of Articles 10 and 13 of the 1977 collective bargaining agreement, to the extent that such payments are consistent with the terms of the collective bargaining agreement and law and regulation, including the Federal Travel Regulations.

____
(Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, 1111 18th Street, N.W., Room 700 (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and Case No. O-NG-1013

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of a single Union Proposal.

II. Union Proposal

> The employer will pay travel and per diem for all union employee negotiators.

A. Positions of the Parties

The Agency contends that the proposal is not within the duty to bargain for the following reasons:

> 1. It does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

2. it is inconsistent with Federal law and Government-wide regulation; and

3. the demand for travel and per diem to employee/negotiators is not limited to those employee/negotiators who are receiving official time.

In its response, the Union states that the proposal "must conform to the Travel Act--a point we do not contest . . . ." See Union Response at page 4. Finally, the Union maintains that its proposal is intended to provide travel and per diem reimbursement only to unit employees authorized to be at the bargaining table on official time.

B. Analysis

1. "Conditions of Employment"

The Agency makes an essentially identical "conditions of employment" argument to that made by the agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) appeal docketed sub nom. Department of Treasury, U.S. Customs Service v. FLRA, Case No. 86-1198 (D.C. Cir. March 27, 1986). The Authority rejected that argument in Customs Service and it is rejected here for the same reasons set forth in that case.

2. Inconsistent with Federal Law and Government-wide Rules or Regulations

The Agency contends, in essence, that under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, a determination as to whether an employee is on "official business" is dependent on the particular facts involved in each individual situation. Consequently, such a determination is not a matter of unlimited discretion on the part of the Agency.

For reasons set forth in our decision in Customs Service, the Authority has found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether and under what circumstances travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business and, hence, to pay for resulting appropriate expenses from Federal funds. The exercise of that discretion was held to be subject to the negotiation process. The Agency here makes no specific argument that the proposal does not meet the statutory and regulatory standards discussed in Customs Service. There is no indication in the record that the Union intends the proposal to be applied contrary to the Federal Travel Regulations. On the contrary, we note that the Union's Response indicates that the proposal is to be read to be in conformity with the Travel Act. Given these circumstances, and for the reasons fully expressed in Customs Service, the Agency's assertion that the proposal is inconsistent with law and Government-wide regulations must be rejected.

3. Limited to Those Employee/Negotiators Who Are Receiving Official Time

The Agency contends that the proposal would entitle employee/negotiators who are not receiving official time to travel and per diem. However, in our view the proposal does not necessarily require payment of travel and per diem to those employee/negotiators who are not receiving official time. Indeed, the Union, as previously noted, interprets the proposal to limit travel and per diem reimbursement to only unit employees authorized to be at the bargaining table on official time. We adopt the Union's interpretation of its proposal for purposes of our decision noting, in any event, that nothing in our analysis in Customs Service indicates that travel and per diem payments depend upon a contemporaneous grant of official time under section 7131. Instead, the negotiability of travel and per diem is based on consideration of whether the travel involved is in the primary interest of the Government so as to constitute "official business". Consequently, we find the Agency's contention not to be supported.

C. Conclusion

Based on the foregoing analysis, the Authority finds that the proposal concerns a condition of employment which is not inconsistent with law or Government-wide regulation. Therefore, the proposal is within the duty to bargain.*/

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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*/ In deciding that the proposal is negotiable, the Authority makes no judgment as to its merits.

Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union Proposal.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

21 FLRA No. 127

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Union

and

Case Nos. O-NG-746
O-NG-748

U.S. DEPARTMENT OF THE INTERIOR,
U.S. GEOLOGICAL SURVEY,
EASTERN MAPPING AGENCY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

These cases are before the Authority because of negotiability appeals filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concern the negotiability of four Union provisions disapproved by the Agency head pursuant to section 7114(c) of the Statute. One of these disapproved provisions, Provision 3, concerns the payment of travel and per diem to employees engaged in various labor-management relations activities. The Union appealed the Agency head's determination on two parts of that provision in Case No. O-NG-746 and the remaining three parts of that provision in Case No. O-NG-748 along with the other three provisions. In these circumstances, the Authority deems it appropriate to consolidate the two cases in the interest of expeditious handling and conservation of resources.

II. Provision 1

> Article 13, Section 6b. Any disciplinary action resulting in removal shall not be effected against the employee for at least ten (10) working days from the receipt of the letter from the deciding official.

A. Positions of the Parties

The Agency contends that under 5 U.S.C. § 7513(b)(1) it has the right to remove immediately an employee where there is reasonable cause to believe that such employee has committed a crime for which a sentence of imprisonment may be imposed. By mandating a ten-day delay in such removal action, Provision 1 directly interferes with the Agency's right to discipline under section 7106(a)(2)(A) of the Statute. The Agency contends further that, since the imposition of a ten-day delay in effecting a removal action results in the Agency being required to assign such employee to perform regular duties or to administrative leave, Provision 1 also violates the Agency's right to assign under section 7106(a)(2)(A).

The Union argues that the provision is a negotiable "procedure" pursuant to section 7106(b)(2) and furthermore is an appropriate arrangement, under section 7106(b)(3) of the Statute, for an employee adversely affected by the exercise by management of its right to remove.

B. Analysis

1. Management Rights

Under 5 U.S.C. § 7513(b)(1) the usual thirty-day advance notice of an intent to take an action against an employee is suspended when there is reasonable cause to believe that employee has committed a crime punishable by imprisonment. In such circumstances an agency may immediately remove that employee. Provision 1, however, does not make an exception for such a situation, nor does the Union indicate that application of the provision would be suspended in such circumstances. Consequently, it must be concluded that the provision contravenes the clear legislative mandate that employees reasonably believed to have committed certain crimes be terminated without delay. The failure of the provision to acknowledge management's authority in that situation substantively interferes with management's rights to take appropriate disciplinary action against, and to remove employees under section 7106(a)(2)(A) of the Statute. Thus, Provision 1 does not constitute a negotiable procedure under section 7106(b)(2) of the Statute. *See* *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 FLRA 604 (1980), *enforced sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F. 2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982).

Of equal significance, in the Authority's view, is the impact of the provision upon management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute. Management, at least in part, exercises its authority to assign work and to direct employees by holding them accountable for meeting the standards set by management for the performance of their work. Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA 343, 344 (1984).

In the circumstances addressed by Provision 1, the concerned employees are on notice that management has decided, after all avenues of appeal have been followed, to terminate them and that their separation date has been fixed. Consequently, in such circumstances, management would have no effective method of holding those employees accountable for their failure or refusal to carry out assigned work during the prescribed period of ten additional workdays.

Further, since such employees could refuse, with impunity, to carry out their assignments, the adverse affect on the effective and efficient conduct of Government operations is a major consideration. That is, employees involved are to be separated for "such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), yet the provision requires their retention in a paid status for ten additional days after the termination decision has been reached. The provision, therefore, must be considered inimical to the effective conduct of public business.

Turning now to whether Provision 1 constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute, the Union asserts that the provision's purpose is "that an employee be given ten working days following a letter informing him/her of the employer's final decision to separate him/her, to clear any work on his/her desk and get personal affairs in order before the separation is effective." Union Petition for Review at 1. The provision, therefore, would ameliorate, to a very limited degree, the adverse affect on employees of management's exercise of its statutory right to remove employees for cause. On balance however, the significant deleterious affect on management's rights to impose disciplinary actions including removing employees, to direct employees, and to assign work, and on the efficiency and effectiveness of Government operations is disproportionate to the limited benefit employees would receive from the proposed arrangement. See National Labor Relations Board Union and National Labor Relations Board, Office of the General Counsel, 18 FLRA No. 42 (1985).

C. Conclusion

Consequently, as Provision 1 excessively interferes with management rights, it does not constitute either a negotiable procedure under section 7106(b)(2) or an appropriate arrangement within the meaning of section 7106(b)(3). Provision 1 is therefore outside the duty to bargain.

III. Provision 2

> Article 19, Section 10a. DETAILS, manner: In the interests of effective employee utilization, details to positions or work assignments requiring higher or different skills will be based upon bona fide needs and will be consonant with the spirit and intent of this Article, applicable regulations, and the merit system. Details may be used to meet emergencies or situations occasioned by abnormal workload, changes in mission or organization, or absences of personnel.

A. Positions of the Parties

The Agency contends that Provision 2 is inconsistent with its rights, pursuant to section 7106(a)(2)(A) and (B) of the Statute, to assign personnel and work.

The Union maintains that the provision, in effect, only requires adherence to law and regulations in detailing employees and thus is a procedure to be followed by management in exercising its authority under the Statute. The Union further states that the list of circumstances in the provision "is not exhaustive, but neither is it exclusive." Union Reply Brief at 3.

B. Analysis

The Union's assertion that the part of the provision listing the situations where details may be appropriate is not intended to be "exclusive" is inconsistent with the express language of the provision. That is, if the Union's intent was to limit the resort to details to those circumstances authorized by regulations, the list of circumstances in the provision would have been unnecessary. Mere reference to the applicable regulations would have sufficed. However, the Union chose to incorporate a list of situations in which details "may be used," stating that such a list is consistent with "the spirit and letter" of Federal Personnel Manual (FPM) Chapter 300, Subchapter 8. Reference to the cited part of the FPM reveals that details are authorized in other circumstances not listed in the provision. Specifically, FPM Chapter 300, Subchapter 8-3.a authorizes details for the following additional purposes: special projects or studies, pending official assignment, pending description and classification of new position, pending security clearance, and for training purposes. The omission of these circumstances, while including others listed in the FPM compels the conclusion that the provision is intended to circumscribe management's ability to detail. Therefore the proposal is in conflict with management's rights to assign employees and to assign work.

C. Conclusion

The Authority concludes, based on the reasoning set forth above, that Provision 2 is inconsistent with rights reserved to management by section 7106(a)(2)(A) and (B) of the Statute and, consequently, is outside the duty to bargain.

IV. Provision 3

> In addition, necessary travel and per diem expenses to the following proceedings will be borne by the Employer:
>
> a. Basic negotiations
>
> b. Impact and implementation bargaining sessions.
>
> c. Mid-term contract bargaining sessions.
>
> d. Impasse proceedings (including mediation)
>
> e. FLRA proceedings (i.e., ULP hearings).[1] [Footnote added.]

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[1] The Petition for Review in Case No. O-NG-746 sought review of the Agency's disapproval of parts a and c of

(Continued)

A. Positions of the Parties

The Agency argues generally that all existing contractual provisions authorizing travel and per diem payments to union representatives engaged in labor-management relations activities should be declared null and void in view of the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), invalidating the basis on which such payments were found to be negotiable.

The Agency specifically contends that Provision 3 is not within the duty to bargain for the following reasons:

(a) It does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

(b) it is inconsistent with Federal law and Government-wide regulations;

(c) it interferes with the Agency's right to determine its budget under section 7106(a)(1), and its right to assign under section 7106(a)(2)(A);

(d) it is inconsistent with an Agency regulation for which a compelling need exists.

The Union asserts that the provision concerns conditions of employment and addresses a matter over which agencies have administrative discretion. The Union also contends that a finding that the provision is negotiable would be "wholly consistent" with the Supreme Court's holding in BATF. Further, the Union explains that Provision 3, by its terms, would only require the payment of "necessary" per diem and travel expenses. Finally, the Union argues that the potential increase in costs resulting from the provision does not, *per se*, make it nonnegotiable as a violation of the Agency's right to determine its budget.

(Continued)

Provision 3. Authority review of the Agency's disapproval of parts b, d and e of the provision was sought in Case No. O-NG-748.

B. Analysis

1. Enforcement of Travel and Per Diem Provisions in Existing Collective Bargaining Agreements

No claim is made that Provision 3 is improperly before the Authority. Thus, the present negotiability appeal is the appropriate vehicle to determine its negotiability. While the Agency argues that all existing contractual provisions concerning travel and per diem payments to union representatives should be declared null and void, it adverts to no existing contractual provisions against which such declaration could be made in the context of this negotiability appeal. Moreover, the question of enforcement of any existing contractual provisions concerning travel and per diem payments to union representatives should be raised in appropriate proceedings other than a negotiability appeal. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

2. Conditions of Employment

The Agency involved in this case makes an essentially identical "conditions of employment" argument to that made by the Agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986). The Authority rejected that argument in Customs Service and it is rejected here for the same reasons as set forth in that case.

3. Inconsistent with Federal Law or Government-wide Rules or Regulations

The Agency contends, in essence, that under the Travel Expense Act and the Federal Travel Regulations (FTRs) an "official business" determination is dependent on the particular facts involved in each individual situation. Consequently, such a determination is not a matter of unlimited discretion on the part of the Agency.

For reasons set forth in its decision in Customs Service, the Authority has found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether, and under what circumstances, travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business and, hence, pay for resulting appropriate expenses from Federal funds. The exercise of that discretion is subject to the negotiation process. The Agency here makes no specific argument that the provision does not meet the statutory and regulatory standards discussed in Customs Service. Moreover, as noted in the Union's position, the provision envisions case by case determinations as to appropriateness of specific travel and expenses which are necessary and proper under law and governing regulation. Given these circumstances, and for the reasons expressed in Customs Service, the Agency's contention that the provision is inconsistent with law and Government-wide regulations must be rejected.

4. Conflict with Management Rights

The Agency's position that the provision interferes with management rights, specifically including "the right to assign," is unpersuasive. The provision is not concerned with authorization of travel or absence from the workplace, but, rather, concerns the payment of travel and per diem expenses for travel in connection with the collective bargaining relationship.

The Agency also contends that management decisions on travel and per diem are determinations of priorities affecting the Agency's mission. The Agency explains that granting travel and per diem expenses for labor-management relations activities makes that much less money available for mission-related activities. While the Agency characterizes this argument as concerning other management rights, the Authority finds this contention is actually directed at budgetary issues.

The Authority stated, however, in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), that a "budget" argument must be supported by a substantial demonstration that a significant and unavoidable increase in costs, not offset by compensating benefits, will result from implementation of the disputed proposal. Here, no such demonstration has been proffered. To the contrary, it would appear from the record in this case that no significant and unavoidable increase would result from the provision, particularly in light of the Agency's argument that the provision is unnecessary because travel would not be required in the conduct of labor-management relations. Hence, based on Customs Service, the Agency's argument cannot be sustained.

5. Compelling Need

While the Agency states that a compelling need determination is not necessary because Provision 3 is inconsistent with applicable law and Government-wide regulations the Agency does claim that a compelling need exists for its travel regulations. As to such regulations, the Agency argues that a compelling need exists under criterion (c) of section 2424.11 of the Authority's regulations because its travel regulations implement a nondiscretionary mandate to the Agency under law and Government-wide regulations. However, those arguments are based essentially on the Agency's view that, since its travel regulations parallel applicable law and Government-wide regulations which it contends bar negotiation of Provision 3, its regulations must also bar negotiation of Provision 3. The Agency has provided no other basis to support its conclusion that a compelling need exists for its regulations. Thus, in view of the decision that Provision 3 is consistent with applicable law and Government-wide regulations the Authority finds that the Agency has not sustained its compelling need contention.

C. Conclusion

For the reasons set forth above, and based especially on the findings contained in the Decision and Order on Remand in Customs Service, the Authority finds Provision 3 to be within the Agency's duty to bargain.

V. Provision 4

> Article 25, Section 5 ADMINISTRATIVE LEAVE OR EXCUSED ABSENCE: . . . Excused absence shall be authorized when the activity shuts down due to circumstances beyond the agency's control for a short period of time. Instances involving snow storms, floods, lack of heat or electricity and similar events are covered by this type of excused absence.

A. Positions of the Parties

The Agency contends that Provision 4 is of "questionable legality," and interferes with its reserved rights under section 7106(a)(2) to elect to furlough or lay off employees and to assign them and direct their work under section 7106 (a)(2)(A) and (B).

The Union's position is that there is no material difference between Provision 4 and the proposal held to be within the duty to bargain in Long Beach Naval Shipyard, Long Beach, California and International Federation of Professional and Technical Engineers Local 174, AFL-CIO, 7 FLRA 362 (1981).

B. Analysis

The record in this case clearly indicates that this provision was not intended to apply to circumstances where laying off of employees would be the appropriate course of action in accordance with applicable regulatory requirements. Thus, the Agency's arguments to the contrary cannot be sustained. Nor does the provision require that employees be excused from work. Rather, the provision only requires the granting of administrative leave or excused absences after management has decided to close temporarily the installation for any of the enumerated reasons.

In the Authority's view, Provision 4 is to the same effect as the proposal requiring the granting of 4 to 5 days administrative leave during a curtailment of agency operations held to be within the duty to bargain in Long Beach Naval Shipyard. In that case, the Authority held that the granting of administrative leave for the short period in question (4 to 5 workdays) affected the working conditions of unit employees and was a matter within the agency's discretion under applicable Government-wide regulations. Since it was not shown that the exercise of such discretion by means of the collective bargaining process was barred by law or regulation, the proposal was held to be negotiable. Therefore, based on the reasoning more fully explained in Long Beach Naval Shipyard, Provision 4 is likewise within the duty to bargain.

C. Conclusion

Based on the foregoing analysis, the Authority finds that Provision 4 concerns a condition of employment which is within the Agency's administrative discretion and that the provision is not inconsistent with law or Government-wide regulation. Therefore, the provision is within the duty to bargain.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Provisions 1 and 2, be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall rescind its disapproval of Provisions 3 and 4 which were bargained on and agreed to by the parties at the local level.2/

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In deciding that Provisions 3 and 4 are within the duty to bargain, the Authority makes no judgment as to their merits.

21 FLRA No. 128

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 153

Union

and

Case No. 0-NG-814

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of seven Union Proposals.

II. Procedural Issues

The Agency contends that the Union's petition for review should be dismissed because the Union failed to furnish an explicit statement of the proposals' meaning as required by section 2424.4(a)(2) of the Authority's Rules and Regulations and because the Union failed to serve a copy of its petition on the Agency head as required by section 2424.4(b) of the Rules. However, the Union provided a satisfactory statement of the meaning attributed to the disputed proposals in its completion of the appeal. In addition, while the initial petition was served on the Agency official who alleged that the proposals were nonnegotiable, the completion of the appeal was served on the Agency head's designee. Thus, the Union's petition for review is properly before the Authority.

III. Background

It appears from the record that the disputed proposals in this case respond to the Agency's announced plan to establish a new tour of duty for its employees at several locations within the Baltimore District. The current tour of duty extends between 8:00 a.m. and 5:00 p.m. The new tour, beginning at 11:00 a.m. and ending at 8:00 p.m., was to be established, as explained by the Agency, to service flights arriving at Baltimore-Washington International Airport in the late afternoon and early evening with the result being that such service could be provided without personnel receiving overtime pay, as had been the prior practice.

IV. Duty to Bargain

The Agency did not contest the negotiability of the proposals in this case but only contended that it had no duty to bargain on them. Specifically, the Agency argues that it has no duty to bargain on Proposals 1, 3, 4, 5 and 6 essentially because the matters sought to be bargained are covered by provisions pertaining to shift changes in an expired national agreement between the parties which provisions must be maintained pending renegotiation. The Agency also contends it has no duty to bargain on Proposal 2 because the subject matter sought to be bargained is not related to the Agency's decision to create a new tour of duty. Finally, the Agency argues that because Proposal 7 addresses matters which were not substantially changed by the decision to create a new tour of duty, it has no obligation to bargain on such matters.

The Authority will decide only the negotiability issues presented under section 7105(a)(2)(D) and (E) of the Statute. To the extent there are factual issues in dispute between the parties in the circumstances of a case, such issues should be resolved in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984). Thus the Agency's position on these proposals cannot be sustained.

V. Union Proposals 1 and 4

Proposal 1

No change, the Customs Service has failed to support any need to establish the new tour of

> duty. In addition, the change is an abuse of discretion, mismanagement and a gross waste of funds. Furthermore, the change has the effect of seriously impacting upon the Baltimore area economy.
>
> Proposal 4
>
> The Customs Service agrees that the established tour of duty shall be 11:00 a.m. to 7:00 p.m.

A. Position of the Union

According to the Union, at the time the new tour of duty was announced, there existed no regularly scheduled work at the airport to warrant the assigning of personnel after 5:00 p.m. The Union asserts that flight records indicate the absence of any work on at least two days each week after 5:00 p.m. for employees on the new tour of duty. As a consequence, the Union contends Customs House brokers and importers would be without sufficient Agency employees between 8:00 a.m. and 11:00 a.m. to permit release of their imported cargoes.

As to Proposal 4, the Union asserts that such proposal is consistent with other established tours of duty within the region of the Agency.

B. Analysis

Although not expressly addressed by either party, the issue with respect to Union Proposals 1 and 4 is whether, under the Statute, the Union may seek by negotiation to nullify management's decision to establish the new tour of duty. It is well established that the decision to establish a shift or tour of duty involves the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" within the meaning of section 7106(b)(1) of the Statute and, thus, is negotiable only at the election of an agency. See, for example, Department of the Air Force, Lowry Air Force Base, Colorado, 16 FLRA 1104 (1984) and U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 118 (1982).

Because Proposals 1 and 4 effectively nullify management's decision to establish a new tour of duty, they also fall within the compass of section 7106(b)(1) of the Statute.

This view is not altered by the Union's argument that the Agency's new tour of duty is unnecessary or that Proposal 2 is consistent with tours of duty which exist elsewhere in the Agency. Such arguments concern only the desirability of the proposals and not whether the proposals are within the duty to bargain under the Statute.

C. Conclusion

The Authority finds, therefore, based on the reasoning and cases cited in Lowry Air Force Base and in U.S. Customs Service, Region V, that Union Proposals 1 and 4 are not within the Agency's duty to bargain.

VI. Union Proposal 2

> The initial staffing at the various Baltimore District facilities will be made utilizing volunteers among qualified employees.

A. Position of the Union

The Union asserts that the proposal establishes a procedure for the initial staffing of the new tour of duty.

B. Analysis

Based on the record, the new tour of duty was intended to be implemented at some, but not all, of the Agency's work stations. Since the proposal has the objective, as explained by the Union, of accomplishing the staffing of the new tour with volunteers, it is to the same effect as the proposal found negotiable in American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 15 FLRA 545 (1984). The proposal in that case required that positions in a particular organizational element first be filled by volunteers qualified for the positions. Noting that the proposal in that case left management with the discretion to determine the qualifications required in filling the positions and to decide upon the occupational types required to perform the work, the Authority concluded that the proposal constituted a negotiable procedure, within the meaning of section 7106(b)(2) of the Statute.

C. Conclusion

Accordingly, based on the reasons and case cited in Social Security Administration, the Authority finds that

Union Proposal 2 constitutes a negotiable procedure under section 7106(b)(2) of the Statute.

VII. Union Proposal 3

> Every effort shall be made to insure uniformity in assignment of personnel to inspectional activities and tours of duty.

A. Position of the Union

The Union asserts that the intent of this proposal is to assure that shift assignments among qualified employees will be made in a uniform manner. Further, according to the Union, the proposal is consistent with Agency regulations.

B. Analysis

Based on the express language of the proposal itself, and the Union's explanation thereof, it is determined that Union Proposal 3 is to the same effect as Union Provision 1 found negotiable in National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 FLRA 578 (1982). Provision 1 in that case required that certain details to positions affording qualifying experience or to those of a higher grade "be rotated among qualified employees to the fullest extent feasible." The Authority noted that the cited provision did "not in any way limit management's discretion to establish the particular qualifications and skills needed to perform the work . . . or limit management's judgment in determining whether a particular employee meets those qualifications . . . ." The Authority concluded that, as the provision "established a general, nonquantitative standard by which the Agency's exercise of its reserved authority to assign employees could be evaluated in a subsequent grievance," it did not interfere with management's right to assign employees, under section 7106(a)(2)(A).

C. Conclusion

Because Union Proposal 3 in this case likewise establishes a general, nonquantitative standard, specifically "uniformity," in making assignments to new shifts, it is, based on the reasons and cases cited in Vint Hill Farms Station, within the duty to bargain.

VIII. Union Proposal 5

> In the alternative, the established tour of duty shall be from 11:00 a.m. to 8:00 p.m. with a lunch break between the hours of 3:00 p.m. to 5:00 p.m.

A. Position of the Union

The Union asserts that, "consistent with workload requirements," under the proposal employees will not be scheduled to work during lunch periods unless otherwise compensated. The Union also states that the proposal is not intended to abridge management's section 7106(a) rights under the Statute.

B. Analysis

It appears from the record that the Agency has misinterpreted the proposal. That is, this proposal has nothing to do with the starting and ending times of a shift. Rather, the proposal is consistent with the Agency's decision to establish an 11:00 a.m. to 8:00 p.m. shift and only sets out the time frame within that shift when employees' unpaid half-hour lunch breaks will be taken.

The Authority has previously determined that the time at which breaks and lunch may be observed within the workday (and not the length of the breaks, lunch or workday themselves) is a matter within an agency's duty to bargain. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 19 FLRA No. 123 (1985).

C. Conclusion

Based on the reasoning and cases cited in Social Security Administration, Baltimore, Union Proposal 5 is within the duty to bargain.

IX. Union Proposal 6

> Any employee subsequently assigned from his/her duty station to the BWIA (Baltimore-Washington International Airport) shall be provided with a government vehicle.

A. Position of the Union

The Union states that the national agreement provides that employees are responsible for transportation to their regular duty stations, but does not concern transport to subsequent work sites. Consequently, the Union seeks to have furnished government vehicles for travel to subsequent assignments. The Union asserts that the Agency has vehicles available for such purposes.

B. Analysis

In American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982), the Authority decided that Proposal 1, requiring the transportation by shuttle bus of employees to and from research facilities in connection with the performance of their duties, was within the duty to bargain. In so deciding, the Authority noted that the proposed transportation was unrelated to the performance of the agency's work and therefore did not concern the technology, methods or means of performing such work within the meaning of section 7106(b)(1) of the Statute. Rather, the Authority found that the proposal concerned a matter "which principally affects working conditions of employees who would be adversely impacted by relocation; such transportation would be only incidental to the performance of the Agency's work." In like manner, the instant proposal is concerned only with furnishing transportation for employees who are required to travel from one work site to another during their established tours of duty.

C. Conclusion

Hence, based on Board of Immigration Appeals, and the reasons and cases cited therein, Union Proposal 6, concerning the transportation of employees from one work site to another, is also within the duty to bargain.

X. Union Proposal 7

> All employees affected by this change and agreement shall be afforded a reasonable amount of personal time for washing up and changing uniforms.

A. Position of the Union

The Union contends that this proposal will preserve the professional image of the Agency because employees' appearance will be enhanced when dealing with passengers at the airport.

B. Analysis

Proposal 7 expressly would require the Agency to give employees time during their hours of duty to clean up and change uniforms prior to starting work at the airport. This proposal is to the same effect as Union Proposal 1 found nonnegotiable in *American Federation of Government Employees, Local 2094, AFL-CIO and Veterans Administration Medical Center, New York, New York*, 19 FLRA No. 120 (1985). Proposal 1 in that case sought to provide employees with 15 minutes prior to the end of their shift to be used for personal hygiene and changing clothing. The Authority found that Proposal 1 interfered with management's right to assign work under section 7106(a)(2)(B) of the Statute because it would preclude the assignment of other types of work during the specified period.

C. Conclusion

Based on reasons and cases cited in *Veterans Administration Medical Center*, Union Proposal 7 violates the Agency's right to assign work under section 7106(a)(2)(B) of the Statute and is outside the duty to bargain.

XI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review as it relates to Union Proposals 1, 4, and 7 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on Union Proposals 2, 3, 5 and 6.*/

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

21 FLRA No. 129

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 12

Union

and Case No. 0-NG-938

DEPARTMENT OF LABOR

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of twenty-four Union proposals. These proposals are set forth in an Appendix to this decision.

II. Background

The Union submitted the proposals at issue to the Agency in response to the Agency's announcement of its intention to implement a space reduction plan in compliance with a General Services Administration (GSA) space reduction regulation. This regulation is GSA Federal Property Management Regulation (FPMR), Temporary Regulation D-68, which was originally effective from March 9, 1983, until January 31, 1984, and was extended until May 15, 1985. However, it has been superseded by FPMR Temporary Regulation D-71, effective July 1, 1985, to June 30, 1987. 41 C.F.R. § 101-17 (1985) at 333.

III. Positions of the Parties

The Agency does not argue that any of the twenty-four disputed proposals is inconsistent with applicable law, rule or regulation and, hence, is nonnegotiable. Rather, the

Agency's sole contention in this case is that it has no duty to bargain on the proposals under the circumstances because its implementation of the GSA space reduction regulation will have no material effect or substantial impact on conditions of employment of bargaining unit employees. The Agency argues that in these circumstances a requirement to bargain on the Union's proposals would be inconsistent with the mandate of section 7101(b) that the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." In support, the Agency relies on the Seventh Circuit's decision in Internal Revenue Service v. Federal Labor Relations Authority, 717 F.2d 1174 (7th Cir. 1983), denying enforcement of Internal Revenue Service, Chicago, Illinois, 9 FLRA 648 (1982).

According to the Union, the disputed proposals are clear as written. The Union did not file a Reply Brief.

IV. Analysis and Conclusion

A. Duty to Bargain

The Agency's reliance on Internal Revenue Service, 717 F.2d 1174 (7th Cir. 1983), is misplaced as that decision concerned whether an agency's failure to bargain in the circumstances of that case constituted an unfair labor practice and not whether particular matters sought to be bargained are consistent with applicable law, rule and regulations. When a union files a negotiability appeal under section 7105(a)(2)(E) of the Statute, section 7117(c) entitles it to a decision on the negotiability issues in the appeal. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of the case, such issues should be raised in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984). Hence, the Agency's contention that, under the circumstances, it has no duty to bargain on the disputed proposals, is not relevant in the context of a negotiability dispute.

B. Proposals 1-16, 18, 19, 21-24

It is well established that the parties bear the burden of creating a record upon which the Authority can make a negotiability determination. See National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886, 891 (D.C. Cir. 1982), aff'g

National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981). A party failing to assume the burden acts at its peril. Proposals 1-16, 18, 19 and 21-24 generally concern reductions in space, space allocation, the arrangement of space, the furniture and equipment to be utilized by employees and information related to those matters requested by the Union for use in negotiations. The Authority has held that such matters principally relate to the working conditions of employees and are within the duty to bargain unless an agency demonstrates that the proposals are inconsistent with applicable law or regulation. See, for example, American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C., 7 FLRA 578, 583 (1982), enforced sub nom. Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280 (D.C. Cir. 1983) in which various proposals concerning bookshelf and file cabinet space, office partitions, office doors, shower and locker facilities were found to be within the duty to bargain because the agency did not establish that the selection of furniture, equipment or office design had, as claimed, a technological relationship to accomplishing or furthering the performance of the agency's work with which the particular proposals interfered. Compare American Federation of State, County and Municipal Employees, AFL-CIO, Local 2910 and Library of Congress, 19 FLRA No. 130 (1985), in which proposals concerning employee seat assignments were found to concern the methods and means of performing work within the meaning of 7106(b)(1) and outside the duty to bargain because the agency made the proper showings.

The Agency in this case has made no claim whatever, and it is not otherwise apparent, that the disputed proposals are inconsistent with law, Government-wide rule or regulation or with an agency regulation for which a compelling need exists. Hence, the Authority is constrained to find Proposals 1-16, 18, 19 and 21-24 to be within the duty to bargain.

C. Union Proposals 17 and 20

Union Proposal 17 provides that the "adverse impact of space change on performance" will be reflected by certain specific adjustments in performance standards. Proposal 20 provides that productivity levels will be established prior to the space changes and that they will be measured and reduced at intervals after the changes. These proposals are to the same effect as Union Proposal 2 found nonnegotiable in National Federation of Federal Employees, Council of Consolidated SSA Locals and Department of Health and Human Services, Social Security Administration, 17 FLRA 657 (1985), petition for review filed sub nom. Department of Health and Human Services, Social Security Administration v. FLRA, No. 85-1601 (4th Cir. June 19, 1985). In that case, the proposal provided that time limits for certain tasks would "be adjusted to take into consideration the additional research and development time needed." The Authority held that as the proposal directly addressed the content of performance standards by requiring that time limits be adjusted, management's authority to establish these performance standards was substantively restricted. Thus, the Authority concluded in Department of Health and Human Services that the proposal interfered with the agency's right to assign work and direct employees pursuant to section 7106(a)(2)(A) and (B) of the Statute. Hence, for the reasons and cases cited in Department of Health and Human Services, Union Proposals 17 and 20 interfere with the rights to assign work and direct employees under section 7106(a)(2)(A) and (B) of the Statute and are outside the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review as it relates to Union Proposals 17 and 20 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 1-16, 18, 19 and 21-24.*/

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals within the duty to bargain, the Authority makes no judgment as to their merits.

APPENDIX

LOCAL 12 PROPOSALS TO ADDRESS THE ADVERSE IMPACT OF THE LMSA SPACE REDUCTION PROGRAM

1. Space changes in LMSA will not be implemented until full and final consultation and negotiations have occurred between the Department and the union.

2. Management will provide all information requested before completing negotiations with the union.

3. LMSA will limit its space reduction in fiscal 1984 to a 10% reduction by September 1984, as provided in GSA Regulation D-68.

4. In reducing space, the current individual space tables will be followed by LMSA (see below). Where there must be a reduction in individual allocations the space provided for higher grades (supervisors-managers-executives) will be reduced to meet the goals along with their adjoining reception areas and foyers. In no case will individual space below 150 square feet be reduced.

SPACE CATEGORIES	GSA ALLOWANCE (D) PER PERSON	(E) TOTAL SQ. FT.
I. OFFICE TYPE SPACE		Sq. Ft.
OFFICE USE SPACE		
1. GS 1-06		60
2. GS 7-11 SUPERVISORY		100
3. GS 7-11 NON-SUPERVISORY		75
4. GS 12-13 SUPERVISORY		150
5. GS 12-13 NON-SUPERVISORY		100
6. GS 14-15 SUPERVISORY		225
7. GS 14-15 NON-SUPERVISORY		150
8. GS 16-17-18		300

Space for special equipment, files, reference books, door swing space and other special items is not included in this allowance.

5. To further the stated LMSA goal "THAT SPACE OCCUPIED BY LMSA EMPLOYEES SHALL BE ARRANGED AND MAINTAINED SO AS TO ASSURE A QUALITY WORKING ENVIRONMENT" the following measures are proposed:

   a) windows will not be blocked by private offices.

   b) the "executive core" approach will be followed with private offices located on the inner core.

   c) window space will be occupied by non-supervisors.

   d) space not by a window will be 10% greater to provide for an "equalization of desirability."

   e) meeting areas will not be included inside private offices and all meeting areas will be useable by all employees on a reservation basis.

   f) in every office a number of common areas will be provided for small meetings with clients, contractors, task forces, colleagues, or for collating.

   g) space for clericals or anyone whose space is not defined by walls or partitions will be shown on the plans by dotted lines and marked on the floor at the corners with carpet tacks in the rug.

   h) the practice of placing clericals in what are essentially passageways will not be followed.

6. Employees may choose whether they wish to have open space or closed space where these choices are posed. Employees will not be limited in their use of partitions in open space. Clericals may elect to have partitions.

7. Reasonable official time will be authorized for the Steward Committee to meet with employees in each office (space) to review management plans and solicit comments and develop alternatives, if appropriate.

8. In each office, after management has prepared a plan, copies will be provided the union and all employees.

9. Management will cancel unnecessary movement of offices from one location to another when the current office space is adequate to accomplish the mission.

10. Management will provide the union copies of all floor plans for changes at least 30 days prior to implementation of a space change. If floor plans are changed this will initiate another 30 day period.

11. Employees will be provided a written notice at least 10 working days in advance of a move. Packing boxes used to relocate employees, will be provided at least 5 working days in advance of the actual move.

12. In making plans, the prints will show space allowed for coat racks, special equipment, xerox machines, library shelves and other fixtures that are a part of the office.

13. The Labor Management Relations Committee will study the sound and ventilation problems of smaller space, including, but not limited to, the use of "white sound," sound deadening materials, drapes, comparative partitions and so forth.

14. The new space arrangements will include self-determination in each office space for smoking rules. Such rules may be initiated by the union or by the supervisor and will be established to the greatest extent possible by consent of all in the space and in the framework of Article 4, Sections 2 and 4. The right of any employee to a smoke free environment will be so addressed.

15. LMSA will provide Local 12 with an office for the use of the Steward Committee and bargaining unit employees.

16. New furniture, drapes, rugs and decorations will not be selected until the union has been provided catalogs and/or samples.

17. Adverse impact of space change on performance will be reflected in appropriate adjustments in performance standards, including a 25% increase in deadlines and a 25% reduction in objective minimum standards such as "correct 85% of the time."

18. Dividers will be noiseproof.

19. White sound will be re-introduced.

20. Current productivity levels will be established prior to space changes and will be again measured 1 year and 2 years after space changes. All productivity expectations and standards will be reduced accordingly.

21. New furniture selections will not be made until choices and catalogs are made available to the union and to employees.

22. No reduction in space will be implemented until new furniture is available.

23. Space changes in LMSA will be implemented gradually as need for moves and reorganizations occur.

24. All prints will show the number of square feet (by number) for each individual's space and be a clear copy.

8. In each division, after management [illegible] plan [illegible] will [illegible]

9. Management will cancel unnecessary moves of offices from one location to another when the current office space is adequate to accomplish the mission.

10. Management will provide the union copies of all floor plans for changes in space [illegible] to implementation of a [illegible] plans are changed [illegible] 30 day period.

11. Employees will be provided a written notice at least 10 working days in advance of a move. Packing materials needed to relocate employees will be provided at least 5 working days in advance of the actual move.

12. In making plans, the agency will show space allowed for coat racks, special equipment, xerox machines, library shelves and other fixtures that are a part of the office.

13. The Labor Management Relations Committee will study the sound and ventilation problems of smaller space, including, but not limited to, the use of "white sound," sound deadening materials, drapes, comparative partitions and so forth.

14. The new space arrangements will include self-determination in each office space for smoking rules. Such rules may be initiated by the union or by the supervisor and will be established to the greatest extent possible by consent of all in the space and in the framework of Article 4, Sections 1 and 4. The right of any employee to a smoke free environment will be so addressed.

15. LMSA will provide Local 12 with an office for the use of the Steward Committee and bargaining unit employees.

16. New furniture, drapes, rugs and decorations will not be selected until the union has been provided catalogs and/or samples.

[ORDER DENYING APPLICATION FOR REVIEW
OF 2-CU-60002]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE

Activity

and Case No. 2-CU-60002

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3614, AFL-CIO

Petitioner

ORDER DENYING APPLICATION FOR REVIEW

On April 10, 1986, the American Federation of Government Employees, Local 3614, AFL-CIO (AFGE) filed a timely application for review pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petition for Clarification of Unit in the above-named case. In its application for review, AFGE contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application.*/

The Regional Director, citing Headquarters, Space Division, Air Force Systems Command, Department of the Air Force, Department of Defense, 9 FLRA 885 (1982) and Department of Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado, 6 FLRA 52 (1981), dismissed this petition without prejudice on the ground that the job classification sought to be clarified became vacant effective at the close of business on January 31, 1986.

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*/ Section 2422.17(c) provides:

> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:

(Continued)

In its application for review, AFGE contends in essence that the Authority should change its policy of not clarifying a unit with respect to a vacant position because it allows an agency to control the timing of a clarification of unit determination by either making or keeping the position in question vacant. The Authority has consistently held, starting with Bureau of the Mint cited by the Regional Director, that it will not make eligibility determinations concerning positions which are vacant. As referenced by the Regional Director, the Authority has found that it can make an eligibility determination only by having before it record testimony by the incumbent or the incumbent's supervisor as to what duties actually are performed by the incumbent.

Upon consideration of AFGE's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

(Continued)

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent;

(2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review of the Regional Director's Decision and Order on Petition for Clarification of Unit be, and it hereby is, denied.

Issued, Washington, D.C., May 30, 1986.

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

In its application for review, AFGE contends in essence that [illegible] a unit [illegible] agency [illegible] determination [illegible] question vacant. The Authority has consistently held, starting with *Bureau of the Mint* cited by the Regional Director, that it will not make eligibility determinations concerning positions which are vacant. As referenced by the Regional Director, the Authority has found that it can make an eligibility determination only by having before it record testimony by the incumbent or the incumbent's supervisor as to the duties actually performed by the incumbent.

Upon consideration of AFGE's application for review, [illegible] all arguments in support thereof, the Authority [illegible] that no compelling reasons exists for granting the application. The application in essence expresses [illegible] Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

(Continued)

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent;

(2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1336, AFL-CIO

Union

and

Case No. 0-AR-1121

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF FIELD OPERATIONS,
KANSAS CITY REGION

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Ronald Hoh filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PENSACOLA COMMISSARY STORE COMPLEX,
NAVAL AIR STATION,
PENSACOLA, FLORIDA

Activity

and

Case No. 0-AR-1126

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edward L. Harrison filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE

Agency

and

Case No. 0-AR-1120

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 60

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edward E. Potter filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., May 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case No. 370

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 370

REPORT OF CASE DECISIONS

June 18, 1986

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Patent and Trademark Office and Patent Office Professional Association (Lubic, Arbitrator), Case No. 0-AR-1054

22 FLRA No. 3 (June 4, 1986)

The 438 Air Base Group, McGuire Air Force Base, New Jersey and American Federation of Government Employees, Local 1778 (Mount, Arbitrator) Case No. 0-AR-1013

22 FLRA No. 5 (June 4, 1986)

U.S. Department of Justice, Bureau of Federal Prisons, Federal Correctional Institution, Seagoville, Texas and American Federation of Government Employees, Council of Prison Locals, Local No. 1637 (Carnes, Arbitrator). Case No. 0-AR-991

22 FLRA No. 6 (June 4, 1986)

American Federation of Goverment Employees, Local 1546 and Sharpe Army Depot (Wilcox, Arbitrator), Case No. 0-AR-1110

*Case No. 0-AR-1019 (Order Denying Request for Reconsideration of 21 FLRA No. 52) (June 4, 1986)

U.S. Department of Commerce, Patent and Trademark Office and The Patent Office Professional Association.

Y3.F31/21-3:

REPRESENTATION CASE

22 FLRA No. 1 (June 2, 1986)

U.S. Department of Energy, Federal Energy Regulatory Commission and American Federation of Government Employees, Local 421, AFL-CIO, Case No. 3-CU-50017

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

22 FLRA No. 1

Dep't of Energy, Federal Energy Regulatory Commission and AFGE, Local 421, Case No. 3-CU-50017
(Decided June 2, 1986)

SUBJECT MATTER INDEX ENTRIES	**STATUTE**
Representation	
Employee Classification	7103(a)(11) 7112
Merit Pay Status Not Sufficient for Classification	
Procedure	
Evidence: Regional Director's Burden of Developing a Full and Complete Record	

DIGEST NOTES

An agency's determination that an employee is a management official for purposes of coverage under the "merit pay" provisions of the Civil Service Reform Act of 1978 has no impact on such employee's inclusion in or exclusion from a unit of exclusive recognition under § 7112. Accordingly, the Authority denied the activity's application for review of a FLRA Regional Director's determination that certain employees were not management officials within the meaning of § 7103(a)(11) to the extent that the activity alleged that the employees were management officials based on their merit pay status.

A hearing officer who is inquiring into representational matters must obtain a full and complete record upon which the Authority can make an appropriate decision. Where a factual record is deemed to be incomplete by the Regional Director, thus precluding a determination of one or more of the issues presented, it is incumbent upon the Regional Director to reopen the record for the purpose of obtaining the necessary evidence. Thus, the Authority viewed the Regional Director as having been in error when he failed to obtain sufficient facts in order to make a unit determination concerning whether or not certain individuals were supervisors. Accordingly, the Authority granted an application for review and remanded the case to the Regional Director for appropriate action.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

22 FLRA No. 2

Patent and Trademark Office and Patent Office Professional Association (Lubic, Arbitrator). Case No. 0-AR-1054 (Decided June 4, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Contrary to 7106(a)
  - Exceptions Asserted in Appeal
    - Award Contrary to § 7106(a)
  - Enforcement
    - Interest Arbitration Award
    - Where Remedy is Contrary to the Statute
  - Interest Arbitration
    - Negotiability Determinations
    - Nonproduction Time for Work Related Travel
  - Procedure
    - Finality of Award
      - Where Award Alleged to be Contrary to the Statute
    - Forums
      - Negotiability Determinations
  - Remedy
    - Enforcement of Prior Arbitration Award

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7117(c)
7122(a) and (b)

DIGEST NOTES

The arbitrator stated that the issue in the case was whether a prior interest arbitration award concerning nonproduction time for work-related travel was final and binding. He found that the interest arbitration award was not precluded by § 7106(a)(2)(A) and (B) and that the interest arbitration award was also final and binding because exceptions were not timely filed under § 7112(b). Accordingly, the arbitrator sustained the grievance and ordered that the agency "honor and implement" the disputed portion of the prior interest arbitration award.

In its first exception, the agency contended that the award was contrary to § 7106(a) because the award was based on a disputed provision that was not negotiable and therefore not enforceable. The Authority has consistently ruled that

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negotiability disputes which arise between an agency and an exclusive representative under § 7117(c) must be resolved by the Authority as required by § 7105(a)(2)(E). An interest arbitrator is without authority to resolve such duty-to-bargain issues. Neither may an arbitrator resolve such issues in the guise of a grievance under the negotiated grievance procedure. Since the arbitrator resolved an issue relating to the obligation to bargain under the Statute, the award was deficient to that extent.

In its second exception, the agency contended that the second arbitration award was deficient because the prior interest arbitration award could not be enforced under § 7122(b) since it was contrary to § 7106(a). The agency did not dispute that exceptions to the interest arbitration award were not timely filed with the Authority and that the award was final and binding under the terms of § 7122(b). Instead, the agency asserted that a final award is enforceable under the Statute only to the extent it is consistent with law. Arguing that the disputed provision of the interest arbitration award was inconsistent with § 7106(a), the agency maintained that consequently it was unenforceable. However, the Authority concluded that the agency's second exception failed to establish that the award was deficient. It is well established that where a party seeks to challenge the propriety of an arbitration award, the appropriate mechanism for doing so is the filing of exceptions to that award under § 7122(a). Under § 7122(b), the interest arbitration award became final and binding when the agency failed to file timely exceptions and the agency was unequivocally obligated to take the actions required by that award. Thus in directing on the basis of § 7122(b) that the agency "honor and implement" the disputed portion of the interest arbitration award, the second award was fully consistent with law, and there was no basis for finding the award deficient.

Federal Labor Relations Authority

22 FLRA No. 3

The 438 Air Base Group, McGuire Air Force Base, N.J. and AFGE, Local 1778 (Mount, Arbitrator), Case No. 0-AR-1013 (Decided June 4, 1986)

SUBJECT MATTER INDEX HEADINGS

- Arbitration
  - Award Set Aside
    - Award Contrary to § 7106(a)(2)(B)
  - Exceptions Asserted in Appeal
    - Award Contrary to § 7106(a)(2)(B)
  - Remedy
    - Limit Assignment of Work
- Negotiability
  - Management Rights
    - Assign Work
      - Prohibition of Non Job-Related Work
        - Clean-up Task
    - Generally
      - Nothing Shall Affect Management Rights

STATUTE

7106(a)(2)(B)
7122(a)

DIGEST NOTES

The arbitrator found that there was no specific reference to assignment of clean-up duties of the flight line area, the disputed matter, in the parties' collective bargaining agreement. However, the arbitrator found that management previously had agreed, in settlement of an unfair labor practice charge, to limit participation of civilian employees in picking up debris. Therefore the arbitrator sustained the grievance and directed the activity to limit the assignment of such work to civilian personnel.

As its exception, the agency contended that the award violated management's right to assign work under § 7106(a)(2)(B). The Authority has previously held in negotiability disputes that proposals which would prohibit management from assigning employees duties not related to their jobs, such as grounds maintenance work, are violative of § 7106(a)(2)(B). In this case, the Authority set aside the award as contrary to § 7106(a)(2)(B).

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22 FLRA No. 4

Federal Labor Relations Authority

Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and AFGE, Council 214, Case No. 5-CA-20018 (Decided June 4, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Appropriate Arrangements and Procedures
    - Performance Standards
      - Union Comment Required
    - Information Under § 7114(b)(4)
      - Privacy Act 5 U.S.C. § 552(a)
    - Details
      - Equitable and Proportionate Weight in Performance Ratings
    - Union Participation on Awards Committee
    - Screening for Promotion Eligibility Required for Employees with Minimally Acceptable or Higher Ratings
    - Procedure
      - Clearly Communicated Request to Bargain Required
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Proposals Concerning Impact and Implementation of Performance Appraisal System
  - Procedure
    - Compelling Need Determination May Be Decided in ULP
  - Remedy
    - No *Status Quo Ante* Warranted

STATUTE

7106(a)(2)(A) and (B)
7106(b)(3)
7116(a)(1) and (5)
7117(b)

DIGEST NOTES

A proposal that management will encourage employee and union representatives to work with supervisors to identify job performance elements and to set performance standards is negotiable. While a proposal requiring negotiations to establish performance standards and critical elements is outside an agency's duty to bargain because it directly interferes with the exercise of management's right to direct employees and to assign work under § 7106(A)(2)(A) and (B), a union must be given the opportunity to be represented at certain meetings between management and employees relating to the development and

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

implementation of performance appraisal systems. Further, proposals which require the opportunity for union comment on proposed changes in performance standards and critical elements are within an agency's duty to bargain. In this case, the proposal as stated was ambiguious as to whether negotiation or merely an opportunity for union comment was required. However, since the record showed that the union, in its request for assistance to the Panel, explained that the proposal would only commit the agency to solicit "input" from employees and Union officials and specifically disclaimed "an attempt for such participation to preclude the supervisor from making final determinations relative to elements and standards, the Judge concluded that the proposal, in these circumstances, did not require negotiations on performance elements and standards but only required an opportunity for union comment. (proposal 1)

A proposal that the union will be provided copies of all standards in a manner which will allow sufficient time for review and discussion with employees, if such is warranted in the opinion of the union is negotiable. While a union's request for such information does have Privacy Act considerations, in such situations where, as here, the information sought is necessary and relevant to perfecting the union's representational responsibilities, the union's statutory right and need for the information substantially outweighs an employee's loss of privacy. Thus, the proposal does not violate the Privacy Act, as contended by the agency. (proposal 2)

A proposal that provides that details be given "equitable and proportionate weight" in performance ratings and that employees detailed or assigned to another position be given no less than 30 days of training before they can be evaluated or required to meet the standards for the position is negotiable. That portion of the proposal requiring equitable and proportionate weight for details in performance ratings, on its face, prescribes an arrangement which is fully consistent with and implements 5 C.F.R. 430.20(q) and (r) (1985), which provide that a performance rating must take into account an employee's performance on a detail which occurs during a rating period. The benefit to employees would simply be that their annual appraisal would include consideration of all the work they had done during the appraisal period. The agency still retains its management right to detail, to determine the length of the detail, to assign work on the current job or the detail, and to determine the priority of the work assigned. Nor does the proposal preclude management from evaluating employees or from setting particular standards for the work assigned. Therefore, the Authority concluded that the first paragraph of the proposal is a negotiable appropriate arrangement as any burden on management in these circumstances is unsubstantial in comparison to the benefit afforded to the affected employees. In respect to the second portion of the proposal, it has the same effect of delaying application of performance requirements for a period during which an employee is performing duties of a new position which has been previously found to be negotiable. (proposal 6).

A proposal that the union will be allowed participation on any committee and/or process established to select recipients for awards is nonnegotiable. The term "any committee and/or process" could include any committee or process established to select employees for performance based awards, and to that extent, the proposal is nonnegotiable. Thus, under existing precedent, it directly interferes with management's reserved rights under § 7106(a)(2)(A) and (B), even if the union's role is limited in observation. (proposal 7)

A proposal that an employee with a minimally acceptable rating or higher will be screened for basic promotion eligibility involves only the screening of employees and is, therefore, negotiable. If the proposal required selection based on the lower standard, it would have been inconsistent with management rights under § 7106(a)(2)(A) and (B). Here, the proposal only proposes a procedure that the agency will use when it determines which employees are eligible for promotion, but will not compel the agency to promote such employees. (Proposal 8)

A proposal that seeks to restrict management's ability to remove or demote an employee is nonnegotiable. The union's intent here was to include "all employees." Since it is clear that the proposal would include within the parties' negotiated grievance procedures those disputes regarding the termination of probationary employees, the entire proposal is, thus, outside the duty to bargain. (proposal 9).

A proposal that forms documenting ratings of unacceptable but not accompanied by a demotion or removal recommendation will be kept for one year then destroyed is negotiable. Since there was no basis, alleged or established, for finding the proposal nonnegotiable, it was an otherwise negotiable procedure which management is to use when an employee receives an unacceptable rating. (proposal 10)

A proposal that an employee who believes any performance standard does not meet the criteria contained in this agreement may file a grievance under the parties collective bargaining agreement is nonnegotiable. Since the union's intent with regard to the proposal was to provide the union and/or employee an opportunity to challenge the validity of performance standards, rather than of their application, through the negotiated grievance procedures, the proposal was outside the duty to bargain. (proposal 11) Accordingly, the Authority, having found that union proposals 1, 2, 6, 8 and 10 were negotiable, concluded, as did the Judge, that the agency's implementation of Air Force Regulation 40-452 (AFR 40-452) without bargaining, as requested, violated § 7116(a)(1) and (5). The Authority also adopted the Judge's conclusion that a status quo ante remedy was not warranted in this case upon weighing the nature and circumstances of the violation against thge degree of disruption in the agency's operations.

The compelling need for an agency's rule or regulation may be decided in an unfair labor practice proceeding. The agency had alleged that the proposals conflicted with AFR 40-452, raising a regulatory bar to negotiating on the union's proposals, However, it did not raise or argue the existence of a compelling need for AFR 40-452 as a reason for refusing to bargain with the union or as a defense to the unfair labor practice allegations in this case. While the Judge found that compelling need could only be resolved by the Authority in a negotiability proceeding, he held that as one of the union's proposals conflicted with Air Force Regulation 40-452, it was therefore nonnegotiable. The Authority concluded that since the agency never even asserted a compelling need existed for AFR 40-452 so as to excuse it from the duty to bargain, such obligation existed unless there was merit to any of the agency's other defenses.

A failure or refusal to negotiate in violation of the Statute assumes that there was a proper request to negotiate. An agency's mere knowledge of the union's modified proposals is not a sufficient basis to find a violation; there must be a clearly communicated request to bargain and a refusal to do so. In this case, prior to the agency's implementation of AFR 40-452, the union requested assistance from the Federal Services Impasses Panel (Panel) concerning the disputed proposals. The union, in its reply to agency's position submitted to the Panel, amended the language of proposals 3 and 5. Although the agency was served with the union's reply which was submitted to the Panel, it was never asked by the union to bargain over these proposals. After the Panel declined to assert jurisdiction over the instant matter, the union, months after the agency's implementation of AFR 40-452, requested the agency's position on the modified proposals. Thus, the Authority concluded that, in these circumstances, there was never a timely request to bargain concerning the modified proposals and therefore that portion of the complaint relating thereto was dismissed.

Federal Labor Relations Authority

22 FLRA No. 5

Dep't of Justice, Bureau of Federal Prisons, Federal Correctional Institution, Seagoville, Texas and AFGE, Council of Prison Locals, Local No. 1637 (Carnes, Arbitrator), Case No. 0-AR-991 (Decided June 4, 1986)

SUBJECT MATTER INDEX HEADINGS

- Arbitration
  - Backpay
    - Nonduty Time Spent Preparing for a Grievance
- Discipline
  - Suspension, 3 Days
- Exceptions Asserted in Appeal
  - Award Contrary to the Back Pay Act [5 U.S.C. § 5596]
  - Award Contrary to § 7131(d)
- Grievance [§ 7103(a)(9)]
- Hours of Work
  - Representational Activities on Nonduty Time Not Overtime
- Official Time
  - Preparation of a Grievance
- Remedy
  - Backpay (4 hours)

STATUTE

7103(a)(9)
7121
7122(a)
7131(a), (b), (c)
7131(d) and (d)(2)

DIGEST NOTES

The arbitrator determined that the activity had just and sufficient cause for the disputed 3-day suspension of the grievant. However, he found that the grievant's rights were violated when the grievant's request for administrative time to prepare his case was denied. The arbitrator found that the negotiated grievance procedures of the parties' agreement covered all matters grievable under § 7121 and provided that employees would be allowed a reasonable amount of official time to present their grievances. The arbitrator concluded that the subject matter of the dispute met the broad definition of "grievance" under § 7103(a)(9) for which official time was allowable under the agreement. As a remedy, the grievant was awarded four hours of pay.

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In its exceptions, the agency contended that the award of four hours pay was contrary to the Back Pay Act, 5 U.S.C. § 5596, because it, in effect, required the retroactive payment of four hours of overtime pay to the grievant and the findings necessary for such a payment under the Back Pay Act were not made. The agency also argued that the award was contrary to § 7131(d) because official time can only be granted in circumstances where the employee would otherwise be in a duty status and the grievant in this case performed the case preparation work on his own time during nonduty hours.

The Authority found that the agency failed to establish that the award was deficient. Where official time, authorized by provisions of a collective bargaining agreement consistent with § 7131(d), is wrongfully denied and the covered activities are thereafter performed on nonduty time, § 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. Also, the Authority has previously determined that performance of representational activities on nonduty time is not overtime work. Therefore, the Authority concluded, contrary to the agency, that since the grievant's performance on nonduty time of case preparation work for which official time should have been granted under § 7131(d)(2) was not overtime work, the arbitrator did not award retroactive overtime pay and his award was not contrary to the Back Pay Act. Finally, the Authority held held that § 7131(d), unlike § 7131(a), (b) and (c), does not require that an employee would otherwise have been in a duty status in order to be entitled to official time.

Federal Labor Relations Authority

22 FLRA No. 6

AFGE, Local 1546 and Sharpe Army Depot (Wilcox, Arbitrator), Case No. 0-AR-1110 (Decided June 4, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	
Arbitrability	7121(f)
Discipline	7122(a)
Removal of Employee	
Exceptions Asserted in Appeal	
Award is Incomplete, Ambiguous and Contradictory so as to Make Implementation Impossible	
No Basis For Review	
Disagreement with Arbitrator's Interpretation of the Agreement	

DIGEST NOTES

The arbitrator ruled that the grievance was not arbitrable under the terms of the parties' negotiated grievance procedure and that the merits of the grievance would not be considered. In its exception, the union contended that the award was deficient because it was incomplete, ambiguous, and contradictory so as to make implementation impossible. The Authority has previously held that to find an award deficient on this basis, there must be a showing that the award is ambiguous or contradictory, or that implementation is impossible, because of the award being unclear in its meaning and effect or because of the award being too uncertain in its effect to be sustained. In this case, the union failed to make the necessary showing. Instead, the union's exception constituted nothing more than disagreement with the arbitrator's determination that there had not been compliance with the procedural requirements of the negotiated grievance procedure of the parties' collective bargaining agreement. Such disagreement does not provide a basis for finding an award deficient.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

Activity

and

Case No. 3-CU-50017

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 421, AFL-CIO

Labor Organization

ORDER DENYING IN PART AND GRANTING IN PART THE ACTIVITY'S APPLICATION FOR REVIEW

On April 1, 1986, the U.S. Department of Energy, Federal Energy Regulatory Commission (Activity), filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside in part the Regional Director's Decision and Order on Petition for Clarification of Unit in the above-named case. In support thereof, the Activity contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application with regard to the Regional Director's determination that 40 employees should be included within the unit and his refusal to pass on the unit status of 6 disputed individuals on the basis that the record contains insufficient evidence as to the duties they perform.

Upon consideration of the Activity's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application with respect to the 40 employees that the Regional Director found should be included in the unit.[1] The 40 employees included 27 alleged to be management officials, 10 alleged to be confidential employees or engaged in personnel work in other than a purely clerical capacity, and 3 alleged to be supervisors. With respect to those employees alleged to be management officials, the Activity argues that extraordinary circumstances exist here because the Regional Director's ruling that certain employees are not management officials within the meaning of section 7103(a)(11) of the Statute will affect their merit pay status. This argument is without merit. As the Authority ruled in December 1980, an agency's determination that an employee is a management official for purposes of coverage under the "merit pay" provisions of the Civil Service Reform Act of 1978 has no impact on such employee's inclusion in or exclusion from a unit of exclusive recognition under section 7112 of the Statute. Interpretation and Guidance, 4 FLRA 754 (1980). The application as to all of the included employees in essence expresses mere disagreement with the Regional Director's findings which are based on Authority precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

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[1] As the Activity in its application for review does not seek review of the Regional Director's findings that 35 employees should be excluded from the bargaining unit, these findings are not at issue and have not been considered herein.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review of the Regional Director's Decision and Order on Petition for Clarification of Unit, to the extent that it challenges his inclusion of 40 employees in the unit, be, and it hereby is, denied.

However, the Authority finds that a compelling reason exists because of a departure from Authority precedent within the meaning of section 2422.17(c)(1) of the Authority's Rules and Regulations for granting review of that part of the Activity's application for review which challenges the Regional Director's failure to rule on the alleged supervisory status of six named individuals due to insufficient record evidence as to the duties they perform.[2] The Authority, in section 2422.16 of its Rules and Regulations, has specifically provided that in representation cases such as the one involved here, "the Regional Director shall issue a Decision and Order determining the appropriate unit, directing an election or dismissing a petition, or making other disposition of the matters before the Regional Director." Further, section 2422.9(a) of the Authority's Rules and Regulations provides: "[I]t shall be the duty of the Hearing Officer to inquire fully into all matters in issue and the Hearing Officer shall obtain a full and complete record upon which the Authority can make an appropriate decision. . . ." Section 2422.9(b) further provides in part that "[h]earings under this section are considered investigatory and not adversary. Their purpose is to develop a full and complete factual record[.]" These provisions codify the well-established principle that the purpose of representation proceedings such as this one is to resolve the issues presented in a non-adversary environment where no party has the burden of proof but where all evidence necessary and relevant to the disposition of the issues must be developed in the record. The Authority has emphasized many times the need for development of a full and complete record in order to decide disputed factual issues. See, for example, the Authority's orders remanding similar cases to Regional Directors for that purpose in Department of Health and Human Services, Region IV, Atlanta, Georgia, Case No. 4-CU-30009 (March 30, 1984), and Red River Army Depot, Texarkana, Texas, Case No. 6-RO-30007 (April 6, 1984).

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[2] As set forth in the Regional Director's Decision (note 14), the six individuals are: Anthony R. Jiorle, Financial Analyst, GM-01160-14, George Shriver, III, Financial Analyst, GM-01160-14, Chester F. Maruszewski, Staff Accountant, GM-00510-14, Jeanne M. Zabel, Public Utility Specialist, GM-01130-14, Russell R. Glasgow, Jr., Regulatory Gas Utility Specialist, GM-01101-14, and Richard J. Marek, Regulatory Gas Utility Specialist, GM-01101-14.

The responsibility for resolving these issues has been entrusted to the Authority's Regional Directors, whose representatives, the Hearing Officers in particular representation proceedings, have the duty to obtain the evidence necessary to enable the Regional Directors to decide the issues presented. Where a factual record is deemed to be incomplete by the Regional Director, thus precluding a determination of one or more of the issues presented, it is incumbent upon the Regional Director to reopen the record for the purpose of obtaining the necessary evidence. The Regional Director may not simply dismiss the petition for lack of evidence. Thus, the Authority views the Regional Director's failure to obtain sufficient facts in order to make a unit determination as to the six individuals at issue to be in error.

Accordingly, IT IS ORDERED that the Activity's application for review, to the extent that it challenges the Regional Director's failure to rule on the supervisory status of six named individuals, is granted, and such matters are remanded to the Regional Director for appropriate action and determinations consistent with the above.

Issued, Washington, D.C., June 2, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1054

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Robert Bennett Lubic filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the Agency's refusal to comply with a portion of an interest arbitration award of Arbitrator Jerome Ross (Ross award). The portion of the Ross award in dispute directed that a provision for nonproduction time for work-related travel be included in the parties' Memorandum of Understanding on the impact and implementation of a relocation of professional employees. The Ross award also directed that the provision be included in the parties' existing collective bargaining agreement and incorporated into the parties' next collective bargaining agreement. The Agency had contended that such a provision was not within the duty to bargain because it interfered with management rights and the Agency had filed exceptions to the Ross award with the Authority. The Agency's exceptions, however, were dismissed by the Authority as untimely filed. *Patent and Trademark Office and Patent Office Professional Association*, 14 FLRA 61 (1984). Subsequently, the Union filed the grievance that was submitted to arbitration protesting the Agency's refusal to comply with the Ross award. Arbitrator Lubic stated the essential issue to be whether the disputed portion of the Ross award was final and binding. He ruled that the disputed provision was final and binding because contrary to the arguments of the Agency, the provision was not precluded by management's right in accordance with section 7106(a)(2)(A) and (B) of the Statute to establish performance standards. The Arbitrator additionally ruled that the Ross award was final and binding under the terms of the Statute. He noted under section 7122(b) that when exceptions are not timely filed to an arbitrator's award, the award is final and binding and that "[a]n agency shall take the actions required by an arbitrator's final award." The Arbitrator explained that what this meant in this case was that the Agency was to take the actions required by the disputed portion of the Ross award. Accordingly, as his award, Arbitrator Lubic sustained the grievance and directed that the Agency "honor and implement" the disputed portion of the Ross award.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency essentially contends that to the extent the award of Arbitrator Lubic is based on the disputed provision of the Ross award being negotiable, the award is contrary to section 7106(a) of the Statute. In support, the Agency primarily argues that contrary to the determination of Arbitrator Lubic, the disputed provision is not negotiable and is not enforceable. The Agency further maintains that arbitrators are not authorized under the Statute to resolve issues concerning the duty to bargain.

B. Analysis and Conclusions

The Authority has consistently ruled that negotiability disputes which arise between an agency and an exclusive representative under section 7117(c) of the Statute must be resolved by the Authority as required by section 7105(a)

(2)(E). Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council of Locals, No. 214, 18 FLRA No. 81 (1985); Louis A. Johnson Veterans Administration Medical Center, Clarksburg, West Virginia and American Federation of Government Employees, Local 2384, 15 FLRA 347 (1984). Thus, the Authority has held on this basis that an interest arbitrator acting pursuant to a direction of the Federal Service Impasses Panel is without authority to resolve such duty-to-bargain issues. AFLC, Wright-Patterson Air Force Base. The Authority has also held that such issues likewise cannot be resolved by an arbitrator in the guise of a grievance under the negotiated grievance procedure of the collective bargaining agreement between the exclusive representative and the agency. Federal Correctional Institution, Texarcana, Texas, Federal Prison System and American Federation of Government Employees, Local 2459, Texarcana, Texas, 19 FLRA No. 26 (1985); Louis A. Johnson VA Medical Center. In this case, by finding the disputed provision of the Ross award to be final and binding because he determined contrary to the arguments of the Agency that the provision was negotiable, Arbitrator Lubic necessarily resolved an issue relating to the obligation to bargain under the Statute. However, with the Agency having consistently objected to this provision as not being negotiable by reason of section 7106(a) of the Statute, Arbitrator Lubic was not authorized under the Statute to resolve such an issue and his award is deficient to the extent that such resolution constitutes the basis for his award that the Ross award was final and binding.*/ See Federal Correctional Institution, Texarcana, Texas; Department of Housing and Urban Development and American Federation of Government Employees, Local 476, AFL-CIO, 18 FLRA No. 95 (1985).

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency argues that the award is also deficient to the extent the Ross award was enforced on the basis of section 7122(b) of the Statute. The Agency does not dispute that exceptions to the Ross award were not timely filed with the Authority and that the award is final and binding under the terms of section 7122(b) of the Statute. Instead, the Agency asserts that a final award is enforceable under the Statute only to the extent it is consistent with law. Arguing that the disputed provision of the Ross award is inconsistent with section 7106(a) of the Statute, the Agency maintains that consequently it is unenforceable.

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*/ In determining that Arbitrator Lubic was without authority to decide the negotiability issue in this matter, the Authority makes no determination on whether the disputed provision of the Ross award interferes with management rights under the section 7106(a) of the Statute.

B. Analysis and Conclusions

The Authority concludes that the Agency's second exception fails to establish that the award is deficient. Contrary to the argument of the Agency, it is well established that where a party seeks to challenge the propriety of an arbitration award, the appropriate mechanism for doing so, as Congress clearly intended, is the filing of exceptions to that award under section 7122(a) of the Statute. *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151 (1984), *aff'd sub nom. Department of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985). As the Authority recognized in *AFLC, Wright-Patterson Air Force Base*, 15 FLRA 151, when a party fails to timely file exceptions to an arbitration award, the award becomes final and binding and the agency must take such actions as are required by the award. As explained by the court in *Department of the Air Force*, "[s]ince the award becomes final and must be implemented if the parties fail to file an exception within the required period, the necessary implication is that a party can no longer challenge the award by any means. It has become final for all purposes." 775 F.2d at 735. In this case, under the terms of section 7122(b), the Ross award became final and binding and the Agency for all purposes was unequivocally obligated to take the actions required by that award. Thus, in directing on the basis of section 7122(b) of the Statute that the Agency "honor and implement" the disputed portion of the Ross award, the award of Arbitrator Lubic is fully consistent with law, and no basis is provided in this respect for finding the award deficient.

V. DECISION

Accordingly, the award is modified to provide as follows:

> The grievance in this matter is sustained. As a result of section 7122(b) of the Statute, the Agency shall honor and implement Section II of the Ross award.

Issued, Washington, D.C., June 4, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

THE 438 AIR BASE GROUP, McGUIRE
AIR FORCE BASE, NEW JERSEY

Activity

and

Case No. 0-AR-1013

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1778

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Robert H. Mount filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator arose when management directed certain civilian employees to pick up debris from the flight line area. The Activity claimed that the task was an important safety measure to protect aircraft and lives and, moreover, was provided for in the parties' collective bargaining agreement. The Union claimed that the performance of the clean-up task by the employees involved was unnecessary and was also contrary to the parties' agreement. The Arbitrator found that there was no specific reference to the task in the parties' collective bargaining agreement and that the parties disagreed as to the intent of their agreement with respect to the task. However, the Arbitrator further found that management previously had agreed, in settlement of an unfair labor practice charge in 1981, to limit participation of civilian employees in picking up debris. The Arbitrator essentially concluded that management was still bound by the settlement. The Arbitrator therefore sustained the grievance and directed the Activity to limit assignment of the work in question for civilian personnel.

III. EXCEPTION

As its exception, the Agency contends that the award violates management's right to assign work under section 7106(a)(2)(B) of the Statute.

IV. ANALYSIS AND CONCLUSION

The Authority has repeatedly recognized that the plain language of section 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70, 79 (1981), aff'd sub nom. AFGE Local 1968 v. FLRA, 691 F. 2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). Therefore, the Authority has consistently held that an arbitration award may not interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under section 7106 or result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights. U.S. Customs Service, Laredo, Texas and Chapter 145, National Treasury Employees Union, 17 FLRA 68 (1985); American Federation of Government Employees, Local 3258 and U.S. Department of Housing and Urban Development, 21 FLRA No. 56, slip op. at 4 (1986). Section 7106(a)(2)(B) of the Statute, in particular, reserves to management officials the authority to assign work. Encompassed within this right is the discretion to determine the particular employees to whom work will be assigned. Department of the Air Force, Carswell Air Force Base and American Federation of Government Employees, Local 1364, 19 FLRA No. 51, slip op. at 2 (1986); Marine Corps Logistic Base, Albany, Georgia and American Federation of Government Employees, Local 2317, 19 FLRA No. 72, slip op. at 2 (1985). Futhermore, the Authority has held in negotiability disputes that proposals which would prohibit management from assigning employees duties not related to their jobs, such as grounds maintenance work, are violative of section 7106(a)(2)(B). Association of Civilian Technicians and State of Georgia National Guard, 2 FLRA 581 (1980).

In this case, the Authority similarly finds that the award conflicts with management's right to assign work. By precluding the assignment of debris pick-up duties to civilian employees, the Arbitrator has substituted his judgment for that of management as to whom that work will be assigned. Therefore, the Authority finds that the award is deficient as contrary to section 7106(a)(2)(B).

V. **DECISION**

Accordingly, based on the above reasons, the Arbitrator's award is set aside.

Issued, Washington, D.C., June 4, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
AIR FORCE LOGISTICS COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

Case No. 5-CA-20018

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 214

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions and cross-exceptions filed to the attached Decision of the Administrative Law Judge. The complaint alleged that the Respondent, Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, violated section 7116(a)(1) and (5) of the Statute[1] by failing and refusing to negotiate in good faith with the American Federation of Government Employees, AFL-CIO, Council 214 (Union), its employees' exclusive representative, by declaring nonnegotiable certain Union proposals regarding the implementation and impact of Air Force Regulation 40-452 (AFR 40-452), entitled "Performance Appraisal System," and by unilaterally implementing that regulation on or about July 1, 1981, without bargaining with the Union concerning eleven (11) specific proposals which the General Counsel alleges to be negotiable. The Respondent asserts that the proposals are nonnegotiable for a variety of reasons as set forth in the Judge's Decision. The Judge found several of the proposals to be negotiable and therefore concluded that the refusal to bargain and unilateral implementation of a performance appraisal system in the circumstances violated section 7116(a)(1) and (5) of the Statute.

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[1] Section 7116(a)(1) and (5) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter[.]

II. Facts

From March 4 to March 17, 1981,[2/] the Respondent and the Union met several times in negotiations concerning proposals relating to the impact and implementation of AFR 40-452. The parties submitted proposals and counter-proposals, and met with a mediator. On March 17, the parties reached impasse on 15 Union proposals. On March 27, the Union submitted a request for assistance to the Federal Service Impasses Panel (the Panel). On this same date, the Respondent sent the Union a letter stating that "[b]ecause of the statutory requirements that the Performance Appraisal System be fully implemented by 1 October 1981, we intend to begin implementing our final offer on 1 June 1981. Between now and 1 June 1981 we will train supervisors and managers. On 1 June or later we will begin implementation with bargaining unit employees in accordance with our final offer." The parties stipulated that the Respondent began implementation on July 1 or later.

During its initial investigation into the parties' impasse, the Panel asked the Respondent to state, in writing, its position on why there was an impasse. The Respondent declared that the parties had reached impasse because the 15 Union proposals were nonnegotiable, citing a different rationale for each. On May 13, in a brief to the Panel, the American Federation of Government Employees, AFL-CIO (AFGE), on behalf of the Union, replied to the Respondent's allegations of nonnegotiability. In its reply, AFGE amended the language of Union Proposals 3 and 5, and modified the

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2/ All references are to 1981 unless otherwise indicated.

stated intent of other proposals. Although the Respondent was served with AFGE's reply which was submitted to the Panel, it was never asked by AFGE or the Union to bargain over these modified proposals. On June 5, the Panel declined to assert jurisdiction because the Respondent had raised a "threshold" question involving negotiability.

III. Administrative Law Judge's Decision

The Judge found that six of the proposals over which the Respondent refused to negotiate were negotiable, and therefore concluded that the refusal to bargain and subsequent unilateral implementation violated section 7116(a)(1) and (5) of the Statute. He also denied the Union's request for a *status quo ante* remedy. The Judge recommended that the Respondent be ordered to cease and desist from the unfair labor practices found, and to take certain affirmative action, including negotiation with the Union, upon request, over the proposals found to be negotiable.

IV. Positions of the Parties

The Respondent asserted that the proposals over which it refused to bargain are nonnegotiable on the basis of various arguments discussed below. It also contended that some of the proposals conflict with an agency regulation, but has not raised or argued that a compelling need exists for the regulation alleged to conflict with the proposals. The Respondent also alleged that its unilateral implementation of changes in its performance appraisal system pursuant to its last best offer before impasse was appropriate and necessary to be accomplished by a specific date, and that it could delay no longer.

The General Counsel excepted to the findings of the Judge that certain Union proposals were nonnegotiable.

V. Analysis

A. Union Proposals 3 and 5

As noted above, the complaint listed 11 of the 15 Union proposals as being negotiable. The complaint asserted as unfair labor practices the Respondent's refusal to bargain over these 11 proposals including Union Proposals 3 and 5 as modified by AFGE in its May 13 submission to the Panel. The question here is whether the Respondent violated the Statute by failing to negotiate over certain Union proposals with respect to the procedures which the Respondent would observe in exercising its authority with regard to changes in its performance appraisal system and its implementation of such performance appraisal system on or about July 1. A failure or refusal to negotiate in violation of the Statute assumes that there was a proper request to negotiate. As to Proposals 3 and 5, the Authority finds, contrary to the Judge, that the Respondent's mere knowledge of the Union's modified proposals is not a sufficient basis to find a violation; there must be a clearly communicated request to bargain and a refusal to do so. The record is clear that the Respondent never was requested to negotiate over the two modified Union proposals before it implemented its last best offer on or about July 1. Thus, the modifications were made when AFGE submitted them to the Panel on May 13 during the Panel's initial investigation of the case (over which it ultimately declined to assert jurisdiction). Only after the Respondent implemented its modified performance appraisal system did AFGE on September 14 ask the Respondent for its position on the negotiability of the modified proposals. Under these circumstances, the AFGE's submission of the modified proposals to the Panel in May did not constitute a request that the Respondent negotiate over the modified proposals. As to the AFGE's request for a negotiability determination on September 14, such request was made months after the Respondent's implementation of the revised performance appraisal system and, therefore, if considered a request to bargain, came after the alleged unfair labor practice occurred in this case. Thus, in these circumstances, it cannot be considered a timely request to bargain.[3] Therefore, the Authority shall dismiss those portions of the complaint dealing with Union Proposals 3 and 5 which never were properly before the Respondent for negotiation as it relates to the complaint in this case.

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[3] The evidence shows that, after the Panel refused to assert jurisdiction on June 5, the local parties resumed negotiations over AFR 40-452 in an effort to overcome the negotiability questions, but were unable to reach any significant agreement. In a September 4 letter to AFGE, the Union president stated, "[W]e were unable to reach any significant agreement on the outstanding issues and as a result *we are in the same position as when these issues were submitted to FSIP.*" (Emphasis added.) The Union president further added that "[t]he issues remain essentially the same

(Continued)

B. Compelling need

1. The Judge's Decision

In deciding whether Union Proposals 8 and 10 were negotiable, the Judge considered whether they conflicted with an agency rule or regulation (in this case AFR 40-452), and determined that Proposal 8, susceptible to varying interpretations, was not incompatible or irreconcilable with the regulation, but that Proposal 10 was incompatible and irreconcilable with the regulation. He therefore found Proposal 8 to be negotiable on the merits, and found Proposal 10 to be nonnegotiable because it conflicted with AFR 40-452. In neither case did the Judge consider whether there was a compelling need for the regulation asserted to be incompatible with the Union proposal, although he noted that agencies are not obligated to bargain over matters encompassed by their regulations unless it is first determined under section 7117(b) of the Statute[4] that no compelling need exists for the regulation. In this regard, he noted that the Authority had not yet addressed whether a compelling need issue could be resolved in an unfair labor

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(Continued)

as outlined in those documents submitted to your office . . . by letters of transmittal dated March 31, 1981 and April 30, 1981." Thus, it appears that the local parties were still bargaining over the unmodified proposals after implementation, and the record further indicates that the Respondent was not requested to bargain over the modified proposals, which are the subject of the complaint in this case, inasmuch as the issues remained essentially the same on September 4 as prior to the May 13 AFGE submission.

[4] Section 7117(b) provides:

> § 7117. Duty to bargain in good faith; compelling need; duty to consult
>
> . . . . .
>
> (b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section

(Continued)

practice proceeding, but concluded that absent the Authority's resolution of that question his opinion was that compelling need could be resolved by the Authority only in a negotiability proceeding. The record indicates, as noted below, that the Respondent did not argue the existence of a compelling need for the regulation to the Judge.

2. Subsequent case law

After the Judge issued his Decision in this case, the Authority determined that a compelling need issue can be decided in an unfair labor practice proceeding. Defense Logistics Agency (Cameron Station, Virginia) et al., 12 FLRA 412 (1983).[5] Thus, agency management may raise compelling

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(Continued)

> which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.
>
> (2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--
>
> (A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or
>
> (B) the Authority determines that a compelling need for a rule or regulation does not exist.

[5] The United States Court of Appeals for the District of Columbia Circuit affirmed the Authority's interpretation of the Statute, but remanded the matter to the Authority for the sole purpose of permitting the petitioners to present evidence as to whether there existed a compelling need for the particular regulation at issue. Defense Logistics Agency, et al. v. FLRA, 754 F.2d 1003 (D.C. Cir. 1985). On April 22, 1985, the Authority remanded the proceeding to the Chief Administrative Law Judge for disposition consistent with the direction of the court. Thereafter, on March 31, 1986, the complaint was withdrawn.

need for an agency regulation as an affirmative defense to an allegation that it unlawfully refused to bargain before implementing its new or revised regulation. In addition, the agency raising compelling need as an affirmative defense is required to come forward with affirmative support for such assertion, just as it would have the burden of establishing compelling need in a negotiability proceeding. See Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100 (1986).[6]

3. Discussion of compelling need in this case

The record discloses that the Respondent did not raise or argue the existence of a compelling need for AFR 40-452 as a reason for refusing to bargain with the Union or as a defense to the unfair labor practice allegations in this case. Rather, the Respondent consistently asserted that since it had claimed the proposals were nonnegotiable because they conflicted with AFR 40-452, raising a regulatory bar, it was up to the Union or the General Counsel to assert and establish the absence of a compelling need. The Respondent contends that it needs only to show a conflict between the proposal and the regulation, and that the burden of proof is on the General Counsel to show that a proposal is negotiable. The Authority disagrees. Section 2424.11 of the Authority's Rules and Regulations states that "[a] compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the . . . criteria[.]" (Emphasis added.) Thus, as the Respondent never even asserted that a compelling need existed for AFR 40-452 so as to excuse it from the duty to bargain, such obligation existed unless there is merit to any of the Respondent's other defenses.

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[6] The Authority notes that the United States Court of Appeals for the Fourth Circuit recently reversed an Authority decision on this same issue, U.S. Army Engineer Center and Fort Belvoir, 13 FLRA 707 (1984), reversed sub nom. United States Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985), rehearing denied (July 26, 1985). In the Authority's Supplemental Decision and Order in that case, U.S. Army Engineer Center and Fort Belvoir, 19 FLRA No. 92 (1985), the Authority stated it "accepts the Court's opinion as the law of the case and, consistent with that opinion, shall order that the complaint in Case No. 3-CA-20133 be dismissed." Slip op. at 2.

C. Analysis of Negotiability Issues

The Authority adopts the Judge's conclusion that Union Proposals 1 and 2 are negotiable, and that Proposal 4 is nonnegotiable, all for the reasons he stated. We will now address the negotiability of the remaining disputed proposals.

Proposal 6.[7]

> Details shall be given equitable and proportionate weight in the overall performance rating as work performed in the employee's actual position. When an employee has been officially detailed to another position, the employee's performance on the detail shall be appraised in writing so that the employee's records reflect this annual appraisal. Details of six months or more will be given equal weight in the overall rating. Accordingly, details of a lesser period will be given an equitable, proportionate amount of weight in the overall rating.
>
> Employees who are detailed or assigned to another position will not be required to meet the standards of this position until they have received the necessary training, guidance, and etc. This training period will be for no less than 30 days. An employee's evaluation will only commence after the training period and the supervisor has fully discussed the performance standards, critical elements, and the performance expected of the employee.

The first paragraph of Union Proposal 6 would, under existing precedent, substantively interfere with management's right to direct and assign work under section 7106(a)(2)(A) and (B) of the Statute.[8] See American

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[7] The second sentence of the first paragraph is not in dispute.

[8] Section 7106(a)(2)(A) and (B) provides:

§ 7106. Management rights

(Continued)

Federation of State, County and Municipal Employees, AFL-CIO, Council 26 and U.S. Department of Justice, 13 FLRA 578 (1984). However, the Union has argued that this proposal was intended to provide an "appropriate arrangement" under section 7106(b)(3) of the Statute for employees whose annual performance rating would be affected because of details during their rating period. In its recent decision in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), the Authority adopted an "excessive interference" test for dealing with proposed appropriate arrangements and addressed the factors it would consider in making its determination. We find that the proposal here, on its face, clearly prescribes an arrangement for employees being appraised who have been detailed during their rating period. We find that the proposal only provides that details be given "equitable and proportionate weight" in the performance ratings. It appears that the proposal is fully consistent with and implements 5 C.F.R. 430.204(q) and (r) (1985), which provide that a performance rating must take into account an employee's performance on a detail which occurs during a

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(Continued)

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

rating period.9/ The benefit to employees under the proposal would simply be that their annual appraisal would include consideration of all the work they had done during the appraisal period.10/ The Agency still retains its

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9/ 5 C.F.R. 430.204(q) and (r) provides in pertinent part:

> § 430.204 The performance appraisal process
>
> (q) Details within the same agency.
>
> Agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion within the same agency when the detail or temporary promotion is expected to last 120 calendar days or longer. Performance ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next annual performance rating.
>
> (r) Details to another agency or organization.
>
> When an employee is or had been detailed or temporarily assigned outside of the agency, an annual performance rating must be prepared if the employee has served for the minimum appraisal period inside the agency.
>
> (1) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period in another organization, the agency must make a reasonable effort to obtain appraisal information from the other organization sufficient to prepare an annual performance rating.

10/ See, for example, American Federation of Government Employees, AFL-CIO, Local 2849 and Office of Personnel Management, New York Regional Office, 7 FLRA 571 (1982), wherein the Authority found negotiable a proposal that would require an employee's performance standard to be consistent with the employee's duties.

management right to detail, to determine the length of the detail, to assign work on the current job or the detail, and to determine the priority of the work assigned. Nor does the proposal preclude management from evaluating employees or from setting particular standards for the work assigned. Therefore, the Authority concludes that the first paragraph of Union Proposal 6 is a negotiable appropriate arrangement as any burden on management in these circumstances is unsubstantial in comparison to the benefit afforded to the affected employees. In conclusion, the Authority finds that it does not excessively interfere with management rights.

Turning to the second paragraph of Union Proposal 6, the Authority finds this portion of the proposal negotiable. In this regard, it has the same effect of delaying application of performance requirements for a period during which an employee is performing duties of a new position as the proposals the Authority found negotiable in *American Federation of State, County and Municipal Employees, Local 2910, AFL-CIO and Library of Congress*, 15 FLRA 541 (1984) and *National Federation of Federal Employees, Council of Consolidated SSA Locals and Department of Health and Human Services, Social Security Administration*, 17 FLRA 657 (1985) (Union Proposal 1), *petition for review* filed sub nom. *Department of Health and Human Services, Social Security Administration v. FLRA*, No. 85-1601 (4th Cir. June 19, 1985). Therefore, for the reasons set forth in those cases, the proposal is negotiable.

Proposal 7.

> The union will be allowed participation on any committee and/or process established to select recipients for awards.

The Authority finds that Union Proposal 7 would, under existing precedent, directly interfere with management's reserved rights under section 7106(a)(2)(A) and (B) of the Statute, even if the Union's role is limited to observation. *See Department of the Navy, Northern Division, Naval Facilities Engineering Command*, 19 FLRA No. 86 (1985), *petition for review filed sub* nom. *National Federation of Federal Employees, Local 1430 v. FLRA*, No. 85-1648 (D.C. Cir. October 9, 1985). Thus, the term "any committee and/or process" could include any committee or process established to select employees for performance based awards, and to that extent the proposal is nonnegotiable.

Proposal 8.

> An employee with a minimally acceptable rating or higher will be screened for basic promotion eligibility.

The Authority finds Proposal 8 to be negotiable since it only involves the screening of employees. If the proposal required selection based on the lower standard, it would have been inconsistent with management rights under section 7106(a)(2)(A) and (B) of the Statute and, thus, nonnegotiable. The proposal here only proposes a procedure that the Respondent will use when it determines which employees are eligible for promotion, but will not compel the Respondent to promote such employees. See, for example, National Treasury Employees Union and NTEU Chapter 72 and Internal Revenue Service, Austin Service Center, 11 FLRA 271 (1983) (Union Proposal 2).

Proposal 9.

> Under no circumstances will an employee be demoted or removed without the following steps being taken by the employer:
>
> 1. The agency shall direct maximum efforts to improve an employee's performance through counselling, training, reassignment, job restructuring, development of suitable incentives and setting short term specific goals to be accomplished within a set time limit before considering whether to initiate procedures to demote or separate the employee.
>
> 2. Following the above, and after a reasonable amount of time has been given to demonstrate acceptable performance and the employee has not improved further action might be warranted. A "reasonable amount of time" is to be defined on a case-by-case basis by the supervisor, employee and union steward. The supervisor at all times should assist the employee in improving his or her performance.

The Union's intent with regard to Proposal 9 was to include "all employees" under its provisions. The Union would not agree with management's counterproposal to change the word "employee" to "non-probationary employees." Since it is clear that the provisions of Proposal 9 would include within the parties' negotiated grievance procedures those disputes regarding the termination of probationary employees, the Authority finds the entire proposal nonnegotiable. See American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 8 FLRA 347 (1982), rev'd sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983). Further, as this proposal arose in an unfair labor practice proceeding, the Authority finds it unnecessary to pass upon whether the provisions of Proposal 9 would be negotiable for non-probationary employees.

Proposal 10.

> Forms documenting ratings of unacceptable but not accompanied by a demotion or removal recommendation will be kept for one year then destroyed.

Since no issue has been raised as to whether there exists a compelling need for AFR 40-452, as noted above, and no other basis for finding the proposal nonnegotiable has been alleged or established, the Authority finds Proposal 10 to be negotiable inasmuch as it relates to a procedure which management is to use when an employee receives an unacceptable rating.

Proposal 11.

> An employee who believes any performance standard does not meet the criteria contained in this agreement may file a grievance under Article 6 of the MLA.

The negotiability of this proposal hinges on the Union's intent. The question is whether it meant to authorize employees to grieve the performance standards themselves or only their application. Relying on the Union's intent at the time the parties were at impasse,[11] the Authority finds the Union's intent with regard to this proposal was to provide "the union and/or employee an opportunity to challenge the validity of performance standards through the negotiated grievance procedure." As the proposal would authorize grievances concerning the standards themselves rather than their application, the Authority concludes that Proposal 11 is nonnegotiable. See American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, St. Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981), affirmed sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

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[11] Any other explanation of intent occurring after the Union's submission to the Panel is not germane to this proceeding. The AFGE's May 13 submission was not a proper bargaining request to the Respondent in terms of its modified Proposals 3 and 5, as discussed earlier, or in terms of its change of intent with regard to the Union's proposals.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties[12] and the entire record, and adopts the Judge's findings, conclusions, and recommended Order as consistent with this decision.

Therefore, having found that Union Proposals 1, 2, 6, 8 and 10 are negotiable, the Authority concludes that the Respondent's implementation of AFR 40-452 without bargaining on these proposals as requested, violated section 7116(a)(1) and (5) of the Statute. See Veterans Administration, Veterans Administration Regional Office (Buffalo, New York), 10 FLRA 167 (1982).

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, shall:

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[12] The Authority's Rules and Regulations do not provide for the Respondent's submission of an opposition to the Charging Party's "Opposition to Respondent's Exceptions and Charging Party's Cross-exceptions." Therefore, the Authority has not considered that submission.

1. Cease and desist from:

(a) Failing and refusing to meet and negotiate with the American Federation of Government Employees, AFL-CIO, Council 214, the employees' exclusive representative, over negotiable proposals with respect to the procedures which the Agency will observe in exercising its authority with regard to any change in the Agency's performance appraisal system and concerning appropriate arrangements for employees adversely affected by such change.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, Council 214, the employees' exclusive representative, meet and negotiate with such representative concerning any of the proposals found negotiable herein, submitted in connection with implemented changes in the Agency's performance appraisal system.

(b) Post at all of its facilities where bargaining unit employees are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

IT IS FURTHER ORDERED that the allegation of the complaint in Case No. 5-CA-20018 relating to the Respondent's refusal to negotiate over those proposals found nonnegotiable be, and it hereby is, dismissed.

Issued, Washington, D.C., June 4, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to meet and negotiate with the American Federation of Government Employees, AFL-CIO, Council 214, our employees' exclusive representative, over negotiable proposals with respect to the procedures which the Agency will observe in exercising its authority with regard to any change in our performance appraisal system and concerning appropriate arrangements for employees adversely affected by such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of any right assured by the Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, Council 214, our employees' exclusive representative, meet and negotiate with such representative concerning any of the proposals found negotiable herein, submitted in connection with implemented changes in our performance appraisal system.

____
(Activity)

Dated:________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Boulevard, Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

[22 FLRA No. 4]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

Case No. 5-CA-20018

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

. . . .

Roger T. McNamara, Esq.
For the Respondent

Steven M. Angel, Esq.
For the Charging Party

Sandra J. LeBold, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq*.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Council 214, AFL-CIO (the Union herein), on October 13, 1981 against the Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (Respondent herein), the General Counsel of the Authority, by the Regional Director for Region 5, issued a Complaint and Notice of Hearing alleging Respondent refused to bargain with the Union by declaring various of the Union's bargaining proposals to be nonnegotiable and thereafter implementing regulations concerning a performance appraisal program without bargaining with the Union on the procedures, impact and implementation of the regulations.

A hearing on the Complaint was conducted on March 9, 1982 in Dayton, Ohio, at which time all parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses and argue orally. Briefs were filed by all parties.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions of law and recommendations.

Chronology of Events

At all times material herein the Union has been the exclusive collective bargaining representative of approximately 70,000 of Respondent's employees nationwide. In early November 1980 Respondent provided the Union with copies of Air Force Regulation (AFR) 40-452, dated October 1, 1980, which dealt with Department of the Air Force policy and procedures for appraisal and rating Air Force employees and offered to bargain with the Union on the impact of the regulation. The regulation implemented the provision of the Civil Service Reform Act of 1978, 5 U.S.C. § 4302, which provided for the establishment of performance appraisal systems, including critical elements and performance standards, by each agency and required that all performance appraisal systems be put into effect by October 1, 1981. The Union made a request to bargain on the regulation and the parties agreed to begin negotiations after the first of the year. In mid-January 1981 the Union sent Respondent various proposals dealing with the regulation. On March 4, 1981 when the parties met for the first time to discuss the proposals, Respondent submitted its counter-proposals to the Union.

The parties continued negotiations on March 5, 6, 8, and 9, 1981. On March 9 the Union submitted its second set of proposals to Respondent. These proposals, consisting of eight pages, addressed ten general topics under the following titles: general information, definitions, purpose of performance appraisal system, identifying job performance elements and performance standards, performance appraisal discussion, details, basic probation requirements, using the results of performance appraisal, record keeping, and rights of parties. On March 10 management presented the Union its second set of counter-proposals, consisting of five pages, which covered the same general topics raised by the Union. Thereafter, the parties met on March 11, 12, and 15 to discuss the proposals.

Although agreement was reached on numerous matters, the parties were unable to agree on 15 Union proposals and impasse was declared. Accordingly, on March 27 the Union requested the assistance of the Federal Service Impasses Panel and indicated to the Panel the areas of impasse and the areas of agreement and provided a summary of positions. On that same date Respondent notified the Union, in writing, that due to statutory requirements that the Performance Appraisal System be fully implemented by October 1, 1981, it intended to begin implementing its final offer to the Union. Respondent advised the Union that it would immediately commence with training its supervisors and managers, and on June 1 or later, it would begin implementation with bargaining unit employees.

By letter to the Impasses Panel dated April 22, 1981 the Union, inter alia, provided the Panel an amendment to supplement its March 27 statement of position on three of its proposals. A copy of this letter was sent to Respondent.

On April 29, 1981 Respondent notified the Impasses Panel of its position that the Union's proposals upon which impasse had occurred were nonnegotiable. Respondent set forth reasons for its conclusions and indicated that fact-facting by the Panel would be a likely course of action to follow to reach a settlement of the dispute.

The Impasses Panel apparently telephonically requested the national office of AFGE to respond to Respondent's allegations of nonnegotiability. Accordingly, by letter dated May 13, 1981 to the Panel, a copy of which was sent to Respondent and AFGE Council 214, the AFGE national office set forth its position and intent regarding each of the Union's proposals Respondent declared nonnegotiable. That letter also explicitly revised two of the Union's specific proposals which Respondent had previously declared to be nonnegotiable.

On June 5, 1981 the Impasses Panel notified the parties that it was declining to assert jurisdiction in the case since Respondent raised threshold questions concerning its duty to bargain with respect to a substantial portion of the Union's proposals.

The process of implementing AFR 40-452 included: instructing supervisors in the procedure; developing a work plan by supervisors which encompassed the identification of critical elements and performance standards of each employee; meeting with each employee to review and discuss the work plan; revision and final drafting of each work plan; and presenting the final work plan to each employee. Around July 1, 1981 AFR 40-452 was implemented with regard to Respondent's supervisors meeting with employees to discuss specific critical elements and performance standards. The process described above was completed by October 1.

On Septemter 14, 1981 AFGE national office wrote Respondent, on behalf of its ". . . constituent, National Council of AFLC (Air Force Logistics Command) Locals," requesting Respondent's position on its claim of nonnegotiability on the Union's March 9, 1981 proposals (above) "as modified in (the national office's) submission to the Federal Service Impasses Panel on May 13, 1981." The letter indicated that the information would be used in connection with a negotiability appeal to the Authority. Respondent replied on September 21 by providing a copy of the document it previously sent the Impasses Panel on April 29 (above) which set forth its reasons for claiming nonnegotiability. The response made no reference to the May 13 letter of AFGE national office revising two of the Union's earlier proposals but, rather, addressed only the Union's March 9 proposals.

On October 8, 1981 the AFGE national office, "on behalf of its constituent Council 214" filed an negotiability appeal with the Authority. On October 13 the present unfair labor practice charge was filed and on November 2 the AFGE national office requested that the Authority hold in abeyance its negotiability appeal and the matter thereafter proceeded to complaint.

The Proposals

The specific proposals at issue herein are as follows:[1]

> (1) Management will encourage employee and union representatives to work with supervisors to identify job performance elements and to set performance standards.
>
> (2) The union will be provided copies of all standards in a manner which will allow sufficient time for review and discussion with employees, if such is warranted in the opinion of the union.
>
> (3) Critical Elements: a job element which is of such importance that if it is not performed adequately, acceptable performance of the job as a whole is not possible.
>
> Performance Standards: Statements of objective requirements measuring various levels of achievement for critical and non-critical elements. All performance standards must be fair, equitable, objective, valid, reliable, and job-related.

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[1] Proposals 3 and 5 appear as revised by the AFGE national office in its May 13, 1981 letter to the Impasses Panel, a copy of which was received by Respondent.

(4) All efforts should be made so that standards reflect expectations of the average employee working a reasonable, normal rate.

(5) The agency shall make every effort to remove whatever obstacles there may be in the job environment, such as excessive paperwork, physical hazards to health and safety, insufficient freedom to exercise initiative, and lack of direction, which makes it difficult for an employee to do the best work.

(6) Details shall be given equitable and proportionate weight in the overall performance rating as work performed in the employee's actual position. When an employee has been officially detailed to another position, the employee's performance on the detail shall be appraised in writing so that the employee's records reflect this annual appraisal. Details of six months or more will be given equal weight in the overall rating. Accordingly, details of a lesser period will be given an equitable, proportionate amount of weight in the overall rating.

Employees who are detailed or assigned to another position will not be required to meet the standards of this position until they have received the necessary training, guidance, and etc. This training period will be for no less than 30 days. An employee's evaluation will only commence after the training period and the supervisor has fully discussed the performance standards, critical elements, and the performance expected of the employee.

(7) The union will be allowed participation on any committee and/or process established to select recipients for awards.

(8) An employee with a minimally acceptable rating or higher will be screened for basic promotion eligibility.

(9) Under no circumstances will an employee be demoted or removed without the following steps being taken by the employer:

1. The agency shall direct maximum efforts to improve an employee's performance through counselling, training, reassignment,

job restructuring, development of suitable incentives and setting short term specific goals to be accomplished within a set time limit before considering whether to initiate procedures to demote or separate the employee.

2. Following the above, and after a reasonable amount of time has been given to demonstrate acceptable performance and the employee has not improved further action might be warranted. A "reasonable amount of time" is to be defined on a case-by-case basis by the supervisor, employee and union steward. The supervisor at all times should assist the employee in improving his or her performance.

(10) Forms documenting ratings of unacceptable but not accompanied by a demotion or removal recommendation will be kept for one year then destroyed.

(11) An employee who believes any performance standard does not meet the criteria contained in this agreement may file a grievance under Article 6 of the MLA.

Discussion

Proposal 1 - "Management will encourage employee and union representatives to work with supervisors to identify job performance elements and to set performance standards."

Respondent contends that this proposal requires negotiations with the Union in identifying job performance elements and setting performance standards and is therefore nonnegotiable. I find the proposal to be negotiable.

The Authority held in American Federation of Government Employees, AFL-CIO, Local 2849 and Office of Personnel Management, New York Regional Office, 7 FLRA 571 (1982), that a proposal requiring negotiations to establish performance standards and critical elements to be outside an agency's duty to bargain.[2] Prior thereto, the Authority held nonnegotiable a similar proposal requiring the establishment of performance standards "through collective bargaining" in that such negotiations would directly interfere with the exercise of management's right to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 at 787-789. However, the Authority stated in that case, ". . . an exclusive representative must be given the opportunity to be represented at certain meetings between management and employees relating to the development and implementation of performance appraisal systems . . ." Further, the Authority noted in a subsequent case that proposals which require the opportunity for union comment on proposed changes in performance standards and critical elements are within an agency's duty to bargain under the Statute. American Federation of Government Employees, AFL-CIO, Local 3656 and Federal Trade Commission, Boston Regional Office, 5 FLRA No. 70 at p.3.

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[2] The requirement for negotiations was actually stated as "meeting and conferring."

In the case herein the proposal as stated is ambiguous as to whether negotiation or merely an opportunity for Union comment is required. Respondent asserts that the following unrebutted testimony of Respondent's negotiator, relating what the Union's negotiator stated concerning the meaning of the proposal during bargaining, demonstrates that "negotiation" was envisioned by the proposal:

> "Q. What did Mr. Ketcherside tell you that proposal meant, Mr. Mullen?
>
> "A. This proposal was explained to me that the supervisor, the union representative and the employee would sit down and identify job performance elements, set the performance standards, and that they would reach agreement. And I pursued that, the requirement for the agreement, with the question of what would happen if there was no agreement. It was explained that there would be. The people working at the first level supervisor level in the shops knew the jobs, knew each other, and that there shouldn't be too much of a problem with that."

I find this testimony still leaves a measure of doubt as to the meaning of the proposal. However, subsequent to the bargaining session which produced the above comments, the Union, in its March 27, 1981 request for assistance from the Federal Service Impasses Panel explained that the Union's proposal would only commit the employee to solicit "input" from employees and Union officials and specifically disclaimed "an attempt for such participation to preclude the supervisor from making final determinations relative to elements and standards." Therefore, in the circumstances herein I find that the proposal does not require negotiations on performance elements and standards but only requires the opportunity for Union comment. Accordingly, I conclude the proposal is negotiable. Federal Trade Commission, Boston Regional Office, supra, and Respondent's refusal to negotiate on this proposal violated section 7116(a)(1) and (5) of the Statute. Social Security Administration, Baltimore, Maryland, 9 FLRA 909 (1982).

Proposal 2 - "The union will be provided copies of all standards in a manner which will allow sufficient time for review and discussion with employees, if such is warranted in the opinion of the union."

Respondent contends that this proposal would require Respondent providing the Union with copies of impending final job performance elements and standards prior to implementation, including the completed work plan for each individual employee. Respondent argues that such a procedure would violate the Privacy Act, 5 U.S.C. 552(a), and is therefore nonnegotiable.

I find the proposal to be negotiable. While AFR 40-452 provides that the Privacy Act is applicable to matters concerning performance appraisal programs developed thereunder, the Authority, as stated above, has held that an agency is obligated to bargain over a proposal providing a union with an opportunity to comment on proposed changes in performance standards and critical elements. Federal Trade Commission, Boston Regional Office, supra. That being the case, it is difficult to imagine how the Union herein could make meaningful comments regarding performance standards and critical elements as applied to a particular employee's job unless the information sought and an opportunity for review and discussion is provided. Further, when considering the application of the Privacy Act in situations where, as here, the information sought by an exclusive representative is necessary and relevant to perfecting its Statutory rights and fulfilling its obligations, the Authority has frequently held that a union's Statutory right and need for the information sought substantially outweighs an employee's loss of privacy which might occur. Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 at 635, 640 (1981) and cases cited therein. Accordingly, I find and conclude that the proposal is negotiable and reject Respondent's contention regarding the application of the Privacy Act.

Proposal 3 - "Critical Element: a job element which is of such importance that if it is not performed adequately, acceptable performance of the job as a whole is not possible."

"Performance Standards: Statements of objective requirements measuring various levels of achievement for critical and non-critical elements. All performance standards must be fair, equitable, objective, valid, reliable, and job-related."

Proposal 3 encompassing definitions of critical elements and performance standards, herein, was one of the two proposals which were revised by the AFGE national office in its submission to the Impasses

Panel on May 13, 1981. Respondent argues that no request to bargain on this proposal as amended was ever made since AFGE national had not participated in negotiations prior to impasse. Therefore, Respondent reasons, procedurally no unfair labor practice violation can lie.

Respondent's procedural argument is rejected. Respondent, by receiving a copy of AFGE national's communication to the Impasses Panel was made aware that AFGE national, on behalf of Council 214, was revising the proposal. It did not object nor indicate any confusion by the revision. Rather, Respondent chose to stand by its last submission to the Impasses Panel re nonnegotiability and indeed, made no comment when responding to AFGE national's September 14, 1981 request for its position on negotiability wherein it specifically noted the proposals had been "modified." Thus, I find it was clear to Respondent that the Union's proposals were revised by AFGE national, on behalf of Council 214, the revision was timely made since the matter was still before the Impasses Panel for consideration, and Respondent's conduct constituted affirmation of its prior contention of nonnegotiability.

With regard to the negotiability of the proposal, Respondent asserts that no duty to bargain on the proposal exists since AFR 40-452 sets forth the definitions of a critical element and a performance standard and the proposed definitions of critical element and performance standards conflict with the regulatory definitions.

Under section 7117(a)(2) and (3) of the Statute, an agency or a primary national subdivision of an agency is not obligated to bargain with a union regarding matters encompassed by their regulations unless a union represents the majority of employees in the agency or primary national subdivision or unless the Authority has determined, under section 7117(b) of the Statute, that no compelling need exists for the regulation in effect. The Department of the Air Force is a primary national subdivision of the Department of Defense and, Respondent reasons, since the Union does not represent a majority of Department of the Air Force employees, and the Authority has not determined that no compelling need exists for the regulation, no obligation to bargain exists regarding the Union's proposal.

The Authority has not yet addressed the question of whether a compelling need issue may be resolved in an unfair labor practice proceeding before an Administrative Law Judge. However, I have previously addressed this issue in Boston District Recruiting Command et al., Case Nos. 1-CA-206, et al., OALJ-81-023 (December 22, 1980). In that case I held that the legislative history and the language of the Statute and Regulations require a conclusion that the compelling need procedures envisioned by section 7117 of the Statute apply generally to all situations where an agency genuinely defends against a demand to negotiate on a matter by interposing the existence of an appropriate regulation. In rejecting a position propounded by counsel for the General Counsel in that case I stated:

> Counsel for the General Counsel also suggests, as an alternative argument, that if the agency regulation stands as a bar to negotiations, then the proceeding herein served to put the issue of compelling need before the Authority for determination. In my view neither the Statute nor the Authority's regulations appear to envision this approach. Indeed, section 7117(b)(3) of the Statute provides that where a hearing is held to make a determination of compelling need, it ". . . shall not include the General Counsel as a party" (Footnote omitted). Accordingly, to combined a compelling need determination with an unfair labor practice proceeding, where the General Counsel has the responsibility of presenting the evidence in support of the complaint and carries the burden of proving the allegations of the complaint, would run contrary to Statutory prohibition. Therefore, Counsel for General Counsel's contention is rejected."

Judge Francis E. Dowd also addressed this issue in Defense Logistics Agency, et al., Case No. 1-CA-213, OALJ-81-131 (July 7, 1981), and Headquarters, Defense Logistics Agency, et al., Case Nos. 3-CA-664 et al., OALJ-81-133 (July 10, 1981). In those cases Judge Dowd similarly found that an agency regulation was a bar to negotiations absent a finding of no compelling need made directly by the Authority in a negotiability context. Judge Dowd based his conclusion not only on a literal reading of the Statutory language but also on the apparent Statutory scheme for resolving such matters.

In the case herein, "critical element" is defined in AFR 40-452 as follows:

> "d. Critical Element. A job performance element of an employee's job of sufficient importance that performance below the minimum performance standard established by management requires remedial action and denial of merit pay or a within-grade increase, and may be the basis for removing, reassigning, or demoting the employee. Such action may be taken without regard to performance on other job performance elements."

I find the definition of "critical element" as proposed by the Union, supra, is at substantial variance and therefore incompatible or irreconcilable with the definition contained in the regulation. Accordingly, I conclude that AFR 40-452 is a bar to negotiations on this proposal. Cf. Office of Personnel Management, Washington, D.C., supra.

With regard to "performance standard," it is defined in AFR 40-452 as follows:

> "f. Performance Standard. A description of the minimum level of accomplishment necessary for satisfactory performance. Performance standards are expressed in terms of qualitative or quantitative objectives, specific actions, project assignments, or other requirements related to job performance elements. There may be more than one standard set for a single job performance element."

I similarly find the definition of "performance standard" as proposed by the Union, supra, is, taken as a whole, at substantial variance and therefore incompatible or irreconcilable with the definition contained in the regulation. Accordingly, I conclude that AFR 40-452 is a bar to negotiations. Office of Personnel Management, Washington, D.C. supra.

Proposal 4 - "All efforts should be made so that standards reflect expectations of the average employee working a reasonable, normal rate."

This proposal would limit Respondent in setting performance standards to the "expectations" of the average employee. Thus, the expectations of such an employee would be the determinative element for management in initially establishing performance standards and management would be precluded from exercising its independent judgment in making the determination. Therefore, the proposal goes to the content of the performance standard and if a grievance were to be decided concerning the application of a performance standard, questions of whether "all efforts" were made and the underlying standard actually reflected the expectations of the average employee would be open for determination by an arbitrator who might well substitute his judgment for that of the agency. Such action would impermissibly restrict Respondent's decision and directly interfer with management's right to direct its employees and assign work under section 7106(a) of the Statute. Accordingly, I find the proposal to be nonnegotiable. Cf. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980); aff'd, No. 80-1895 (D.C. Cir. Oct. 12, 1982); Office of Personnel Management, Washington, D.C., supra; National Treasury Employees Union and Department of Health and Human Services, Region 10, 7 FLRA 727 (1982); and National Federation of Federal Employees, Local 1437 and U.S. Army Armament Research and Development Command, Dover, New Jersey, 8 FLRA 414 (1982).

Proposal 5 - "The agency shall make every effort to remove whatever obstacles there may be in the job environment, such as excessive paperwork, physical hazards to health and safety, insufficient freedom to exercise initiative, and lack of direction, which makes it difficult for an employee to do the best work."[3]

Respondent contends, inter alia, that the above proposal violates management's right to direct employees and assign work under 7106(a)(2), and is therefore nonnegotiable. I agree.

The Authority has held that a proposal to "tailor" or redesign a position in a particular manner conflicts with management's right to assign work under section 7106(a)(2)(B) of the Statute and is therefore nonnegotiable. National Federation of Federal Employees, Local 1624 and Air Force Contract Management Division, Hagerstown, Maryland, 3 FLRA 142 (1980) and American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 at 620-622. The proposal herein, encompassing such matters as reducing "paperwork" and providing better "direction" and "freedom to exercise initiative," clearly requires restructuring duties to provide a job which does not make it "difficult for an employee to do the best work." Accordingly, I find the proposal to be nonnegotiable.

Proposal 6 - "Details shall be given equitable and proportionate weight in the overall performance rating as work performed in the employee's actual position. When an employee has been officially detailed to another position, the employee's performance on the detail shall be appraised in writing so that the employee's records reflect this annual appraisal. Details of six months or more will be given equal weight in the overall rating. Accordingly, details of a lesser period will be given an equitable, proportionate amount of weight in the overall rating."

"Employees who are detailed or assigned to another position will not be required to meet the standards of this position until they have received the necessary training, guidance, and etc. This training period will be for no less than 30 days. An employee's evaluation will only commence after the training period and the supervisor has fully discussed the performance standards, critical elements, and the performance expected of the employee."

With regard to the first part of this proposal, Respondent argues that by "dictating" to appraising officials the weight accorded detail duties in the overall rating, management's rights to direct and assign work under section 7106(a)(2) of the Statute are abridged. I find this part of Proposal 6 to be negotiable.

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[3] Proposal 5 appears as revised in the AFGE national office submission to the Impasses Panel on May 13, 1981.

In my view that part of the proposal concerning the weight given to details deals primarily with procedures for the implementation of performance standards and does not infringe on management's section 7106(a) rights. Indeed, the Authority specifically indicated in Bureau of the Public Debt, supra at 780, that the manner in which the performance of employees on detail will be appraised was an example of ". . . the wide range of employee participation possible through negotiations . . ." relative to performance standards.[4]

Turning now to the second part of Proposal 6 dealing with training detailed employees prior to requiring them to meet the standards of the position they have been assigned to, I find this proposal to be nonnegotiable. A very similar proposal was found to be outside an agency's duty to bargain in American Federation of Government Employees, AFL-CIO, Local 3004 and Department of the Air Force, Otis Air Force Base, Massachusetts, 9 FLRA 723 (1982). In that case the essence of the proposal provided that employees would not be evaluated on assigned duties which were outside their position description until management provided, and the employee completed, a formal training program in these duties. The Authority, citing numerous cases, held that determining which employee duties would be included in a performance appraisal is a management's right to direct and assign work under section 7106(a)(2)(A) and (B) of the Statute and therefore, management was not required to negotiate proposals relating to the substance of such determinations. The Authority specifically stated:

> "Furthermore, proposals which would contractually obligate an agency to provide formal training, to periodically assign employees to specific types of training programs, and to make specific training assignments upon employee requests are outside the duty to bargain because the assignment of training under such circumstances constitutes an assignment of work the negotiation of which is inconsistent with management's right to assign work under section 7106(a)(2)(B)." (Citations omitted).

Thus, I conclude the second part of Proposal 6 is outside Respondent's duty to bargain.[5]

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[4] The second sentence of the first portion of Proposal 6 dealing with an employee being provided a written appraisal while on detail is not alleged by Respondent to be nonnegotiable. In any event I would find such proposal to be clearly negotiable.

[5] Cf. American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Service, Social Security

(continued)

Proposal 7 - "The union will be allowed participation on any committee and/or process established to select recipients for awards."

Respondent contends it has no bargaining obligation regarding this proposal arguing that regulation AFR 40-470 controls the subject of awards and no changes in the awards program encompassed by AFR 40-470 occurred to require negotiations thereon.

I find that the change which occurred in Respondent's basic system of employee appraisal opened for bargaining the performance awards program under the new appraisal system. AFR 40-452 section 5-3 [6] states, inter alia, that "(e)mployees who get excellent or superior ratings should be considered for some kind of official honorary or monetary recognition." The regulation further treats the variety of awards available and circumstances for granting them, noting, "(m)ost employees covered by this regulation are eligible for awards covered by AFR 40-470."

The current AFR 40-470 [7] recognizes, under section 4A, inter alia, that appraisals given under AFR 40-452 are the basis for granting performance recognition. The regulation also provides under section 4D for an "interim measure" to permit granting performance recognition until employees covered by AFR 40-452 have been given an earned performance rating under that regulation. Section 4D reveals that the interim measure was to expire September 30, 1982.

AFR 40-470 also indicates that union representation on Incentive Awards Committees covering civilian performance awards programs is acceptable. Thus, section 6 of that regulation provides, inter alia: "Both supervisory and nonsupervisory military and civilian personnel may be represented on or participate in the committee's work including civilian personnel representation resulting from local negotiated agreements."

Accordingly, in the circumstances herein wherein a new appraisal system was adopted, that new system envisions awards, the regulation

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(5/ continued)

Administration, 9 FLRA 899 (1982); But see American Federation of Government Employees, AFL-CIO, Social Security Local No. 1760 and Department of Human Service, Social Security Administration, 9 FLRA 813 (1982) at 814 and cases cited therein.

[6] Chapter 5 of the regulation is entitled: "Using the Results of Performance Appraisal."

[7] Although a copy of this regulation was not offered in evidence, I hereby take administrative notice of its content.

relating to the performance awards program was obviously amended to apply to appraisals under the new program, and the regulation controlling performance awards programs does not preclude union participation in the awards process, I find and conclude that Union Proposal 7 is negotiable.

Proposal 8 - "An employee with a minimally acceptable rating or higher will be screened for basic promotion eligibility."

Respondent contends that this proposal is nonnegotiable in that it conflicts with section 5-5 of AFR 40-452.

Section 5-5 of AFR 40-452 provides, in relevant part:

"The extent of consideration an employee receives for merit promotion purposes will be determined by the performance appraisal. An employee with a fully successful rating or higher will be screened for basic merit promotion eligibility."

Respondent argues that the impact of the second sentence of the quoted portion of section 5-5 is to set the minimum rating required for screening for promotion. However, I find that section 5-5 is open to another interpretation whereby the Union's proposal would not be in conflict with the regulation. Thus, if the section were read to mean that all employees with a fully successful rating or higher must be considered for promotion eligibility, such would not preclude others, namely employees with a minimally successful ratings, from also receiving consideration. This construction is supported by the fact that section 5-5 does not state that only employees with a fully successful rating would be screened. Accordingly, I find that section 5-5 is susceptible of varying interpretations and the Union's proposal is not incompatible or irreconcilable with the regulation Cf. Office of Personnel Management, Washington, D.C., supra. I therefore conclude the proposal is negotiable. Such finding and conclusion is in accord with congressional intent that management rights be treated narrowly as an exception to the general obligation to bargain.

Proposal 9 - "Under no circumstances will an employee be demoted or removed without the following steps being taken by the employer:

"1. The agency shall direct maximum efforts to improve an employee's performance through counselling, training, reassignment, job restructuring, development of suitable incentives and setting short term specific goals to be accomplished within a set time limit before considering whether to initiate procedures to demote or separate the employee.

"2. Following the above, and after a reasonable amount of time has been given to demonstrate acceptable performance, and the employee has not improved further action might be warranted. A "reasonable amount of time" is to be defined on a case-by-case basis by the supervisor, employee and union steward. The supervisor at all times should assist the employee in improving his or her performance."

Respondent raises a variety of arguments to support its contention that Proposal 9 is nonnegotiable, including conflict with regulations[8/] and impermissable restricting of management rights set forth in 7106(a) of the Statute.

Section 4302(b)(3) of the Civil Service Reform Act (CSRA) requires that performance appraisal systems provide for "assisting employees in improving unacceptable performance" and providing "an opportunity to demonstrate acceptable performance "before management reassigns or take an adverse action against an employee whose performance is deemed unacceptable. However, Union Proposal 9, Section 1, requires management to engage in a training program and job restructuring for an employee whose performance is unacceptable before considering whether to demote or separate the employee from service.

Clearly, Proposal 9, Section 1, goes substantially beyond the requirements of the CSRA. Indeed, as stated above regarding Proposal 5, the Authority has held that a proposal to redesign or restructure a particular job conflicts with management's right to assign work under section 7106(a)(2)(B) of the Statute. Air Force Contract Management Division, supra, and Air Force Logistics Command, supra. Further, a similar proposal relative to demoting employees was construed by the Authority to improperly establish a condition upon an agency's rights under section 7106(a)(2)(A) of the State to remove or reduce in grade employees and assign employees. American Federation of Government Employees, Local 1760 and Department of Health and Human Services, Social Security Administration, Northeast Program Service Center, 9 FLRA 1025 (1982).

With regard to the requirement that an employee not be demoted or removed from service without first receiving "training" to improve performance, as stated above regarding the second portion of Proposal 6, the Authority has held that "proposals which would contractually obligate an agency to provide formal training, to periodically assign employees to specific types of training programs, and to make specific training assignments upon employee requests . . . are inconsistent with management's right to assign work under section 7106(a)(2)(B))." Department of the Air Force, Otis Air Force Base, supra; see also National Association of Air Traffic Specialists and Department of Transportation, Federal

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[8/] As a part of this position Respondent strongly argues that the proposal does not differentiate between the treatment of probationary and nonprobationary employees as required by 5 U.S.C. 4303 and AFR 40-452.

Aviation Administration, 6 FLRA 588 (1981) and cases cited in footnote 5 herein. Accordingly, in these circumstances I conclude that Proposal 9, taken as a whole, is nonnegotiable.[9]

Proposal 10 - "Forms documenting ratings of unacceptable but not accompanied by a demotion or removal recommendation will be kept for one year then destroyed."

Respondent takes the position that section 6-2 of AFR 40-452 conflicts with this proposal and therefore should be declared nonnegotiable. I agree.

Section 6-2 of AFR 40-452 provides:

> "a. Forms documenting ratings of superior, excellent, fully successful, or minimally acceptable, or an unacceptable rating not accompanied by a demotion or removal recommendation, will be kept for 5 years and then destroyed."

Proposal 10 limits retention of the designated unacceptable ratings for one year while the regulation specifically requires retention for five years. The proposal and the regulation are clearly incompatible and irreconcilable. Accordingly, for the reasons set forth above with regard to my conclusions regarding Union Proposal 3, I conclude Proposal 10 is nonnegotiable.

Proposal 11 - "An employee who believes any performance standard does not meet the criteria contained in this agreement may file a grievance under Article 6 of the MLA."

Respondent bases its contention that this proposal infringes upon the Respondent's right to direct employees and assign work on the "intent and the plain and clear language of the proposal."

With regard to the intent of the proposal, the Union in the attachment to its March 27, 1981 submission to the Impasses Panel, supra, explained that the proposal ". . . provides the union and/or the employee an opportunity to challenge the validity of performance standards through the negotiated grievance procedure." When the national union made its

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[9] Section 2 of Proposal 9 is designed to take effect only after the procedures set forth in section 1 have been exhausted. Since section 1 is nonnegotiable, obviously the elements of section 2 cannot be implemented and no independent negotiability determinating of this proposal need be made herein.

May 13, 1981 submission to the Impasses Panel it indicated that the intent of the proposal was not to violate management's right to direct and assign work. The national office further stated that, as used in the proposal, grievance meant ". . . grievance consistent with the Federal Labor Relations Authority decision that performance standards are grievable only after they are applied", citing American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, St. Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA No. 14 (1981), aff'd, No. 81-1274 (D.C. Cir. Oct. 12, 1982). In the cited case the Authority interpreted a union proposal that the grievance procedure therein extended to any action taken as a result of a performance appraisal to mean any action taken as a result of the application of critical elements and performance standards to an employee covered by the procedure. Id. at p. 11. This interpretation reflects the Authority's holding in Office of Personnel Management, Washington, D.C., supra, at 789-794 that a proposal which establishes a "general, nonquantitative requirement by which the application of critical elements and performance standards . . . may subsequently be evaluated in a grievance . . . is within the duty to bargain.

In all the circumstances herein I find Proposal 11 does not infringe upon management's right to direct employees or assign work. In my view, the statements of intent by the Union and the Union's national office do not help to clarify the meaning of the proposal. However, the express language used in the proposal merely implies that performance standards will comport with whatever "criteria" is ultimately contained in the parties collective bargaining agreement. One must assume that nonnegotiable or unlawful "criteria" will not be "contained in (the) agreement." That is what these proceedings, in part, are intended to assure. Accordingly, I find the proposal to be negotiable.

Summary and Remedy

I have found that Union Proposal 1, Proposal 2, Proposal 6, first paragraph, Proposal 7, Proposal 8, and Proposal 11 are negotiable.[10] Accordingly, I conclude that Respondent's refusal to bargain on these proposals, and subsequent unilateral implementation of a performance appraisal system on July 1, 1981 in these circumstances, violated section 7116(a)(1) and (5) of the Statute. Cf. Veterans Administration, 1 FLRA 888 (1979) and Internal Revenue Service, Chicago, Illinois, 9 FLRA 648 (1982).

The Union requests as a remedy a return to the status quo ante.[11]

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[10] In finding that these proposals are within the duty to bargain I make no judgment as to their merits.

[11] The General Counsel did not urge a status quo ante remedy.

In Federal Correctional Institution, 8 FLRA 604 (1982), the Authority held that in cases involving a violation of the duty to bargain over "impact and implementation", the appropriateness of the status quo ante remedy will be determined "on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." The Authority went on to list five factors it considered important in making a status quo ante determination through "balancing the equities." See also Internal Revenue Service, Chicago, Illinois, supra at 651.

In the case herein negotiations between the parties produced agreement on numerous items. However, 15 of the Union's proposals were declared nonnegotiable by Respondent and the General Counsel issued a complaint alleging Respondent illegally refused to bargain on 11 of the Union's proposals. I find herein that Respondent was obligated to bargain on five Union proposals and a portion of a sixth.

Respondent began to implement its new performance appraisal program in the collective bargaining unit on July 1, 1981 and by October 1, 1981, work plans encompassing performance standards and critical elements for some 70,000 employees were established. Within-grade pay increases to employees based upon the new appraisal system began to occur in February 1982 and continue at a rate of 25,000 a year.[12] Effective October 1982, promotions of employees will relate to appraisals received under the new appraisal system.

In the circumstances herein, and applying the standards set by the Authority in Federal Correctional Institution, supra, I conclude that a status quo ante remedy requiring Respondent to withdraw the new performance appraisal system and invalidating all personnel actions taken in accordance thereunder, reinstituting the performance appraisal program which was in effect prior to October 1, 1981 and appraising all employees and effectuating any personnel actions in conformance therewith, is not warranted. Rather, I conclude that requiring Respondent to bargain on the proposals found negotiable herein and subsequently putting into effect the performance appraisal program as negotiated would best effectuate the purposes and policies of the Statute and comply with the Authority's direction to balance the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy.

Accordingly, in view of the entire foregoing and having concluded that Respondent has violated section 7116(a)(1) and (5) of the Statute, I recommend the Authority issue the following:

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[12] Between October 1981 and February 1982 Respondent gave "presumptive" satisfactory ratings to employees eligible for within-grade increases.

ORDER

Pursuant to section 2423.20 of the Federal Labor Relations Authority's regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio shall:

1. Cease and desist from:

(a) Instituting any change in the Performance Appraisal Program without affording the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, the opportunity to bargain with respect to the procedures which the agency will observe in exercising its authority with regard thereto and appropriate arrangements for employees adversely affected by such change.

(b) Failing and refusing to negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, to the extent consonant with law and regulation, concerning any change in the Performance Appraisal Program.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, meet and negotiate with respect to the proposals previously submitted by the Union and found negotiable herein, to the extent consonant with law and regulation, concerning changes in the Performance Appraisal Program.

(b) Post at all of its facilities where bargaining unit employees are located copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained by him/her for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region 5, Federal Labor Relations Authority, 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Salvatore Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

ed: October 20, 1982
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the Performance Appraisal Program without affording the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, the opportunity to bargain with respect to the procedures which the agency will observe in exercising its authority with regard thereto and appropriate arrangements for employees adversel affected by such change.

WE WILL NOT fail and refuse to negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, to the extent consonant with law and regulation, concerning any changes in the Performance Appraisal Program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, meet and negotiate with respect to the proposals previously submitted by the Union and found to be negotiable, to the extent consonant with law and regulations, concerning changes in the Performance Appraisal Program.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region 5, Federal Labor Relations Authority, 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, and whose telephone number is (312) 353-0139.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE,
BUREAU OF FEDERAL PRISONS,
FEDERAL CORRECTIONAL INSTITUTION,
SEAGOVILLE, TEXAS

Activity

Case No. 0-AR-991

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON LOCALS,
LOCAL NO. 1637

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Charles N. Carnes filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator arose when the Activity proposed to suspend the grievant for 14 days for continuing to work on a particular project after being instructed by his supervisor to stop. The Activity's notice of proposed suspension advised the grievant, among other things, that he would be granted a reasonable amount of official time to review the materials upon which the proposed action was based and to present a reply. The grievant's request for eight hours of "administrative time" to prepare his reply was denied by the Activity's Personnel

Office on the ground that there was no provision in the parties' collective bargaining agreement for granting any time at that stage of the proceeding. The grievant then prepared his reply to the notice of proposed action on his own time after duty hours. The grievant eventually was suspended for three days and filed the grievance before the Arbitrator in this case. The grievance contested the merits of the suspension action and also raised a number of procedural issues, including the Activity's denial of the grievant's request for time to prepare his case.

As to the merits, the Arbitrator determined that the Activity had established just and sufficient cause for the 3-day suspension. As to the pertinent procedural issue, however, the Arbitrator found that the grievant's rights were violated when his request for time to prepare his case was denied. The Arbitrator noted that the Activity had promised the grievant a reasonable amount of official time for that purpose and was obligated to keep its promise. The Arbitrator also found that the negotiated grievance procedures of the parties' agreement cover all matters grievable under section 7121 of the Statute and provide that employees will be allowed a reasonable amount of official time to present their grievances. The Arbitrator concluded that the subject matter of the dispute before him met the broad definition of "grievance" under section 7103(a)(9) of the Statute for which official time was allowable under the agreement. The Arbitrator further concluded that in the circumstances involved the grievant should have been granted four hours of official time to prepare his case. As a remedy, the Arbitrator awarded the grievant four hours of pay.

III. EXCEPTIONS

In its exceptions, the Agency contends that the award of four hours pay is contrary to law. More specifically, the Agency argues that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it in effect requires the retroactive payment of four hours of overtime pay to the grievant and the findings necessary for such a payment under the Back Pay Act were not made. The Agency also argues that the award is contrary to section 7131(d) of the Statute because official time can only be granted in circumstances where the employee would otherwise be in a duty status and the grievant in this case performed the case preparation work on his own time during nonduty hours.

IV. ANALYSIS AND CONCLUSIONS

The Authority finds that the Agency has failed to establish that the Arbitrator's award is deficient as alleged. In a recent decision, American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986), the Authority reiterated its previous indications that section 7131(d) of the Statute*/ expressly authorizes parties to negotiate for the granting of official time for the performance of specified activities and that the Statute effectively provides a remedy when official time under section 7131(d) is wrongfully denied. Thus, where official time, authorized by provisions of a collective bargaining agreement consistent with section 7131(d) of the Statute, is wrongfully denied and the covered activities are thereafter performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. In this case, while the grievant was not engaged in union representational activities, section 7131(d)(2) of the Statute expressly provides for official time for bargaining unit employees "in connection with any other matter covered by this chapter." The Arbitrator found the dispute was a "grievance" covered by the Statute and the parties' agreement and that under the agreement the grievant was entitled to four hours of official time. Thus, the Arbitrator effectively found that the conditions of section 7131(d) had been met.

With regard to the Agency's specific contentions, the Authority first finds that the Agency's argument that the

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*/ Section 7131(d) provides:

> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Arbitrator's award is contrary to the Back Pay Act because the Arbitrator awarded the grievant retroactive overtime pay without making the necessary findings for such an award is without merit. The Authority has determined that performance of representational activities on nonduty time (outside regular working hours) is not overtime work. *See Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO*, 19 FLRA No. 4 (1985); *National Treasury Employees Union v. Gregg*, No. 83-546, slip op. at 4-5 (D.D.C. Sept. 28, 1983). The Authority therefore concludes, contrary to the Agency's contention, that since the grievant's performance on nonduty time of case preparation work for which official time should have been granted under section 7131(d)(2) was not overtime work, the Arbitrator did not award retroactive overtime pay and his award is not contrary to the Back Pay Act. With regard to the Agency's argument that under section 7131(d) of the Statute an employee must "otherwise be in a duty status" in order to be eligible to receive official time, such argument is also without merit. While subsections (a), (b) and (c) of section 7131 are explicit in regard to requiring an employee to be in a duty status in order to receive official time, subsection (d) is silent in that regard. In interpreting that subsection, the Authority has clearly indicated that it is not required that an employee would otherwise have been in a duty status in order to be entitled to official time under section 7131(d). *See Local 1164, American Federation of Government Employees, AFL-CIO and Social Security Administration, Boston Region*, 19 FLRA No. 110 (1985). The Authority therefore concludes that the Agency has also failed to establish that the Arbitrator's award is contrary to section 7131(d) of the Statute as alleged.

V. DECISION

Accordingly, for the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., June 4, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 6

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1546

Union

and

Case No. 0-AR-1110

SHARPE ARMY DEPOT

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Jean Wilcox filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance over the removal of the grievant was submitted to arbitration at which a preliminary issue was presented of whether the grievance initiated by the Union directly with Commander of the Activity complied with the requirements of the parties' negotiated grievance procedure. The Arbitrator determined that the grievance in this case was not the type of grievance properly filed directly with the Commander and that consequently the Union had failed to comply with the requirements of the parties' negotiated grievance procedure in filing the grievance. Accordingly, the Arbitrator ruled that the grievance was not arbitrable and that the merits of the grievance would not be considered.

III. EXCEPTION

The Union contends that the award is deficient because it is incomplete, ambiguous, and contradictory so as to make implementation impossible.

IV. ANALYSIS AND CONCLUSIONS

With respect to the Union's contention, the Authority has advised that to find an award deficient on this basis, there must be a showing that the award is ambiguous or contradictory, or that implementation is impossible, because of the award being unclear in its meaning and effect or because of the award being too uncertain in its effect to be sustained. Veterans Administration Hospital, Newington, Connecticut and National Association of Government Employees, Local R1-109, 5 FLRA 64 (1981). In this case the Union fails to establish that the Arbitrator's finding the grievance nonarbitrable and refusing to consider the merits is in any manner unclear in its meaning and effect or too uncertain in its effect to be sustained. Instead, this exception constitutes nothing more than disagreement with the Arbitrator's determination that there had not been compliance with the procedural requirements of the negotiated grievance procedure of the parties' collective bargaining agreement. In this respect, the Authority has consistently and repeatedly held that such questions are for resolution by the arbitrator and are not subject to review or challenge before the Authority. Headquarters, Fort Sam Houston, Department of the Army and Local 2154, American Federation of Government Employees, AFL-CIO, 15 FLRA 974 (1984). Consequently, the Union's exception provides no basis for finding the award deficient.

[22 FLRA No. 6]

V. DECISION

For these reasons the Union's exception is denied.*/

Issued, Washington, D.C., June 4, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ Although the issue has not been raised by the parties, the Authority confirms its jurisdiction to resolve the Union's exception. Because the Arbitrator's award pertained solely to the question of whether the grievance in this case was filed in accordance with the terms of the parties' agreement, it is not apparent that the award relates to a removal action within the meaning of section 7121(f) and section 7122(a) of the Statute. Naval Ordnance Station, Louisville, Kentucky and Lodge No. 830, International Association of Machinists and Aerospace Workers, 11 FLRA 19, 20 n.3 (1983).

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 52]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1019
(21 FLRA No. 52)

THE PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority on a request filed by the Union seeking reconsideration of the Authority's decision of April 21, 1986, modifying the Arbitrator's award.

In its decision, the Authority held that the provisions in the Arbitrator's award which directed the Agency to promote the grievant retroactively with backpay were contrary to the Back Pay Act and section 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute because the Arbitrator had not made the findings necessary for such an award. Accordingly, the Authority modified the award by striking the provisions found deficient. In its request for reconsideration, the Union argues that the Authority's decision should be reconsidered because it is based on an apparent misreading of the Arbitrator's findings.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Union has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Union in support of its motion essentially constitute nothing more than disagreement with the merits of the Authority's decision that the Arbitrator's award was deficient.

Accordingly, the Union's request for reconsideration is denied.*/

Issued, Washington, D.C., June 4, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/The Authority notes that one of the findings attributed to the Arbitrator in describing the background facts in the dispute was made by the grievant's supervisor. The Authority has revised its decision to clarify that fact.

9/case No. 371

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 371 REPORT OF CASE DECISIONS June 19, 1986

NEGOTIABILITY CASE

22 FLRA No. 12 (June 12, 1986)

National Treasury Employees Union and Department of Energy, Case No. 0-NG-956

UNFAIR LABOR PRACTICE CASES

21 FLRA No. 7 (June 6, 1986)

American Federation of Government Employees, Local 2369, AFL-CIO and Social Security Administration, New York Regional Office, Case No. 2-CO-20025

22 FLRA No. 10 (June 6, 9186)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, Case Nos. 9-CA-30242, 9-CA-30344, 9-CA-30348, 9-CA-30351 and 9-CA-30395

22 FLRA No. 11 (June 10, 1986)

162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and American Federation of Government Employees, Local 2924, AFL-CIO, Case Nos. 8-CA-30098, 8-CA-30099 and 8-RO-30002

Y3.F31/21-3:

ARBITRATION CASES

22 FLRA No. 8 (June 6, 1986)

General Services Administration, Region 10 and American Federation of Government Employees, Council 236 (Lumbley, Arbitrator), Case No. 0-AR-1051

22 FLRA No. 9 (June 6, 1986)

U.S Army Corps of Engineers, Kansas City District and Local 29, National Federation of Federal Employees (Clark, Arbitrator), Case No. 0-AR-1072

Federal
Labor Relations
Authority

21 FLRA No. 7

AFGE, Local 2369 and SSA,
NY Regional Office, Case
No. 2-CO-20025 (Decided
June 6, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice Union Violations Picketing Activity	7116(b)(7)(A)

DIGEST NOTES

Picketing of an agency in a labor-management dispute is a violation of § 7116(b)(7) if it "interferes, with an agency's operations." The question of when such picketing "interferes with an agency's operations" under the Statute is one of first impression for the Authority. An examination of the legislative history of section 7116(b)(7) shows that Congress intended to prohibit only picketing that actually interferes with an agency's operations; indeed, Congress chose not to enact language passed by the Senate which would have prohibited picketing that "interferes or reasonably threatens to interfere with an agency's operations." Instead, Congress adopted the language of the House Substitute bill, which did not contain the "reasonably threatens to interfere standard. Thus, since picketing is an unfair labor practice only if it interferes with an agency's operations, it must be determined in each case whether the picketing actually caused "interference."

The focus of inquiry must be to determine whether the inconvenience or disturbance to particular agency operations resulting from the picketing constitutes an unfair labor practice. The picketing in each case must be considered in terms of such factors as the government interest involved, the sensitivity of the function and its purpose, the location of the picketed operation, the duration of the picketing, and the number and conduct of the pickets. In each case the Government interest to be protected is related to the mission of the agency involved. Thus, an operation of high sensitivity such as one involving national security or with critical functions related to health or safety, could justify a relatively high degree of

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restraint of even First Amendment-related activities such as picketing. In such cases, even a relatively brief and minor disruption could in some circumstances justify a finding of unlawful interference. On the other hand, in an operation involving a relatively lower degree of sensitivity, the same picketing activities might not be found to be unlawful interference.

In this case, the purpose of the agency's operation is to process various Social Security claims, which includes both interviews and processing paperwork. While the agency, in anticipation of the picketing, changed the work assignments of its employees and increased their interviews with claimants while decreasing paper work for that one day, which represented adjustments in the agency's operation, it had not been shown that these changes were necessary to the continued functioning of the agency's operations or that the result of increased interviews and decreased paperwork had any appreciable negative impact on the accomplishment of the mission of the picketed operation. Nor did the record support a conclusion that the picketing appreciably delayed processing of claims. Further, the number and conduct of the pickets and the duration of their picketing in this case demonstrated that the picketing did not interfere with the agency operations. Approximately ten pickets demonstrated silently in a 17 x 70 foot public waiting room of a Social Security District Office, causing no disturbance. Some employees peered over a partition as they passed, several supervisors checked on the picketing and one security guard who normally would not be in the reception area joined the one who was routinely assigned there for the ten minutes during which the picketing occurred. Thus, the number and conduct of the pickets, as well as the location of the picketing in a public area, accessible even to individuals who have no business with the agency, could not be said to have caused interference with agency operations in any real sense. The Authority, therefore, concluded that the picketing here did not "interfere" with agency operations within the meaning of § 7116(b)(7)

Federal Labor Relations Authority

22 FLRA No. 8

GSA, Region 10 and AFGE, Council 236 (Lumley, Arbitrator), Case No. 0-AR-1051 (Decided June 6, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Award Contrary to § 7106(a)
  - Exceptions Asserted in Appeal
    - Award Contrary to § 7106(a)(2)(A) & (B)
  - Performance Appraisal System
    - Arbitrator's Review of Performance Ratings
      - Independent Evaluation of Employee's Performance
      - Review of Management's Application of Established Standards
- Remedy
  - Award Grievant "Outstanding" Performance Rating

STATUTE

7106(a)(2)(A) and (B)
7122(a)

DIGEST NOTES

The continuing jurisdiction of the arbitrator was invoked when the grievant disagreed with the reappraisal of her performance that management performed in response to the earlier arbitration award. On review of this performance appraisal, the arbitrator determined that the rating was arrived at arbitrarily. He further ruled that the appraisal contained numerous contradictions, misstatements of fact, assessments of fault which did not lie with the grievant, and references to performance occurring outside the period stipulated to and designated by the parties to serve as the basis for her appraisal. As his award, the arbitrator ordered that the grievant be given a rating of "outstanding".

In its exception, the agency contended that the award was contrary to § 7106(a)(2)(A) and (B). The Authority has previously held that an arbitrator may determine that management applied its established performance standards in violation of law, regulation, or an appropriate, nonquantitative review criterion, and the arbitrator to that extent may sustain a grievance. In sustaining such a grievance, the arbitrator as a remedy may direct that the grievant's work product be properly evaluated by management or, where appropriate, that the grievant's work product as appraised

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by management be granted the rating to which entitled under the establish elements and standards. However, the Authority has cautioned that an arbitrator may not conduct an independent evaluation of an employee's performance under the elements and standards established by management and may not substitute his or her own judgment for that of management as to what that employee's evaluation and rating should be.

In this case, the Authority concluded that the reappraisal of the employee was not the type that would permit an arbitrator in an objective, nondiscretionary, and essentially mechanistic manner to determine without an independent evaluation that an aggrieved employee was entitled to a different rating under the established standards. Although the arbitrator could have ordered the grievant reevaluated, he instead independently determined what that rating would have been. Consequently, the Authority found that the award was contrary to § 7106(a).

**Federal
Labor Relations
Authority**

22 FLRA No. 9

Army Corps of Engineers, Kansas City District and Local 29, NFFE (Clark, Arbitrator), Case No. 0-AR-1072 (Decided June 6, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Exceptions Asserted in Appeal
    - Award Contrary to § 7106(a)(2)(B)
  - Official Time
    - Procedures Involved in Granting of Official Time
      - At the Discretion of Union Official
      - Prior Approval Requirement
  - Remedy
    - Reinstate Past Practice Regarding Official Time Procedures
    - Withdraw Management Advisory Documents about Official Time
- Negotiability
  - Management Rights
    - Assign Work
      - Procedures Involved in Granting of Official Time

STATUTE

7106(a)(2)(B)
7116(a)(1) and (5)
7122(a)

DIGEST NOTES

In settlement of several unfair labor practice charges, the parties agreed that procedures involving the granting of official time contained in "management advisories" used by supervisors as guidance in their related actions, could be grieved by the union and submitted to arbitration. In a subsequent dispute that was submitted to arbitration, the arbitrator stated that the issue was whether management advisories could properly require union officials and stewards to obtain permission in order to perform union representation functions. The arbitrator determined that such a requirement was neither consistent with the parties' agreement nor past practice. The past practice was for union officials and stewards to inform their supervisors of the need to perform representational activities and not to request permission. Accordingly, the arbitrator ordered the management advisories be withdrawn and the past practices reinstated until negotiation of a new contract was completed.

In its exception, the agency contended that the award was contrary to management's right to assign work under § 7106(a)(2)(B). However, the Authority concluded that the award was fully consistent with the Statute. In accordance with the settlement agreement limiting the arbitrator's authority to the procedures regarding the granting of official time, the award does not provide for any entitlement to an allocation of official time to a particular steward or union official without regard to management needs and requirements regarding the performance of assigned work. Accordingly there was no basis for finding the award contrary to § 7106(a)(2)(B).

Federal Labor Relations Authority

21 FLRA No. 10

DHHS, SSA, Baltimore, MD and AFGE, Case Nos. 9-CA-30242, 9-CA-30344, 9-CA-30348, 9-CA-30351 and 9-CA-30395 (Decided June 6, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1), (2), (5) and (8)

Unfair Labor Practice
  Agency Violations
    Discrimination
      Supervisor's Statement that Performance Appraisal to Negatively Reflect Union Actvities
      Implicit Threat Inferred from Timing of a Potentially. Unsatifactory Performance Action due to Union Activities
      Progress Report Failed to Account for Time Spent of Union Activities
      Official Time for Alternate Representative
      Contract Interpretation Matter Resolvable Under Agreement
    Refusal to Bargain
      Impact and Implementation Regarding Major Reorganization Requiring Staffing Changes in Work Unit
      Formal Discussion
        Union Designated Representaive Not Present
      Bypass/Dealing Directly with Employee
        Agreement with Employee regarding Staffing Changes

DIGEST NOTES

The agency violated § 7116(a)(1) and (2) when it referenced a union representative's participation in protected activity in connection with a performance discussion concerning the representative. A supervisor informed the union representative that a second-line supervisor had informed him that she wanted the representative's activities negatively reflected in his periodic performance assessment.

The agency violated § 7116(a) (1) and (2) when a supervisor, after having informed the union representative that the second line supervisor was concerned about the representative's low productivity due to his union activities and that such activities should be negatively reflected in his periodic performance assessment, told the representative that the

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second line supervisor also wanted to put him on a performance improvement plan (PIP) for potentially unsatisfactory performance. The Judge concluded that although the representative's union activities were not explicitly mentioned in supervisor's statement about the PIP, the representative could have reasonably inferred, due to the timing of the statement, that the statement was made because of his continued participation in union activities, and it was, therefore, an implicit threat against such activities.

The agency violated section 7116(a)(1) when soon after an union representative had been informed that his low productivity was attributable to the time spent on union activities, a supervisor, during a discussion with the representative concerning the representative's low productivity, told him that his work had been timed by the second line supervisor. The Judge found that the statement was inherently threatening and discriminatory, particularly in light of the fact that no other employee had been timed by management.

The agency did not violate the Statute when a second line supervisor of a union representative called another second line supervisor to ascertain whether the representative's wife was at work the same day that the representative called in to request sick leave. The Judge found that the representative's supervisor had the responsibility to insure that employees abide by leave regulations which includes the discretion to initiate appropriate investigations and exchange pertinent information with similar agency officials; that the inquiry was discreet and directed only to another second line supervisor and no attempt was made to communicate to the representative or his wife that they were under some kind of investigation. Thus, the Judge concluded a preponderance of the evidence did not show that the agency's actions were taken to discourage the representative's participation in, or to otherwise interfere with, protected activities.

The agency violated § 7116(a)(1) and (2) when it issued a union representative a progress report known as a DPR which was discriminatory in nature due to his participation in protected activities. The Judge found that the representative was engaged in protected activities during the time that the PR was issued and the agency had knowledge of the same. The representative's DPR established a productivity goal that he take 25% of the interviews in a four person unit without taking into account the known fact that he spent 20 to 25% of his work time on union activities and the second line supervisor admitted that the production goal within the union representative's DPR should have taken his union activities into account. Further, the DPRs of his coworkers who were not involved in union activities contained no similar fixed numerical productivity goal. The Judge concluded, therefore, that the representative's DPR was discriminatory in nature due to his union activities and, therefore, violative of § 7116(a)(1) and (2).

The agency did not violate § 7116(a)(1), (2) when it denied official time to a union representative to represent the local union representative at meetings concerning her personal grievances; the agency did not violate § 7116(5) and (8) when it conducted such meetings with the aggrieved local representative in the absence of her designated representative. The local representative had filed grievances relating to the agency's denial of official time in order to file an unfair labor practice charge and designated another union representative as her represenatative for both grievances. The agency refused to grant official time, relying on a provision of the parties' collective bargaining agreement which it argued meant that where the local representative had filed a grievance and designated another representative, management would accept the designation but no official time would be provided. The agency subsequently held a grievance meeting with the aggrieved representative in the absence of her designated representative. The Judge, in respect to the agency's refusal to grant official time, concluded that since the refusal was based upon the agency's interpretation of the union's right to official time, arguably within the terms of the parties' negotiated agreement, it did not rise to the level of interference with rights guaranteed by the Statute. With respect to the alleged refusal to provide representation on behalf of the aggrieved representative at the grievance meetings, the Judge found that this dispute also arose out of the parties' basic disagreement over official time. The local union representative's grievances concerned not personal grievances but dealt with her use of official time as a union representative and she was either well aware or should have been well aware that the dispute with management was not over her right to have a representative at the grievance meetings, but on that representative's use of official time. Further, the aggrieved representative had notice of the meeting and she could have designated a representative to attend her grievance sessions on other than official time. Accordingly, in these circumstances, the Judge concluded that there was no violation.

The agency did not violate § 7116(a)(1) when it refused to bargain with the union's designated representative regarding its implementation of substantial staffing changes affecting bargaining unit employees as the result of a major reorganization of the agency's work units. The agency refused to honor the union's choice for its bargaining representative other than the union's designated local representative when that representative was availible on the ground that the parties' collective bargaining agreement provided that it would utilize the local representative as the individual with whom management should deal regarding labor relations matters and that it should deal with the alternate representative only when the local representative is out of the office. The Judge determined that while a union had a statutory right to designate its own representatives in negotiations, the parties here had provided in their collective bargaining agreement for a formalized bargaining relationship. The Judge concluded that because the parties took opposite interpretations of the previously mentioned language and the contract was unclear on its face in this regard, the appropriate avenue for resolution of the dispute was through the parties' mutually agreed upon contractual grievance and arbitration procedures rather than through the unfair labor practice procedures.

The agency violated § 7116(a)(1) and (5) when it made changes in conditions of employment affecting bargaining unit employees based upon an agreement with an employee concerning its chan After meeting with an employee regarding its unilaterally imposed staffing changes, agreed to implement the employee's suggestions with respect to the changes, and unilaterally did so. The union was not provided prior notice or the opportunity to bargain in any respect thereto. The Judge found that the agency's conduct of negotiating or otherwise dealing directly with a unit employee over conditions of employment inherently undermined the status of the union and constituted an unlawful bypass. Thus, the Judge concluded that the agency's bypass of the union and unilaterally implementation of further changes in working conditions as a direct result of such bypass violated § 7116(a)(1)(and (5).

The agency violated § 7116(a)(1) and (5) when it refused to bargain on the union's proposals concerning proposed staffing changes affecting bargaining unit employees. The agency had proposed staffing changes which involved the relocation of its aged and disability workloads within the unit as well as the transfer of one experienced claim representative out of the unit and a new claims representative trainee into the unit. The union thereafter, submitted several revised proposals about the effect of the reorganization on prior agreements to rotate the aged claims workload, the equity of the distribution of the workload, and the opportunity for employee input concerning the changes. The agency asserted that the changes had insubstantial impact and/or the union's proposal were non-negotiable. The Judge concluded that because, as a result of the changes, a new claims representative would be handling an undisputedly more difficult work load; the reassignment of the another took her out of a grade determining factor for claims representatives and a third was being denied the opportunity to learn a more complex work load with potential impact on her promotion opportunities, the staffing changes clearly had an adverse impact on bargaining unit employees. Since the union's proposal requiring employee input prior to final assignment decisions being made merely required management to give consideration to the stated preferences of the employees regarding the assignments but reserved the right to assign work or to select any particular employee, it was negotiable. Similarly, the union's proposal that assignments be fair and equitable established a general, non-quantitative requirement by which management's assignment of work could be evaluated did not interfere management's right to make assignments based on personnel requirements. The Judge found also that union was clearly entitled to obtain management's position regarding the effect of the changes on prior rotation agreements before it unilaterally implemented what appeared to be a breach of such agreements. Thus, in the absence of any overriding exigencv which required to proposed changes to be implemented only two days after the union's submission of its revised proposals, the agency had a duty to bargain in good faith with the union to agreement or impasse on its negotiable proposals.

The agency violated § 7116(a)(1) and (5) when refused to bargain concerning the impact and implementation with respect to a major reorganization. The reorganization resulted in the merger of three separate work units and transformed the affected claims represenatatives handling one type of case to generalists responsible for all three types of cases. The agency did not dispute that the reorganization had substantial impact on the working conditions of unit employees but asserted that it had reached an agreement with the union prior to implementation. The Judge concluded that in the absence of any evidence of any reached between the parties concerning the reorganization or any overriding exigency, the agency's failure to bargain at the union's request constituted bad faith bargaining in violation of the Statute.

The agency did not violate § 7116(a)(1)(5) and (8) when it held two meetings with unit employees to solicit their views prior to implementing the staffing changes. While the meetings did constitute formal discussions within the meaning of § 7114(a)(2)(A), the Judge found that the union was provided with prior notice and the opportunity to select its own representative at these meetings as required by that section.

was being denied the opportunity [illegible] unequally [illegible] and with potential impact on her promotion opportunities. The [illegible] particular [illegible] had an adverse impact on bargaining unit employees. [illegible] the union's proposal requiring employee [illegible] preference [illegible] assignments being made merely [illegible] final assignment decisions [illegible] the stated preference of the management to give consideration [illegible] but reserved the right to [illegible] employees regarding the assignments [illegible] particular employee [illegible] assignments [illegible] negotiable. Similarly, the union's proposal that assignments be fair and equitable established a general, non-quantitative requirement by which management's assignment of work could be [illegible] management's right to assign [illegible] The judge found [illegible] also that the union was clearly entitled to obtain [illegible] position regarding the effect of the changes [illegible] agreements before it unilaterally implemented [illegible] Thus, in the absence of any a breach of such agreements [illegible] which required [illegible] overriding exigency [illegible] implement [illegible] only two days after the union's submission of its [illegible] proposals, the agency had a duty to bargain in good faith with the union on its negotiable proposals.

The agency violated 7116(a)(1) and (5) when it refused to bargain concerning the impact and implementation [illegible] a major reorganization. The reorganization resulted in the merger of three separate work units and transferred the affected claims representatives handling one type of case to [illegible] responsible for [illegible] types of cases. [illegible] dispute that the reorganization had substantial impact on the working conditions of unit employees but asserted that it had reached an agreement with the union prior to implementing [illegible] The judge concluded that in the absence of any evidence of any agreement between the parties [illegible] overriding exigency, the agency [illegible] had failed [illegible] bargaining in violation of the union's request [illegible]

The agency did not violate 7116(a)(1) and (5) when it held two meetings with unit employees to solicit their views prior to implementing the staffing changes. While the meetings did constitute formal discussions within the meaning of 7114(a)(2)(A), the judge found that the union was provided with prior notice and the opportunity to select its own representative at these meetings as required by that section.

Federal
Labor Relations
Authority

22 FLRA No. 11

162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and AFGE, Local 2924, Case Nos. 3-CA-30098, 3-CA-30099 and 3-RO-30002 (Decided June 10, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1)
Agency Violations	7116(e)
Interference, Restraint, Coercion	7118
Statements Made to Correct the Record	
Request for Reconsideration	
Reconsideration Granted Based on Factual Error	

DIGEST NOTES

A commanding officer did not violate § 7116(a)(1) when he stated at a meeting with employees five days before an election that he was disappointed about the distribution of literature by the union in that it demonstrated a lack of good faith, since an agreement had been made between the parties not to campaign on the premises. The statements were permissible under § 7116(e) since the comments served to "correct the record with respect to [a] false or misleading statement made by any person". Specifically the statements corrected the record with respect to the union's disclaimer of responsibility for the distribution of campaign literature in the face of its agreement not to do so. The commanding officer knew that the union agreed not to campaign on the premises; knew and observed that seemingly official union literature had been posted around the base; and knew of the union's disclaimer of responsibility. The record indicates that the local union president supplied the literature to an employee who was very active in supporting the union's campaign and who posted the literature along with other employees. Under these circumstances, the union president's disclaimer of union responsibility for or authorization of the literature in question was at best misleading. Thus, in granting reconsideration of a prior decision due to a factual error, the Authority reaffirmed its conclusion that the commanding officer's comments did not violate § 7116(a)(1).

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Federal Labor Relations Authority

22 FLRA No. 31

162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona and AFGE, Local 2924, Case Nos. 8-CA-30098, 8-CA-30099 and 8-RO-30002 (Decided June 10, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1)
Agency Violations	7116(e)
Interference, Restraint, Coercion	7118
Statements Made to Correct the Record	
Request for Reconsideration	
Reconsideration Granted Based on Factual Error	

DIGEST NOTES

A commanding officer did not violate § 7116(a)(1) when he stated at a meeting with employees five days before an election that he was disappointed about the distribution of literature by the union in that it demonstrated a lack of good faith, since an agreement had been made between the parties not to campaign on the premises. The statements were permissible under § 7116(e) since the comments served to "correct the record with respect to [a] false or misleading statement made by any person". Specifically the statements corrected the record with respect to the union's disclaimer of responsibility for the distribution of campaign literature in the face of its agreement not to do so. The commanding officer knew that the union agreed not to campaign on the premises; knew and observed that seemingly official union literature had been posted around the base; and knew of the union's disclaimer of responsibility. The record indicates that the local union president supplied the literature to an employee who was very active in supporting the union's campaign and who posted the literature along with other employees. Under these circumstances, the union president's disclaimer of union responsibility for or authorization of the literature in question was at best misleading. Thus, in granting reconsideration of a prior decision due to a factual error, the Authority reaffirmed its conclusion that the commanding officer's comments did not violate § 7116(a)(1).

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Federal Labor Relations Authority

22 FLRA No. 12

NTEU and Dep't of Energy, Case No. 0-NG-956 (Decided June 12, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Conditions of Employment	7114(b)(4)
Information Relating to Administrative Costs of RIFs	
Information, Union's Right	
Administrative Cost of RIFs	
Other than Determinations Made on a Case-By-Case Basis	
Other than Relevant and Necessary Information	
H.R. Rep No. 95-1403, 95th Cong., 2nd Sess. 48 (1978)	

DIGEST NOTES

A proposal is negotiable that would require the agency to provide the union with information regarding the administrative costs of each RIF affecting unit employees, particularly administrative costs such as severance pay. Matters pertaining to RIFs concern conditions of employment. The union sought the information in order to represent employees who might challenge RIF actions through statutory appeals procedures or through the negotiated grievance procedure and to negotiate future contract provisions relating to RIFs. Under § 7114(b)(4), an agency is required to provide an union with information which is relevant and necessary to the performance of its representational activities. A determination as to whether the information sought is relevant and necessary is made on a case-by-case basis. The union's proposal is negotiable under the Statute notwithstanding the fact that the information provided for in the proposal might in part pertain to nonunit employees and a case-by-case analysis might reveal that the information is not relevant and necessary. Section § 7114(b)(4) is a statutory "floor" and not a "ceiling." The language and the legislative history of that provision does not indicate that Congress intended to prohibit an agency from providing a union with information other than that which is relevant and necessary. Rather, Congress meant that provision to establish the minimum information which must be disclosed to a union.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2369, AFL-CIO

Respondent

and Case No. 2-CO-20025

SOCIAL SECURITY ADMINISTRATION
NEW YORK REGIONAL OFFICE

Charging Party

DECISION AND ORDER

I. Statement of the Case; Issue

This unfair labor practice case arose as a result of picketing by members of the American Federation of Government Employees, Local 2369, AFL-CIO, Respondent Union, in the reception area of a District Office of the Charging Party, the Social Security Administration, New York Regional Office. It was alleged that the Union called for and participated in the picketing and thereby violated section 7116(b)(7)(A) and (B) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

The question presented is whether, under the circumstances, the picketing interfered with agency operations within the meaning of section 7116(b)(7) of the Statute. The question of when such picketing "interferes with an agency's operations" under the Statute is one of first impression for the Authority.

---

[1] Section 7116(b)(7) provides:

§ 7116. Unfair labor practices

. . . .

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

(Continued)

The Administrative Law Judge found that the Union had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint be dismissed. The case now is before the Authority because of exceptions to the Judge's Decision, and briefs, filed by the General Counsel and the Activity. The Union filed a brief in opposition to the exceptions.

II. Facts

As more fully set out by the Judge, the picketing occurred on August 24, 1982, in the reception area of the Social Security Administration Mid-town District Office in New York City. The office is on the ninth floor of a privately owned office building located at 1515 Broadway.

The Mid-town District Office processes claims for Social Security benefits, retirement benefits, survivors' rights and disability entitlements. Approximately 80 employees handle some 300 interviews each day. These interviews normally are conducted in the work area which is separated from the 17x70 foot reception area-waiting room by five-foot high partitions. One must pass through the reception area to enter the office. Occasionally, street people enter the reception area and are permitted to sit there.

(Continued)

. . . .

> (7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
>
> (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity[.]

. . . .

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

On approximately August 23, the District Office assistant manager, Michael Pregon, learned that on August 24 the AFGE planned to have a mass demonstration in the Times Square area, near the Mid-town District Office. Anticipating that some of the demonstrators might attempt to enter the District Office facility on the scheduled date, Activity officials decided to put into effect certain operational changes. The record shows, however, that Activity management had no advance knowledge of any plan that picketing actually would occur at the District Office. The operational changes taken consisted of assigning all available claims representatives, including eight employees who normally process paperwork, to interview claimants so that no claimants would be kept waiting in the reception area. Also, two account clerks who are normally stationed in the reception area were moved into the main office area. By reason of these changes, no paperwork was completed on August 24.

The scheduled demonstration at Times Square by AFGE took place as planned on August 24 between 11:30 a.m. and 1:30 p.m. At about 12:30 p.m. William Nussbaum, President of AFGE Local 2369 and Regional Vice President of AFGE, National Council of Social Security Field Offices, gathered a group of approximately ten convention delegates of AFGE locals and entered the District Office. A guard on duty in the office let them in. After the group of pickets entered the reception area they turned to the left and paraded in a circle. There was no chanting by the pickets nor did they make any noise or create a disturbance. During the picketing one claimant entered the office and was escorted without incident into the rear work area, and two claimants who were leaving the work section upon completion of their business were escorted out of the office, also without incident. Other than the receptionist, no other employees were present in the reception area except for two guards mentioned below. The record also shows that one unidentified woman sat in the reception area without speaking or being spoken to throughout the picketing.

During the course of the picketing, which lasted approximately ten minutes, some employees peered over the partition while enroute to the photocopying machine or other locations; several supervisors left their desks to appear at the reception area to check on the picketing; and both security guards employed by the Activity were positioned at the reception area. Normally one guard is stationed there and the other one roams the facility. Approximately 20 to 25 claimants were being interviewed in the work area during the picketing. Under normal circumstances there would have been about ten claimants in the reception area waiting to be interviewed. After having circled within the reception area, and following a short discussion between Nussbaum and Pregon, the pickets departed.

III. Administrative Law Judge's Decision

The Judge found that the picketing occurred in the course of a labor-management dispute, as required to bring the picketing within the general prohibition of section 7116(b)(7) of the Statute. He then noted that the critical issue was whether the picketing constituted "interference" with the operations of the Office. He reasoned that "interference" must connote "some form of disruption or thwarting of an agency's operations." He went on to explain that in his opinion, "it is doubtful that Congress intended to outlaw picketing which did not seriously interrupt or impair governmental activities. If not, the term 'interference' loses its significance and . . . freedom of expression is endangered." Slip op. at 8. The Judge concluded that, under the circumstances, the picketing did not constitute interference with the operations of the Activity within the meaning of the Statute, and therefore the Union did not commit an unfair labor practice. The Judge also stated that even if the term interference as used in the Statute could be said to include any picketing, he would conclude that the interruption or interference here was de minimis and was not an unfair labor practice. The Judge accordingly recommended that the complaint be dismissed.

In reaching this conclusion, the Judge noted that no claimants who appeared on the day of the picketing were caused to be ignored or neglected; that the pickets did not enter the work area and no attempt was made to interfere with employees' duties or to communicate with them; and that claims were processed without interruption.

As to the argument by the Activity that there was a disruption because management moved the claimants to the work area and out of the reception room before the pickets arrived, and that this prevented a disturbance which would have otherwise taken place, the Judge found that such argument was conjectural. He also found that anticipatory action by management does not serve as a basis for characterizing subsequent picketing as unlawful.

IV. Positions of the Parties Before the Authority

A. The Activity

The Activity excepts to the Judge's conclusion that the picketing did not interfere with its operations within the meaning of the Statute, asserting that the Judge improperly created a *de minimis* interference standard which is not permitted by the Statute. The Activity also argues that management's precautionary measures resulted in a one-day delay in processing claims because all available employees' duties were switched to interviewing, and that there was substantial disruption caused by the Union's picketing. The Activity contends that the Judge "seemed to down play the degree of actual disruption to the work flow by the admittedly well ordered and peaceful picketing, but he completely over-looked the volatile potential inherent in the situation and the potential injury to the agency's fragile clientele that could have and foreseeably would have occurred had not the office managers taken precautionary measures."

B. The General Counsel

The General Counsel states that under the Statute picketing is prohibited only if it actually interferes with an agency's operations, as distinguished from picketing which only reasonably threatens to cause such interference. However, the General Counsel argues that the picketing in this case did constitute "interference" within the meaning of the Statute because the picketing occurred in an area open only to the public with official business to transact with the Agency and therefore is "inherently disruptive" of the Agency's normal operating procedure. The General Counsel also argues that the inherent and actual interference caused by the picketing would have been greater if the Activity had not taken precautionary steps.

C. Respondent Union's Opposition to Exceptions

The Union argues that for picketing to be an unfair labor practice, any interference caused by the picketing must be more than *de minimis*. It notes that the legislative history of the Statute demonstrates the intent of Congress to broaden a union's right to picket an agency as evidenced by the change from the Senate version, which would have made any picketing an unfair labor practice if it interfered with or threatened to interfere with agency operations. The Union points out that the final language of section 7116(b)(7) prohibits picketing only if it actually "interferes" with an agency's operations.

V. Analysis

A. Background

As noted, section 7116(b)(7) of the Statute makes picketing of an agency in a labor-management dispute an unfair labor practice if it "interferes with an agency's operations." An examination of the legislative history of section 7116(b)(7) shows that Congress intended to prohibit only picketing that actually interferes with an agency's operations; indeed, Congress chose not to enact language passed by the Senate which would have prohibited picketing that "interferes or reasonably threatens to interfere with an agency's operations" (emphasis added).[2] Instead, Congress adopted the language of the House substitute bill, which did not contain the "reasonably threatens to interfere" standard.

In enacting section 7116(b)(7) of the Statute, Congress took into account the language of Executive Order 11491, as amended, and administrative and court interpretations of the ban on picketing contained in the Order. For example, during consideration of the House substitute bill, Representative Clay noted that in NTEU v. Fasser, 428 F. Supp. 295 (D.D.C. 1976), the district court had held that the absolute ban on picketing under section 19(b)(4) of the Order was overbroad and violated the First Amendment.[3] He then stated that in view of the constitutional principles involved, the language in section 7116(b)(7) was adopted. Additionally, Representative Ford stated, during deliberations on the bill, that section 7116(b)(7) "contains language adopted in lieu of the Federal Labor Relations Council policy statement in this area."[4] The Council's statement, issued in response to the decision in NTEU v. Fasser, had found that picketing under the Executive Order was an unfair labor practice if it actually interfered or reasonably threatened to interfere with agency operations. Statement on Major Policy Issue, FLRC No. 76P-4, 5 FLRC 991 (1977). On the Senate side, it was clear that the Senate's language on picketing was intended to be a continuation of the Executive Order prohibition on picketing that interfered or reasonably threatened to interfere with agency operations.[5] As we have noted, Congress did not enact that language.

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[2] S. 2640, 95th Cong. 2d Sess. 196 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 582 (1979). See also S. Rep. No. 95-969, 95th Cong. 2d Sess. 106 (1978), reprinted in Legislative History at 766, for discussion of section 7216(b)(4) of S. 2640.

In sum, this review of the language and legislative history of section 7116(b)(7) makes clear that Congress rejected the "reasonably threatens to interfere" part of the standard under the Executive Order and instead required actual "interference" for picketing to be an unfair labor practice under the Statute.[6]

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[3] 124 Cong. Rec. 29,188 (1978), reprinted in Legislative History at 933. Section 19(b)(4) of the Order provided:

> Sec. 19. Unfair labor practices
>
> . . . .
>
> (b) A labor organization shall not--
>
> . . . .
>
> (4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it[.]

[4] 124 Cong. Rec. 29,200 (1978), reprinted in Legislative History at 957.

[5] In addition to the Senate report cited in note 2, above, see, for example, the statements of Congressman Collins at 124 Cong. Rec. 29,174 and 29,189, reprinted in Legislative History at 907 and 935, respectively.

B. Discussion

The background set forth above dispels any notion that picketing in a public waiting room of Government premises must always be considered unlawful "interference" with agency operations. The mere appearance of pickets, without more, would not in all circumstances produce the kind of disturbance justifying a total ban on such picketing. As the court said in NTEU v. Fasser, "surely not all Government activity, in all Government offices, requires [a total picketing ban]. Picketing that is strictly informational, and limited in place and focus, does not in all situations create the probability of interference with Government functions sufficient to justify [such a total limitation]." 428 F. Supp. at 299 (citation omitted).

Since picketing is an unfair labor practice only if it interferes with an agency's operations, it must be determined in each case whether the picketing actually caused "interference." The focus of inquiry, as noted in our discussion above, must be to determine whether the inconvenience or disturbance to particular agency operations resulting from the picketing constitutes an unfair labor practice. The picketing in each case must be considered in terms of such factors as the Government interest involved, the sensitivity of the function and its purpose, the location of the picketed operation, the duration of the picketing, and the number and conduct of the pickets.

In each case, the Government interest to be protected is related to the mission of the agency involved. Thus, an operation of high sensitivity, such as one involving national security or with critical functions related to health or safety, could justify a relatively high degree of restraint of even First Amendment-related activities such as picketing. In such cases, even a relatively brief and minor disruption could in some circumstances justify a finding of unlawful interference. On the other hand, in an operation involving a relatively lower degree of sensitivity, the same picketing activities might not be found to be unlawful interference.

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[6] The Authority, unlike the Judge, does not place reliance on Representative Ford's statement made after enactment of the Statute. "It is well-settled that courts construing statutory language should give little weight to post-enactment statements by members of Congress." AFGE, Locals 225, 1504 and 3723 v. FLRA, 712 F.2d 640, 647 (D.C. Cir. 1983) (citations omitted).

The purpose of the Activity's operation in this case is to process various Social Security claims. This includes both interviews and processing paperwork. Due to the anticipation of picketing, all available employees were used to conduct interviews that day so that as few clients as possible would be kept waiting in the reception room. As a result of having everyone available to do interviews, no paperwork was done on the day of the picketing. Although both changing the work assignments and increasing interviews while decreasing paper work for that one day represented adjustments in the Activity's operation, it has not been shown that these changes were necessary to the continued functioning of the Activity's operations (the Authority of course makes no suggestion that the action taken in anticipation of the picketing by management was inappropriate), or that the result of increased interviews and decreased paperwork had any appreciable negative impact on the accomplishment of the mission of the picketed operation. While the importance of the timely processing of Social Security claims is self-evident, the record simply does not support a conclusion that the picketing appreciably delayed processing of claims. As suggested above, however, even the slight inconvenience caused by this picketing might be "interference" with a Government operation of a different nature. Thus, for example, a slight change in operating procedures could well be far more than a "slight inconvenience" at a national security facility or an operation dealing directly with health or safety matters.

The number and conduct of the pickets and the duration of their picketing in this case are also factors which demonstrate that the picketing did not interfere with Agency operations. Approximately ten pickets demonstrated silently in a 17 x 70 foot public waiting room of a Social Security District Office for ten minutes, causing no disturbance. Some employees peered over a partition as they passed, several supervisors checked on the picketing and one security guard who normally would not be in the reception area joined the one who was routinely assigned there for the ten minutes during which the picketing occurred. Thus, the number and conduct of the pickets, as well as the location of the picketing in a public area, accessible even to individuals who have no business with the agency, could not be said to have caused interference with Activity operations in any real sense.

C. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed, and thus affirms the rulings. The Authority has considered the Judge's Decision and the entire record, and adopts the Judge's findings, conclusions and recommended Order, as explained above.

In all the circumstances, the Authority concludes that the picketing in this case did not "interfere" with agency operations within the meaning of section 7116(b)(7)(A) of the Statute. Therefore, the complaint shall be dismissed.

ORDER

The complaint in Case No. 2-CO-20025 is dismissed.

Issued, Washington, D.C., June 6, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 7]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2369, AFL-CIO

Respondent

and

Case No.: 2-CO-20025

SOCIAL SECURITY ADMINISTRATION
NEW YORK REGIONAL OFFICE

Charging Party

Gay Snyder, Esq.
For the Respondent

Lee Mingledorff, Esq.
For the General Counsel

Daniel H. Green, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on May 31, 1983 by the Acting Regional Director for the Federal Labor Relations Authority, New York, New York Region, a hearing was held before the undersigned on October 20, 1983 at New York, NY.

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based on a first amended charge filed on February 23, 1983 by Social Security Administration, New York Regional Office (herein called Social Security) against American Federation of Government Employees, Local 2369, AFL-CIO (herein called Respondent or the Union).

The Complaint herein alleged, in substance, that on or about August 24, 1982 Respondent called for, and participated in, the picketing of the Social Security's reception area at 1515 Broadway, New York, NY and thereby interfered with its operations - all in violation of Sections 7116(b)(7)(A) and (B) of the Statute.

Respondent filed its Answer dated June 22, 1983 wherein it denied the foregoing allegations as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact[1]

1. Social Security maintains a Mid-town District office at 1515 Broadway, New York, NY, a privately-owned office building. The said office, which is located on the ninth floor, processes claims for Social Security benefits, retirement benefits, survivors' rights, and disability entitlements. As a general rule, about 300 people may be interviewed in a day, with about 40% of the interviews conducted between 11:00 a.m. and 2:00 p.m. Lunch hour for half the staff starts at 12:00 p.m., while the remaining employees go to lunch at 1:00 p.m.

2. At the relevant time herein about 80 people were employed at the aforesaid District office. The employees were, for the most part, classified as claims representatives, service representatives, clericals, data review technicians, operations supervisors, data transcribers, mail clerks, and field representatives.

3. The facility on the ninth floor[2] has a reception area which is at the entrance to the office. It is rectangular in shape and separated from the main work area by partitions which are five feet high. The reception area is approximately 70 feet by 17 feet. The receptionist's desk is opposite, and about eight feet from the doorway entrance to the

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[1] Factual findings are based, in part, upon a Stipulation of Facts which was agreed to by the parties and read into the record.

[2] Social Security also utilizes space on the eighth floor as a training center, and the mail room is located thereat. One individual is employed on that floor.

District office. While the interviews are conducted in the work area - behind the partitions - the reception area serves as a waiting place for those who are to be interviewed. In order to enter and leave the office one must pass through the reception area. Occasionally, street people enter this area and are permitted to sit there. There is an access area, about four and a half feet wide, between the partition on one side of the reception area and the partition on the other side. This leads to the work area and the office of the operations supervisor.[3]

4. At all relevant times herein William Nussbaum was President of Local 2369, and regional vice-president of AFGE, National Council of Social Security Field Offices. Together with other Local AFGE officials, as well as employees of other agencies, Nussbaum decided in and about July, 1982 to stage a demonstration in New York City on August 24, 1982. This action was to be taken in conjunction with the AFGE national convention in the Times Square section of New York City to protest Social Security's alleged "union busting" tactics and also "Reaganomics".

5. Approximately one day before the scheduled demonstration several fliers announcing the intended event came to the attention of Michael Pregon, Assistant Director Manager of the Social Security office at 1515 Broadway, New York City. Anticipating that the demonstrators might attempt to enter the District office on the scheduled date, Pregon conferred with other Social Security officials and it was decided to put into effect certain operational changes. Thus on August 24 Pregon assigned all available claims representatives, including eight employees who usually process paperwork, to interview claimants. As a result of this change, it was contemplated that no claimants would be kept waiting in the reception area. Further, two account clerks who were normally stationed in the reception area to handle claimants were moved into the main office area. By reason of these changes no paperwork was completed on August 24. Claims filed before that date were delayed since employees were instructed to cease work on such claims and take care of individuals who might appear on August 24.

6. The scheduled demonstration at Times Square by AFGE took place between 11:30 a.m. and 1:30 p.m. on August 24. At about 12:30 p.m. Nussbaum gathered a group of approximately ten convention delegates of AFGE Locals and they entered the District office on the ninth floor. A guard on duty in the office let them in. Two of the individuals carried signs which read "SSA busts unions" and "Reagan won't bust us". Some of the other individuals wore small buttons bearing the AFGE name and legend. Nussbaum testified the union was engaged in a picketing action to protest Social Security's union busting attack against Local 3369 and

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[3] The layout of the reception and work areas can be clearly seen in the diagrams (G.C. Exhibits 3 and 9) as well as in the six photographs. (G.C. Exhibit 5).

certain of the latter's officers; that the management officials of the District office were involved in disciplinary action being taken against officers of Local 3369.

7. After the group of pickets entered the reception area they turned to the left and paraded in a circle within said area.[4] Pregon saw them through the access area and came out to the reception room. He told Nussbaum, who led the pickets, that he had no business being there; that it was government property. The union official replied he was on annual leave and had a right to be there. Record facts reflect there was no chanting by the pickets nor did the latter make any noise or create a disturbance. During the picketing one claimant entered the office and said person was escorted into the rear work area. Moreover, two claimants who were leaving the work section upon completion of their business were escorted out of the office while the pickets were there. Nussbaum testified that, other than the receptionist, no other employees were present in the reception room. He further testified that one woman sat there during the picketing, but she never spoke or was spoken to by anybody.

8. During the course of the picketing, which lasted about 10 minutes, some employees peered over the partition while en route to the photocopying machine or other locations. Several operations supervisors left their desks to appear at the reception area and check on the picketing. Two guards are usually employed by the District office. One is stationed in the reception area and the other roams the office. When the picketing occurred management had both guards positioned at the reception area. Further, two policemen approached Edward Lacey, operations officer, and asked whether he wanted the pickets removed. Lacey stated he wouldn't make that decision, that management was endeavoring to minimize the situation.

9. About 20-25 claimants were being interviewed on August 24 at the work area behind the partitions while the pickets were in the reception area. All of these claimants came to the District office before the pickets arrived. Under normal circumstances there would have been about 10 claimants in the reception area waiting to be interviewed.

10. After having circled within the reception area, and following the short discussion between Nussbaum and Pregon, the pickets departed by exiting at the door to the office. They did not return.

11. An article appeared in "The Chief," a Civil Employees Weekly, on September 3, 1982 and also in "The Government Standard", in the September,

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[4] There is a conflict in testimony as to whether the pickets paraded around the receptionist's desk. No resolution is made in that regard since I conclude it would not result in a material finding of fact.

1982 issue re the concerns of, and protests by, Local 3369. These articles revealed the objection by the union to Social Security's attempts to discipline several officials of Local 3369 by reason of their taking leave without management's approval of official time therefor. Further, one article reflects that Social Security planned to cut off the salary of the president of Local 3369 as of June 18. As indicated in the article of September 3, a dispute existed over the amount of time union officials were entitled to take under a new national contract.

Conclusions

It is asserted by the General Counsel that the picketing of Social Security of Social Security's District office in the reception area, at 1515 Broadway, New York City, on August 24, 1982 was violative of Section 7116(b)(7)(A) and (B) of the Statute. In furtherance of this assertion it is contended that, as required by that statutory language, the picketing within the office interfered with the activity's operations.

In denying that it violated the Statute[5] as alleged. Respondent makes two principal arguments: (1) no labor-management dispute existed between the parties so as to outlaw the picketing under 7116(b)(7); (2) there was no interference with the operation of Social Security's District office within the meaning of the Statute.

In seeking to determine whether a labor-management dispute existed during the course of picketing, it is noted that the Federal Service Labor-Management Relations Statute does not define the term "labor dispute." Contrariwise, in the private sector a definition thereof is set forth as follows:[6]

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment,

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[5] The applicable section of the Statute, Section 7116(b)(7)(A) provides as follows:

> 7116(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization -
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> "(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations." (underscoring supplied)

[6] Section 2(g) of the National Labor Relations Act, 29 U.S.C. 152(9).

> regardless of whether the disputants stand in the proximate relation of employer and employee.[7]

While no case is presented in the public sector delineating types of controversies which may be deemed to constitute a "labor dispute," the courts have spoken in that regard when confronted with disputes in the private sector. Thus, in N.L.R.B. v. Sands Mfg. Co., CCA 6, 1938, 96 F2d. 721, affirmed in 306 U.S. 332, it was held that such a dispute is present when a controversy exists between employers and employees over seniority rights. Further, when picketing took place at a construction site to publicize the fact that an electrical sub-contractor did not conform to fringe benefits, it was held that this constituted a "labor dispute" Pokigo v. Local No. 719 IBEW (1965), 213 A 2d. 689. Finally, even though the definition set forth in the National Labor Relations Act of a "labor dispute" was not considered by the courts to be a jurisdictional requirement in boycott cases, it was determined that the term has a broad connotation. Thus, in Teamsters Local 812 v. NLRB, 105 LRRM 2659, enforcing 243 NLRB No. 126, the U.S. Court of Appeals, District of Columbia Circuit, stated as follows:

> . . . Congress explicitly stated that labor disputes are not limited to controversies in which the "disputants stand in the proximate relations of employer and employee" . . . and the phrase "any controversy concerning terms and conditions, terms, tenure or conditions of employment" is general enough to include a situation in which a union exerts pressure on businesses to preserve the economic foundation of its members' livelihoods. (footnote 11). (underscoring supplied).

Applying the rationale expressed in the cases cited, supra, I am persuaded that the picketing herein occurred in the course of a labor-management dispute. The September 3, 1982 flier (The Chief-Leader) and the article in the Government Standard, September, 1982 both attest to a controversy which falls within the framework of a labor dispute under Section 7116(b)(7)(A) of the Statute. They indicate concern over a protest against Social Security's proposals to suspend three officials of AFGE Local 3369 and to cut off the salary of the president of Local 3369 as of June 18, 1982. The picketing at Times Square in New York City on August 24 was undertaken to protest the foregoing action by Social Security against local union officials. In extending the picketing to the District office on the ninth floor at 1515 Broadway, the union's controversy with management was not altered. While the picket signs in the reception area were not so self-explanatory, the record reflects that the basic protest still remained the same. As stated in "The Chief," which appeared under date of September 3, 1982, there was a dispute between management and the union re the amount of official time officers of the labor organization could take under the national contract. In this context I am satisfied that the picketing was designed to put pressure on management to rescind or cancel any action against the union officials which affected their status or livelihood, and to publicize its positions re the official time controversy. Accordingly, I conclude that a labor-management dispute, within the meaning of Section 7116(b)(7)(A), existed at the time of the picketing on August 24.

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[7] This definition parallels the one set forth in the Norris-LaGuardia Act of 1932, Section 113(C).

The critical issue posed herein is whether the picketing on August 24 at the Social Security reception area, Mid-town office, constituted "interference" with the operations of said office. A resolution of this question turns on (a) what is deemed interference under 7116(b)(A)(7); (b) whether the resultant effect of the picketing may be described as interfering with the operations of the Social Security office on the ninth floor at 1515 Broadway, New York City.

The case at bar, under the circumstances heretofore set forth, is one of first impression in the public sector. Very little authoritative declarations are available to serve as a predicate for a determination of the aforesaid issue. Under Executive Order 11491, as amended, it was provided in Section 19(b)(4) that picketing was banned when it occurred in connection with a labor management dispute. The prohibition was seemingly absolute. However, despite such broad restriction of picketing by the Executive Order, the U.S. District Court, District of Columbia, in N.L.R.B. v. Fasser, 428 F. Supp. 295 (1976) did not accept such an absolute ban on picketing. It concluded that a Decision and order of the Assistant Secretary of Labor for Labor-Management Relations which adopted such a broad prohibition of picketing violated the First Amendment. The court recognized, however, that picketing of a government facility could be disruptive and injure the government so as to be justifiably banned. Without such disruption, the Docket Court observed, the prohibition of picketing would unduly intrude upon free expression.

In passing the Civil Service Reform Act of 1978, Congress saw fit to change the language which, under Executive Order 11491, as amended, outlawed picketing per se. Congressman Ford stated in this regard as follows:

> . . . The House rejected the FLRC major policy statement on picketing and provided that only picketing which has in fact interfered with an agency's operations may be considered an unfair labor practice. There is, in other words, no "prior restraint" against proposed picketing which the agency, however reasonably, believes will interfere with its operations. Picketing is a well-recognized long-established first amendment right. This fact must be kept in mind in assessing whether picketing

> has in fact "interfered" with an agency's operations. For example, embarrassment to the agency obviously does not constitute interference. (124 Cong. Rec. H. 13608).

It seems apparent that, in enacting the present Statute, Congress was concerned about protecting freedom of speech or expression. Picketing, which may be informational in nature, was not forbidden. The restraint imposed upon picketing was one of non-interference with operational activities of the government. While no precedent appears which will shed light on the interpretation of the term "interference", I am persuaded that it connotes some form of disruption or thwarting of an agency's operations. It may well be argued that an entry upon the premises by any person at any time during working hours is properly deemed to interfere with a host's activities. To the extent that the latter is diverted for however short a time, or stops to scan a picket, one might conclude that interference with work has occurred. Thus the appearance of a picket could, under such a view, be deemed to have affected the operations of an agency and hence be a violation of 7116(b)(7)(A) of the Statute. In my opinion it is doubtful that Congress intended to outlaw picketing which did not seriously interrupt or impair governmental activities. If not, the term "interference" loses its significance and once again freedom of expression is endangered.

Applying this interpretation of the phrase. ". . . if such picketing interferes with an agency's operations", to the case at hand. I am satisfied that the picketing on August 24 at the Social Security office (Mid-town District) did not constitute prohibited interference. Record facts disclose that no claimants who appeared at the office on that date were ignored or neglected by virtue of the picketing. Further, the pickets did not enter the work area occupied by the claims representative, service agents, or other employees, and no attempt was made to interfere with their duties or communicate with them. As confirmed by Social Security's supervisors, claims were processed without interruption. It is contended that, in effect, there was a disruption since management moved the claimants to the work area before the pickets arrived. Social Security argues this move prevented a disturbance which would have otherwise taken place. Apart from the fact that this is conjectural, such anticipated action by management does not serve as a basis for characterizing subsequent picketing by the union as unlawful. The conduct of the pickets must be viewed at the time of the picketing and under the circumstances then prevailing. Assigning all employees to interview claimants on August 24 before the picketing began may have delayed processing of claims filed theretofore. However, the decision to do so did not result from the picketing, and any delay thereof was occasioned by management's election in this regard.

It is true that momentary cessation of work may have occurred by reason of employees in the work area having peered over the partition to view the pickets. There is no showing, however, that such pauses were more than brief stares at those in the reception area, and the record reflects some of the employees stopped to view the picketing en route to the copying machines. Likewise, supervisors Parrotta and Lacey made an appearance in the reception room during the course of the picketing. While it is argued that by so doing the officials were diverted from their tasks, I do not view such a diversion as hampering the activity's operations. In much the same view do I construe the alleged impact upon the work as occasioned by Supervisor Lacey's stationing two guards in the reception area, as well as moving an additional supervisor near the exit door to the office. While both moves may have been inconvenienced management somewhat, I do not conclude they disrupted operations.

Accordingly, I conclude that Respondent's picketing in the reception area of Social Security's Mid-town District office on August 24, 1982 did not constitute interference[8] with the operation of Social Security within the meaning of Section 7116(b)(7)(A) of the Statute, and hence further conclude Respondent Union did not thereby commit an unfair labor practice.

Having concluded for the reasons set forth hereinabove that Respondent did not violate the Statute as alleged, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 2-CO-20025 be, and the same hereby is, DISMISSED.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: May 1, 1984
Washington, DC

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[8] Assuming arguendo, the term "interference" as used in the Statute could be said to embrace any picketing, I would conclude that such interruption or interference was, in this instance, de minimis and not violative of 7116(b)(7)(A).

22 FLRA No. 8

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION,
REGION 10

Activity

and

Case No. 0-AR-1051

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator M. Zane Lumbley filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute in this case was submitted to the Arbitrator pursuant to his continuing jurisdiction reserved in an earlier award concerning the appraisal of the performance of the grievant. In that award the Arbitrator found that in appraising the grievant's performance for the period in dispute, the Activity had violated Article 19 of the parties' National Agreement which provides that the performance appraisal system, as applied, will be "fair, equitable, [and] reasonable." Pursuant to this finding the Arbitrator, in part, had ordered that the grievant be reappraised by management. Accordingly, the Activity had reappraised the grievant and rated her overall as "highly successful." When the grievant disagreed with this rating, claiming that she deserved an overall rating of "outstanding," the continuing jurisdiction of the Arbitrator was invoked to resolve the issue of the propriety of her overall rating of "highly successful."

The Arbitrator noted that under the parties' agreement, highly successful performance is defined as performance which "exceeds the performance standards for a given position 50% of the time or more" and outstanding performance is defined as performance which "exceeds the performance standards for a given position 85% of the time or more." The Arbitrator further noted that in her annual appraisal, the grievant was rated as exceeding the performance standards 50% of the time as to two of her job elements and as meeting the standards as to her other job element. On review of this performance appraisal and the grievant's overall rating, the Arbitrator determined that the rating was arrived at arbitrarily. Specifically, he ruled that there had not been a complete and reasonable review of all the factual information relating to the grievant's performance under the respective job elements as required by the agency handbook on the general performance appraisal system. He further ruled that the appraisal contained numerous contradictions, misstatements of fact, assessments of fault which did not lie with the grievant, and references to performance occurring outside the period stipulated to and designated by the parties to serve as the basis for her appraisal for the two appraisal periods in question. After discounting all of these components of the grievant's appraisal, the Arbitrator concluded that there was nothing in the appraisal of a negative nature and that consequently the grievant deserved an overall rating of "outstanding." Accordingly, as his compliance opinion and award, the Arbitrator ordered that the grievant be given a rating of "outstanding" for the two appraisal periods in question.

III. EXCEPTION

In its exception the Agency contends that the award is contrary to section 7106(a)(2)(A) and (B) of the Statute. Specifically, the Agency argues that by supplanting management's assessment of the grievant's performance with his own evaluation, the Arbitrator contravened the principle enunciated by the Authority that an arbitrator may not substitute his or her judgment for that of management as to what an employee's performance evaluation and rating should be. The Agency maintains that even if the Arbitrator effectively found that the performance standards had not been applied to the grievant fairly, equitably, and reasonably as required by the parties' agreement, there was no basis for the Arbitrator's conclusion that the grievant affirmatively met the standard necessary to achieve an outstanding rating. In particular, the Agency maintains that the mere agreement by the Arbitrator with the Union's arguments disputing certain performance deficiencies contained in management's appraisal of the grievant's performance does not justify the Arbitrator's ruling that the grievant was entitled to have been rated "outstanding."

IV. ANALYSIS AND CONCLUSIONS

In Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760, 21 FLRA No. 86 (1986), the Authority reviewed recent decisions discussing in detail the role of an arbitrator in resolving disputes pertaining to performance appraisal matters. In these decisions the Authority had specifically advised that an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his or her performance appraisal by management's application of the established performance standards. The Authority had further advised that in resolving the grievance, the arbitrator properly may determine that management applied the established standards in violation of law, regulation, or an appropriate, nonquantitative review criterion, and the arbitrator to that extent may sustain the grievance. The Authority also had stated that in sustaining the grievance, an arbitrator as a remedy may direct that the grievant's work product be properly evaluated by management or where appropriate that the grievant's work product as appraised by management be granted the rating to which entitled under the established elements and standards. The Authority, however, had cautioned in these decisions that the arbitrator may not conduct an independent evaluation of an employee's performance under the elements and standards established by management and may not substitute his or her own judgment for that of management as to what that employee's evaluation and rating should be. SSA, Office of Hearings and Appeals, slip op. at 4 (citing Bureau of Engraving and Printing, U.S.

Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO, 20 FLRA No. 39 (1985); Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148, 21 FLRA No. 15 (1986)).

Applying these decisions in SSA, Office of Hearings and Appeals, the Authority determined that the arbitrator was not authorized to determine that the grievant's case production would have been rated at least as "fully successful" but for the violation of the parties' collective bargaining agreement. The Authority noted that management's appraisal of the grievant's numerical case production was based on the statistical determination of the grievant's average daily production and the rating of that production under the established standards. The Authority found that this was not the type of appraisal that would permit an arbitrator in an objective, nondiscretionary, and essentially mechanistic manner to determine without an independent evaluation that an aggrieved employee was entitled to a different rating under the established standards. In finding the award deficient, the Authority concluded that the arbitrator, in determining that the grievant's performance would have been rated higher, necessarily conducted an independent evaluation of the grievant's case production performance under the established standards and substituted his judgment for that of management as to what the grievant's performance evaluation should have been. The Authority contrasted this case to the Bureau of Prisons case in which exceptions were denied where the arbitrator had expressly examined the performance standards and regulatory definition of outstanding performance, had specifically evaluated the application of the standards to the grievant's performance as described in his performance appraisal, and had determined in accordance with the definition of outstanding performance and management's own appraisal of the grievant's peformance that the grievant was entitled under the established standards to a rating of "outstanding" as to three of his job elements.

In this case the Authority concludes, as it did in SSA, Office of Hearings and Appeals and in contrast to Bureau of Prisons, that the award is deficient. As noted, management's appraisal of the grievant's performance was based on a determination of the percentage of time that the grievant's performance exceeded the established standards. The Authority finds, similar to SSA, Office of Hearings and

Appeals, that this is not the type of appraisal that would permit an arbitrator in an objective, nondiscretionary, and essentially mechanistic manner to determine without an independent evaluation that an aggrieved employee was entitled to a different rating under the established standards. Instead, the Arbitrator, in determining that the grievant deserved an overall rating of "outstanding," necessarily conducted an independent evaluation of the percentage of time that the grievant's performance exceeded established standards and clearly substituted his judgment for that of management as to what the grievant's performance evaluation under those established standards should have been. Although the Arbitrator properly could have ordered the grievant reevaluated on finding that management's appraisal of the grievant was not in accordance with the agency's performance appraisal system and apparently Article 19 of the parties' agreement, the Arbitrator instead independently determined what that rating would have been.

V. DECISION

For these reasons, the Authority finds that the Arbitrator's order that the grievant be given a rating of "outstanding" is contrary to section 7106(a) of the Statute and the decisions of the Authority and must be modified. Accordingly, the last sentence of the award, ordering that the grievant be given a rating of "outstanding" is struck and the following language substituted:

> Management shall reevaluate in accordance with the general performance appraisal system and Article 19 of the parties' National Agreement the grievant's performance for the period stipulated to and designated by the parties and shall apply that rating to the appraisal periods in question.

Issued, Washington, D.C., June 6, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY CORPS OF ENGINEERS,
KANSAS CITY DISTRICT

Activity

and Case No. 0-AR-1072

LOCAL 29, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Charles E. Clark filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute submitted to arbitration in this case concerned the procedures for granting official time for representational activities. In settlement of several unfair labor practice charges, the parties agreed that the Activity's implementation of two directives or "management advisories," which provided guidance and instructions for supervisors to follow in approving and recording the use of official time, could be grieved by the Union and submitted to arbitration. The parties further agreed that the scope of the grievance and the award of the arbitrator would be limited to the procedures regarding the granting of official time for representational purposes for specified stewards and officers. Pursuant to this agreement, a grievance was filed and submitted to arbitration in which one of the issues the parties stipulated to was whether the procedures for granting official time implemented by the management advisories violated the official time provisions of the parties' collective bargaining agreement or past practices of the parties. According to the Arbitrator, the dispute primarily concerned whether the management advisories could properly require the specified officials and stewards to obtain permission in order to perform union representational functions. The Arbitrator determined that such a requirement was not consistent with the language of the parties' agreement and that the past practice of the parties clearly was only for the specified officials and stewards to apprise or inform their supervisors of the need to perform representational activities and not to request permission. Consequently, as his award the Arbitrator ruled that the procedures for granting official time implemented by the management advisories violated the official time provisions of the parties' agreement and past practices. Accordingly, the Arbitrator ordered both management advisories withdrawn with the past practices reinstated until negotiation of a new contract is completed.

III. EXCEPTION

A. Agency's Contentions

In its exception the Agency contends that the award is deficient as contrary to the Statute. Specifically, the Agency argues that the award is inconsistent with management's right to assign work in accordance with section 7106(a)(2)(B) of the Statute. The Agency maintains that the Arbitrator's interpretation of the agreement restricts management's right to schedule the use of official time consistent with the mission requirements of the Agency and to obtain information necessary to determine whether official time is used in accordance with the Statute.

B. Union Opposition

In its opposition the Union essentially argues that the award only concerns the procedures regarding the granting of official time and does not restrict management's right in particular circumstances to disapprove the use of official time.

IV. ANALYSIS AND CONCLUSIONS

The Authority concludes contrary to the Agency that the award is fully consistent with the Statute. The Authority finds that the Arbitrator's award is to the same effect as the Authority's decision and order in Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA No. 122 (1985). In that case the Authority adopted the Judge's finding that prior to the unilateral implementation by the activity of a requirement that union officers obtain permission from their supervisors in order to take official time, there had been a past practice of allowing union officers to use official time at their discretion. Accordingly, in agreement with the Judge, the Authority determined that the activity's unilateral change in policy without affording the union notice and an opportunity to bargain concerning the change in established practice violated section 7116(a)(1) and (5) of the Statute. In addition, the Authority ordered the activity on request of the union to meet and negotiate with regard to any changes in established practices concerning the use of official time by unit employees serving as union officers and with regard to the implementation of any such changes. Based on the decision in VA Medical Center, Muskogee, the Authority finds that the Agency in this case has failed to establish that the similar order of the Arbitrator, withdrawing both advisories and reinstating the established past practices regarding the procedures for granting official time until completion of negotiations, is contrary to the Statute. Furthermore, in agreement with the Union, the Authority in particular concludes that the Agency fails to establish that the award is inconsistent with management's right to assign work. In accordance with the settlement agreement limiting the arbitrator's authority to the procedures regarding the granting of official time, the award does not provide for any entitlement to an allocation of official time to a particular steward or official without regard to management needs and requirements regarding the performance of assigned work. Accordingly, no basis is provided for finding the award contrary to section 7106(a)(2)(B). See American Federation of Government Employees, AFL-CIO, New York-New Jersey Council of District Office Locals, Social Security Administration and Department of Health and Human Services, Social Security

Administration District Office Operations, 7 FLRA 413 (1981); *see also Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region*, 21 FLRA No. 81 (1986) (analysis of the relationship between section 7131(d) and section 7106 of the Statute).

V. DECISION

Accordingly, for these reasons, the Agency's exception is denied.

Issued, Washington, D.C., June 6, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE, MARYLAND

Respondent

and

Case Nos. 9-CA-30242
9-CA-30344
9-CA-30348
9-CA-30351
9-CA-30395

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain of the unfair labor practices alleged in the consolidated complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge also found that the Respondent had not engaged in other alleged unfair labor practices and recommended dismissal of the consolidated complaint with respect to such allegations. Thereafter, the General Counsel filed exceptions limited to the Judge's dismissal of one allegation in the consolidated complaint.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, and noting particularly the limited nature of the General Counsel's exceptions as well as the absence of exceptions by the Respondent, the Authority hereby adopts the Judge's findings,*/ conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, shall:

1. Cease and desist from:

(a) Making unilateral changes in the conditions of employment of employees exclusively represented by the American Federation of Government Employees, AFL-CIO, such as the reorganization of the Title II and Title XVI initial claims units in its South Seattle Branch Office, without notifying AFGE of the proposed change and, upon request, negotiating to the extent required by the Federal Service Labor-Management Relations Statute.

(b) Bypassing the American Federation of Government Employees, AFL-CIO, and dealing directly with bargaining unit employees concerning their conditions of employment.

(c) Telling the representative of the American Federation of Government Employees, AFL-CIO, that the Branch Manager wants his next Documented Progress Review to reflect his union activity in a negative way; threatening said representative with a Performance Improvement Plan; and stating that the Branch Manager is timing the representative's interviews with the public, in order to interfere with or discourage him in the exercise of rights accorded by the Statute.

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*/ The General Counsel excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

(d) Discriminating against employees because of their union activities by evaluating said employees in a Documented Progress Review or other work review in an adverse manner which penalizes approved official time spent on union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain with the American Federation of Government Employees, AFL-CIO, concerning the impact and implementation of changes stemming from the reorganization in the Title II initial claims unit on or about May 2, 1983, and in the Title XVI initial claims unit on or about April 11, 1983.

(b) Rescind the Documented Progress Review issued to John Mack in March 1983, and reevaluate Mack, taking into consideration Mack's time spent on approved official time for labor-management relations, when assessing his level of production for purposes of that Documented Progress Review.

(c) Post at its facilities at the South Seattle Branch Office copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Manager, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations of the consolidated complaint be, and they hereby are, dismissed.

Issued, Washington, D.C., June 6, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make unilateral changes in the conditions of employment of employees exclusively represented by the American Federation of Government Employees, AFL-CIO, such as the reorganization of the Title II and Title XVI initial claims units in our South Seattle Branch Office, without notifying the American Federation of Government Employees of the proposed change and, upon request, negotiating to the extent required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT bypass the American Federation of Government Employees, AFL-CIO, by dealing directly with bargaining unit employees regarding proposed changes in their conditions of employment.

WE WILL NOT tell the representative of the American Federation of Government Employees, AFL-CIO, that the Branch Manager wants his next Documented Progress Review to reflect his Union activity in a negative way; threaten said representative with a Performance Improvement Plan; or state that the Branch Manager is timing the representative's interviews with the public, in order to interfere with or discourage him in the exercise of rights accorded by the Federal Service Labor-Management Relations Statute.

WE WILL NOT discriminate against our employees because of their union activities by evaluating said employees in a Documented Progress Review or other work review in an adverse manner which penalizes approved official time spent on union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees, AFL-CIO, concerning the impact and implementation of the changes stemming from the reorganization in the Title II initial claims unit on or about May 2, 1983, and in the Title XVI initial claims unit on or about April 11, 1983.

WE WILL rescind the Documented Progress Review issued to John Mack in March 1983, and reevaluate Mack, taking into consideration Mack's time spent on approved official time for labor-management relations, when assessing his level of production for purposes of that Documented Progress Review.

(Agency or Activity)

Dated: ____________ By: ____________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Room 542, San Francisco, California 94108, and whose telephone number is: (415) 556-8106.

[22 FLRA No. 10]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE, MARYLAND

Respondent

and **Case Nos. 9-CA-30242**
9-CA-30344
AMERICAN FEDERATION OF GOVERNMENT **9-CA-30348**
EMPLOYEES, AFL-CIO **9-CA-30351**
9-CA-30395

Charging Party

. . . .

Mr. Wilson Schuerholz
For the Respondent

Mr. Michael J. Teefy
For the Charging Party

Joanna Berkow, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns unfair labor practice complaints issued by the Regional Director, Region Nine, Federal Labor Relations Authority, San Francisco, California, dated July 29, 1983 and September 20, 1983, against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (Respondent), based on charges filed by the American Federation of Government Employees, AFL-CIO (Charging Party or Union). The complaints allege a multitude of statutory violations based upon Respondent's actions in its South Seattle Branch Office. Specifically, the complaints allege that Respondent made various threatening statements regarding the alternate union representative's work performance

in violation of section 7116(a)(1) of the Statute[1]; that Respondent realized one of these threats by the issuance of an adverse performance document to the alternate Union representative in violation of section 7116(a)(1) and (2) of the Statute; that Respondent discriminated against another Union representative by denying her designated representative official time to represent her in a personal grievance on the sole basis of her Union status in violation of section 7116(a)(1) and (2) of the Statute; and that holding a grievance meeting in the absence of her designated Union representative was an unlawful formal discussion in violation of section 7116(a)(1)(5) and (8) of the Statute. The complaints further allege Respondent's failure to bargain in good faith with the Union in violation of section 7116(a)(1) and (5) of the Statute by its unilateral implementation of substantial changes in the staffing of the Title II and Title XVI Initial Claims Units, its refusal to bargain with the Union's designated representative regarding said changes, and by its direct dealing and formal discussions with employees affected by these changes. Respondent filed Answers admitting the jurisdictional allegations as to the Respondent, Charging Party, and the filing of charges, but denying any violative conduct.

A hearing was held in Seattle, Washington. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The General Counsel and Respondent filed helpful briefs, and the proposed findings have been adopted in whole or in substance where found supported by the record as a whole. Based on the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

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[1] The Consolidated Amended Complaint dated July 29, 1983 alleged, inter alia, that Respondent timed the work interviews with the public conducted by employee John Mack because of Mack's union activities in violation of section 7116(a)(1) and (2) of the Statute (GC Exh. 1(q) 7(a), 8 and 15). In light of Respondent's stipulation at hearing in response to General Counsel's subpena duces tecum that no recordation or documentation of timing work interviews taken by claims representatives in the office exists, the General Counsel moved to withdraw that portion of the Consolidated Amended Complaint alleging that Mack's interviews were actually timed in violation of section 7116(a)(1) and (2). The motion is granted.

[2] The General Counsel's unopposed motion to correct the transcript is granted; the transcript is hereby corrected as set forth therein.

II. Findings of Fact

A. Background

The South Seattle Branch Office, herein called the Office, is one of Respondent's field offices in the Seattle metropolitan area. The Office processes initial claims and post entitlement actions under Title II and Title XVI of the Social Security program. Its staff consists of approximately 30-37 employees, two operations supervisors and a branch manager (Tr. 267-268). Mary O'Malley was the Union representative and John Mack, the alternate Union representative for the Office at all times material herein (Tr. 28, 202). In addition, John Mack was and is the Union's technical advisor for the Puget Sound area and regional chairman for the Union's appraisal, grievance, safety and contract committees (Tr. 29-30). At all times material herein, Frank Allard was John Mack's immediate supervisor and Mack's management contact for approval of official time and preliminary matters on certain grievances. Branch Manager Ruth Saunders was Allard's supervisor and Mack's management contact for local negotiations (Tr. 41). Respondent does not dispute its knowledge of either O'Malley's or Mack's various Union positions (Tr. 28-29, 31; 202-203). During the period of time relevant to the present charges, Mack and/or O'Malley have processed approximately 36 grievances and over three dozen unfair labor practice charges involving working conditions in the Office generally and Branch Manager Ruth Saunders specifically (Tr. 32).

B. Respondent's Alleged Intimidation of Mack

1. The Documented Progress Review

A Documented Progress Review, herein called a DPR, is a periodic written supervisory assessment of an employee's performance between annual appraisals (Tr. 41-42). It is designed "to identify and resolve problems in the employee's performance." (Jt. Exh. 1, p. 38). In mid-February, Operations Supervisor Allard initiated a discussion with John Mack concerning Mack's upcoming DPR wherein he stated that Branch Manager Ruth Saunders had told him (Allard) that she was angry with Mack about discussions Mack had with Vicki Winn, another operations supervisor in the Office, regarding certain proposed changes in working conditions and wanted Mack's Union activities to be reflected on his next DPR; that she wanted his next DPR to be negative. Allard told Mack that he had informed Saunders that a negative DPR was inappropriate and that Mack's Union activities should not be reflected on his DPR. Allard also told Mack that Saunders had stated she was upset with the quantity of Mack's work compared to other employees and that he was spending too much time on Union activities. Allard said he disagreed with Saunders on that, but warned Mack that Saunders was watching his work and that he had better be careful (Tr. 42-43).[3] Employee O'Malley corroborated Mack's testimony in all material respects (Tr. 203-204).

Mack, one of four claims representatives in his unit, received his DPR on March 2 from Allard. Of the four, only Mack was a Union official. During the period covered by the DPR Mack spend 20-25% of his total work time on Union activities. The DPR stated as to Mack: "Overall and in each generic job task your performance has been fully satisfactory since October 29, 1982." However, the DPR stated that Mack "should strive to approximate taking 25% of the interviews in a four person unit, and 33% in a three person unit," and noted that Mack would have to increase his overall productivity to remain fully satisfactory overall. (Tr. 44-45; GC Exh. 2). Allard testified that this was an attempt to create a fair share baseline from which other factors or variables, such as future official time, would be taken into account (Tr. 357). Although Saunders testified that she reviewed the DPR prior to its issuance and instructed Allard that Mack's official time would have to be subtracted from the 25% workload Allard was expecting Mack to carry (Tr. 275), the DPR issued to Mack on March 2, 1983 set forth the 25% productivity standard without any allowance for the official time Mack was utilizing for Union activities (Tr. 53; GC Exh. 2).[4] Unlike Mack's DPR, the February/March 1983 DPR's issued to the three other claims representatives in his unit do not contain a fixed and objective percentage expectation of productivity; two of these three DPR's reference a "fair share" standard (GC Exh. 2(a) to (d)).

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[3] Allard admits discussing Mack's upcoming DPR with Mack in mid-February but denies saying that Saunders wanted Mack's DPR to negatively reflect his Union activities (Tr. 362-363). I credit Mack's specific and detailed testimony on this point.

[4] Saunder's testimony that the DPR did reflect Mack's Union activities is not credible (Tr. 347-348). First, the DPR on its face sets forth a strict 25% standard without any limitation or consideration of time spent on Union activities. Second, Saunders's assertion contradicts her own prior testimony that when she reviewed the DPR she was aware of the problem that no consideration was made for Mack's Union activities and instructed Allard to deduct that time. According to Saunders, Allard didn't have the official time calculation at the time she reviewed the DPR with him (Tr. 275). Notwithstanding her alleged concerns about the official time issue, Saunders admitted on cross examination that she never directed Allard to change the final DPR (Tr. 348). Mack's next DPR, issued in August of 1983, several months after the instant charge was filed, reiterates that 25% production expectation, but stated that Mack's Union activities had been considered in connection therewith (GC Exh. 42).

2. The Performance Improvement Plan

A Performance Improvement Plan, herein called PIP, is a supervisor's written plan identifying an employee's performance deficiencies. It sets forth actions which must be taken by the employee to improve performance and contains provisions for counseling, training, reassignment, or other assistance as appropriate. A PIP is established when an employee's performance indicates potential unsatisfactory performance (Jt. Exh. 1, Article 21, Section 7(c), p. 38; Tr. 46). The possible consequences of failure to meet the requirements of a PIP include reassignment, denial of promotions, and/or termination (Tr. 46).

Shortly after Allard's discussion with Mack on Mack's upcoming DPR, but before Mack received it, Allard initiated a further discussion with Mack on his work performance (Tr. 144; 45-46). This discussion occurred in the parking lot of the Office as Allard and Mack were leaving for the day (Tr. 46-47). Allard told Mack that Saunders wanted to put Mack on a PIP based on low productivity, but that Allard had told Saunders a PIP was not warranted at that time.[5] Allard also told Mack that Saunders had timed his work interviews in comparison to one of Mack's co-workers, Tinie Briscoe, and found that Briscoe did three interviews in the time it took Mack to do one.[6] Allard said Saunders had asked him if Mack could be written up for this (Tr. 47-48).

3. The Sick Leave Investigation

Allard approved sick leave for Mack on March 10 (Tr. 50-51). Mack stayed home with stomach cramps and diarrhea that day (Tr. 52). Mack has never been counseled regarding sick leave abuse and has a sick leave balance in excess of 550 hours (Tr. 51).

After Mack was placed on sick leave, Saunders called Carol Hearn, Branch Manager of the Social Security office in Seattle West where Mack's wife, Carol, worked as a data review technician. Saunders called to ask whether Carol Mack was working that day (Tr. 199-200). Carol Mack was at work that day, she overheard the call being announced and, upon her inquiry, was advised of the substance of the call by Ms. Hearn.

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[5] Allard testified that he told Mack management was considering putting him on a PIP and that he had discussed the matter with Saunders, but nothing final had been decided. (Tr. 363-364). Betty Heavey, an employee in the Office who was riding home with Allard that day, overheard this conversation and corroborated Mack's testimony that Allard said Saunders had asked him to put Mack on a PIP (Tr. 196-197).

[6] Allard testified that Mack was the one who mentioned the timing of interviews. (Tr. 365). I credit Mack's testimony in this respect.

Saunders testified that she called Carol Hearn to ascertain whether Carol Mack was working on the day in question even though she had not observed John Mack to be a sick leave abuser. Saunders explained that Hearn had recently made a similar call to her to ascertain John Mack's whereabouts on a day that Carol Mack had taken off on leave. Saunders stated that there was no abuse of sick leave on John's part, and she wasn't sure what was going on with Carol. (Tr. 286-287). Saunders had never made such an inquiry regarding any other employee. (Tr. 337-338). She dropped the matter, and nothing was said about this to the Macks. (Tr. 287-288). Carol Mack testified on rebuttal that she took no sick leave from January 1 to March 10. (Tr. 418-419).

4. Saunders' Call to Saul

From 8:00 to 9:00 a.m. on the morning of February 16 management conducted a general staff meeting attended by the entire Office (Tr. 53). Most of the meeting was taken up with a training session, conducted by Allard, on protective filing (the protection of a Social Security claimant's right to file a claim in advance of when payment would be due). At the end of the meeting, Mack became involved in a heated exchange with Saunders and Winn regarding what he perceived to be inconsistencies in the protective filing instructions given employees at the staff meeting. Saunders became upset and terminated the meeting (Tr. 53-56). Shortly thereafter, at roughly 10:00 a.m. that morning, Saunders telephoned Jeff Saul, the Union's Vice President in charge of appointing and dismissing Union representatives. Saunders informed Saul that Mack had lied to her and that Mack was unfair (Tr. 245-246).[7]

C. The Alleged Denial of O'Malley's Right to Representation

On March 22 and 24, O'Malley filed two separate grievances relating to denial of official time in order to file an unfair labor practice charge and designated Mack as her representative in each (Tr. 206-207; GC Exh. 34, 35). She designated Mack because she wanted union representation, he was the alternate representative, and he was trained and experienced in handling grievances (Tr. 207). On March 23, Mack twice requested official time to process O'Malley's March 22 grievance. Both requests were denied by management on the grounds that official time may be granted only to the primary representative and the local representative must represent herself

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[7] Saunders admits making the call to Saul and telling him that Mack was a liar, but denies doing so on February 16th (Tr. 291). I credit the testimony of Saul in this regard. Saul's testimony was also corroborated by Mack's testimony that a couple of days after the February 16 meeting Saul told him that Saunders had called on February 16 regarding Mack's performance as a Union representative (Tr. 56).

(GC Exh. 4, 5; Tr. 56-59). The denials were based on advice received by Saunders from Richard A. Morris, Regional office management analyst, concerning management's understanding of Article 30, Appendix F, section (k) of the collective bargaining agreement. The advice was that where the local representative has filed a grievance and designated another representative, management will accept the designation of representative; however, no official time will be granted. (Tr. 292-293; 399-400). One month after the denial of his requests for official time to represent O'Malley, Allard informed Mack he could have taken annual leave or leave without pay for this purpose (Tr. 61).

O'Malley again requested union representation at her first step grievance meeting with Allard which was held by Allard on April 1 (Tr. 209). At that time, Allard promised O'Malley that he would address the representation issue in his first step decision (Tr. 210). Allard failed to do so and did not address the issue until O'Malley wrote a subsequent memorandum to him requesting management's position in writing (Tr. 210; GC Exh. 36-38). Management's position as indicated in two memoranda from Allard and one from Saunders through Winn was that the grievances were Union-initiated issues, the primary representative was on official time, and the Union representative should represent himself/herself absent a request for annual leave or leave without pay from the designated representative (Tr. 213-214; GC Exh. 38 to 40). A national grievance on official time was filed July 13, 1982 (Tr. 260-261). One of the issues involved therein was the denial of union representation to union representative grievants under certain circumstances (Tr. 255). The grievance itself was not introduced nor was there any further evidence delineating those circumstances of denial involved in the grievance. It is undisputed that the denial of O'Malley's right to union representation in her March 1983 grievances is not and was not the subject of any pending grievance (Tr. 401-402; 415).

D. The Title XVI Changes

At all times material herein there were three claims representatives in the Title XVI Initial Claims Unit, O'Malley, Heavey and Furugori. The Title XVI Claims Unit in the Office processes both aged and disability claims (Tr. 216). Aged claims are undisputedly the more difficult workload because of their restrictive time limits, the fact that the claims representative makes a payment determination on all such claims as opposed to 20% of the disability claims, they are reviewed five times more frequently than disability claims for appraisal purposes, and have more complex eligibility factors (Tr. 216-217; 63-64; 191-192).[8] The rotation of the aged workload within Office's Title XVI Initial Claims Unit had previously been negotiated with the Union on two occasions. The first agreement, dated October 19, 1982, assigned the aged claims to Betty Heavey for six months (GC Exh. 15). The second agreement dated January 19, 1983 reassigned the aged workload to Mary O'Malley for six months and then to Kim Furugori "barring any unanticipated changes." (GC Exh. 16).

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[8] The medical determination in disability cases is made by appropriate state agencies rather than by Social Security Administration employees (Tr. 64).

Prior to April of 1983 O'Malley was assigned the aged claims and some disability claims. Heavey and Furugori worked only on disability claims (Tr. 216). On March 31 Saunders verbally proposed the following changes to O'Malley: that O'Malley be reassigned to the post-entitlement unit; that Heavey resume the aged workload; and that a new claims representative, Verna Bush, be brought into the Initial Claims unit to replace O'Malley (Tr. 217-218). O'Malley confirmed Saunders' proposals by memorandum to Saunders dated April 1 wherein she designated John Mack as the Union's bargaining representative on the proposed changes (GC Exh. 6). O'Malley designated Mack primarily because she was personally affected by the change and didn't want to create the appearance of a conflict of interest and, secondarily, because she was going to be out the office for the following week (Tr. 218-219). Mack submitted a formal bargaining request and opening proposals to Saunders by memorandum of April 1 (GC Exh. 7). Saunders replied on April 1 that Mack's proposals were non-negotiable (GC Exh. 8). Mack responded by a second memorandum, also dated April 1, that he would petition the Authority for a negotiability determination on his proposals and/or bargain to impasse on alternative proposals (GC Exh. 9). On April 4 Saunders stated that the proposed staffing changes did not substantially impact either O'Malley or Heavey and were therefore non-negotiable (GC Exh. 10). On April 5 Mack informed Saunders in writing that he was in the process of preparing a new position paper more clearly outlining the Union's proposals (GC Exh. 11). On April 6 Mack submitted an impact statement to Saunders citing prior rotation agreements and the detrimental effect of O'Malleys frequent reassignments (GC Exh. 12).[9] Saunders replied by memorandum dated April 7 wherein she restated her position of no impact and gave an April 11 implementation date for her proposed changes, but agreed to consider any proposals Mack cared to submit (GC Exh. 13).

Mack submitted the following new counter-proposals on April 7 in lieu of his previously submitted proposals: (1) that the staffing changes be made in a fair and equitable manner; (2) that the changes not violate prior agreements; (3) that the changes not unfairly disadvantage any particular employee or impose any unreasonable or unnecessary workload burden upon any particular employee; and (4) that employees' views be fully and fairly considered (Tr. 74-75; GC Exh. 14). The employees' views were represented to be recommendations that (1) Betty Heavey not be reassigned the aged workload; (2) that Mary O'Malley not be reassigned to the SSI PE Unit; and (3) that Kim Furugori be reassigned to SSI PE. By memorandum dated April 8, Saunders refused to bargain on the Union's new proposals (GC Exh. 17). The Title XVI staffing changes were implemented by Allard's April 11 memorandum to employees (GC Exh. 18).

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[9] The post-entitlement work to which O'Malley was reassigned did not involve payment authorization, a grade determining factor for the claims representative, GS-10 (Tr. 219-220).

Upon receipt of this memorandum on April 11, claims representative Betty Heavey, a bargaining unit employee, suggested certain changes in Allard's initial memorandum to the effect that she not take over O'Malley's caseload, that she be allowed to work through her own pending disability caseload, take the aged cases from O'Malley, and have an alpha split for incoming cases with the new employee. Allard said that would be okay with him. (Tr. 194, 376). After meeting with Heavey on this matter, Allard implemented her suggestions by a second memorandum also dated April 11 (GC Exh. 19; Tr. 194-195). The Union was not provided prior notice or the opportunity to be present at the meeting between Allard and Heavey (Tr. 82; 221). Nor was the Union provided prior notice or the opportunity to bargain on Allard's accommodation of Heavey's requested amendment to management's initial proposal.[10]

On April 12 Saunders told O'Malley she would not deal with Mack on the proposed Title XVI changes and that she felt Mack was wasting his time preparing for negotiations. O'Malley informed Saunders that Mack was the Union's designated representative in this matter. Saunders then requested a written designation of Mack. O'Malley gave Saunders a written designation of Mack as the Union's bargaining representative for all matters he became involved with during O'Malley's absence from the office.[11] Saunders repeated that she would not consult with Mack and confirmed this in writing by letter to O'Malley dated April 18. Saunders stated that she would contact Mack only in O'Malley's absence and referenced Article 30, Appendix F, Sections E and F of the agreement. (Tr. 221-223; GC Exh. 21, 25).

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[10] Allard claimed that he ran the amended proposal by Mack (Tr. 377). I credit Mack's testimony in this regard in light of the record as a whole.

[11] The Title XVI reorganization was one of several matters Mack dealt with in the week of O'Malley's absence (April 4-8) (Tr. 219).

E. The Title II Changes

Prior to May of 1983 there were three different specialized work groups in the Office handling Title II claims. One group, supervised by Allard, consisted of four claims representatives, including Mack, and specialized in disability claims. The second group consisted of two part-time claims representatives, also supervised by Allard, who did the post-entitlement work. A third group of two claims representatives, supervised by Winn, specialized in retirement/survivor claims (Tr. 87-88).

On Thursday, April 7, when O'Malley was out of the office, Saunders sent Mack a memorandum proposing that Barbara Larsen, one of the two claims representatives handling retirement/survivor claims, be reassigned to a Title XVI unit on a trial basis for six months. The memorandum was addressed to Mack as the alternate local representative and requested his "comments" by April 15 with implementation to occur April 22 (GC Exh. 23).

Mack requested official time to meet with Saunders on Larsen's proposed reassignment the following Monday, April 11 (Tr. 90-91; GC Exh. 24). On April 12 Saunders denied the request for official time for Mack, stating that since O'Malley was the primary representative and was now back from leave, she was the proper representative to handle labor-management relations matters. (Tr. 91; GC Exh. 24). O'Malley reminded Saunders on April 12 that Mack was the Union's designated representative in this matter and confirmed this designation in writing by memorandum dated April 13 (Tr. 224; 221-222; GC Exh. 25). Following this written designation, Mack made a second request for official time to meet and consult on Larsen's reassignment. The latter request was also denied by Allard on April 14 on the grounds that O'Malley was present to conduct Union business (Tr. 95; GC Exh. 26).

On April 18 Saunders discussed with O'Malley the change in the Title II Unit, as well as another change she was making. (Tr. 316). Saunders suggested to O'Malley that there be a staff meeting to pull together information from employees. Saunders indicated that no decisions would be made at the meeting, and it would just be information gathering. O'Malley thought it was a good idea and had no problem with it.[12]

On April 20 Saunders met with the dozen or so employees involved in Title II work in the break room. Prior to the meeting, she reminded Mack, in O'Malley's absence, of the meeting and that he would be there in his Union capacity. (Tr. 317, 396).[13] She also stated at the meeting that

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[12] O'Malley denied that she received any notification of the April 20 meeting. I credit Saunders' testimony on this point.

[13] Mack denied that he received any notice of the meeting prior to the meeting. I credit the testimony of Saunders and Winn concerning a conversation with Mack prior to the meeting.

Mack was representing the Union and told him to "put on your union cap." (Tr. 317, 381, 397).

Immediately after the meeting ended, Mack again requested official time to meet with Saunders to discuss the impact of Larsen's reassignment. Saunders responded that the Union would be given an opportunity to bargain when management formulated its proposal on the Title II reorganization (Tr. 100-101; GC Exh. 27).

Saunders continued the meeting with the same employees at 8:00 a.m. the following day, April 21, to finish up the meeting. (Tr. 318). At this meeting, Saunders narrowed the reorganization to two options: appoint someone to Larsen's work or establish a consolidated Title II initial claims unit responsible for both disability and retirement/survivor claims. She solicited employees' comments on each of these two options. Employees expressed concerns about training, performance appraisals, and about controlling the work flow. Saunders stated she would consider the employees' concerns and make her decision. (Tr. 103-105).

On April 22, Saunders presented nine proposals to O'Malley for comment by April 27 with a projected May 2 implementation date (GC Exh. 28). O'Malley then distributed the proposals to employees for their comments (Tr. 105).

Saunders notified O'Malley on April 25 that she wanted to meet with employees on April 26 regarding the Title II changes. O'Malley agreed to the meeting, but told Saunders she would not bargain in such a setting and expected Saunders to submit final proposals to her following the April 26 meeting with employees and, based on Saunders' final proposals, O'Malley would decide whether to invoke bargaining (Tr. 225).

Saunders held a third meeting with the same employees on April 26. O'Malley also attended. Saunders went over her April 22 proposals and solicited employee reaction to each (Tr. 108). Employees again expressed concern over tally board control, folder location, training and performance documentation (Tr. 108-109; 226-229). Saunders ended the meeting by stating she would consider the employees' concerns expressed and get back to the employees (Tr. 109). After the April 26 meeting ended O'Malley asked Saunders whether Saunders would give her revised proposals. Saunders stated she would do so (Tr. 229).[14]

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[14] Saunders testified that she and O'Malley reached agreement on the Title II changes immediately after the meeting and Saunders was supposed to reduce it to writing (Tr. 321). O'Malley's testimony that it was merely agreed that Saunders would give the Union revised proposals is more credible considering the record as a whole.

On April 27 Saunders issued a memorandum to the Title II staff encouraging them to accept despecialization. (GC Exh. 29). The Union received no advance notice of the April 27 memorandum prior to its issuance to employees (Tr. 110; 229-230). After reviewing a copy of the memorandum, Mack asked Saunders on April 28 when the Union could expect her final proposal. Saunders said that the April 27 memorandum was her final proposal. Mack replied that the memorandum merely outlined some staff training but did not cover all the issues discussed at the April 26 meeting. Saunders then stated that Allard was formulating a policy memorandum. Mack showed Saunders a list of six employee concerns expressed at the April 26 meeting. He told her that the Union wanted to ensure that these six concerns were addressed in management's final proposal on the reorganization. He also told Saunders the Union would want to negotiate any of the concerns not incorporated into her final proposal. Saunders told him to discuss the list with Allard (Tr. 111 to 113; GC Exh. 30). On April 29 Mack gave Allard a copy of the list of concerns he had shown Saunders the day before (GC Exh. 30). Allard reviewed the list and they discussed it briefly. Allard told Mack he would get back to him (Tr. 114-116). Instead, Allard distributed two policy memoranda announcing the Title II reorganization to employees (Tr. 117; 230).[15]

The changes outlined in the April 29 memorandum were implemented by Respondent on May 2 (Tr. 121). At the time of implementation, the Union had the following outstanding concerns: (1) did the April 29 memoranda replace Saunders' April 22 proposal or were they an addition thereto; (2) in the new initial claims unit, what type of work would be reviewed for evaluative purposes and by whom; (3) would Larsen receive the same benefits regarding training and an evaluation-free period as the others in the event she opted to return to Title XVI work after six months; (4) were the alpha splits determining work distribution fair and equitable [16];

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[15] Saunders claims she showed the April 29 memoranda to Mack prior to their distribution to employees and that he requested official time to poll the employees thereon (Tr. 321-322). Saunders' testimony is refuted by Mack and cannot be supported by the weight of the evidence. As evidenced by GC Exh. 4, 5, 24, 26 and 27 Mack habitually utilized official time request forms to request official time for representational matters thereby creating a record of such time. There is no evidence of any such form here.

[16] For example, under Allard's April 29 policy memoranda, Mack was given an equal share of case responsibility despite Respondent's knowledge of his extensive use of work time for representational activities during this period (Tr. 120-121).

and (5) what input would the Union have in management's reassessment of the new structure following the 30 day grace period. The Title II changes were implemented by Respondent. The Union reached no agreement with Respondent thereon (Tr. 122 to 123).[17]

III. Discussion, Conclusion and Recommendations

A. Alleged Violations of Section 7116(a)(1)

1. Paragraph 5(a) of the July 29 Complaint (Case No. 9-CA-30242)

The credible testimony establishes that Allard told Mack that Saunders had said Mack's next DPR should negatively reflect Mack's union activities. It is well established that protected activity cannot be considered or referenced, even non-judgmentally, in connection with performance discussions. Department of Health and Human Services, Social Security Administration, 12 FLRA 667, 12 FLRA No. 132 (1983) citing Naval Facilities Engineering Command, 3 A/SLMR 209 (1973). Statements implying that union activity is a "negative factor" in a performance rating restrain employees in their right to form, join, and assist labor organizations without fear of penalty or reprisal and, therefore, constitute unlawful interference in violation of Section 7116(a)(1). Social Security Administration, supra citing U.S. Customs Service, Miami, Florida, 6 A/SLMR 695, Supplement 6 A/SLMR 259, 262 (1976). Accordingly, Allard's statement was violative of Section 7116(a)(1), as alleged.

2. Paragraph 5(b) of the July 29 Complaint (Case No. 9-CA-30242)

Shortly after Allard's initial threat that Saunders was concerned about Mack's low productivity due to Union activities and her desire to have such activities negatively reflected on Mack's upcoming DPR, Allard told Mack that Saunders also wanted to put him on a PIP based on low productivity. Although Mack's Union activities were not explicitly mentioned in Allard's statement about the PIP, Mack could reasonably have inferred that Saunders had asked about putting him on a PIP due to his Union activities inasmuch as Allard had recently told Mack that Union activities were causing his low productivity. Thus, Allard's statement regarding the PIP was an implicit threat against Mack's continued utilization of official time for union activities. See, Social Security Administration, supra:

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[17] O'Malley sent Saunders a July 29 memorandum several months after the instant charges citing several "commitments" regarding the changes (R Exh. 4). O'Malley testified that she wrote the memorandum pursuant to employee request and that had there been any prior collective bargaining agreement she would have filed a grievance (Tr. 403). Saunders confirmed on cross-examination that she considered the policy statements contained in the April 29 memoranda on the restructuring of the Title II unit as management commitments upon which employees should be able to rely. (Tr. 332-333).

> It is apparent that any threats to employees, express or implied, in respect to their union activities will have a restraining effect upon such employees and will constitute an unfair labor practice, quoting U.S. Customs, Id., at p. 261.

3. Paragraph 5(c) of the July 29 Complaint (Case No. 9-CA-30242)

The record establishes that during Allard's discussion with Mack concerning the PIP he also told Mack that Saunders had timed his work interviews with the public and found Mack a very slow worker. Allard said Saunders then asked if Mack could be written up for this. The statement that Mack's interviews were being timed (made at the same meeting where Mack's low productivity was being discussed and soon after he had been informed that Saunders attributed his low productivity to time spent on union activities) was inherently threatening and discriminatory, particularly in light of the undisputed testimony that no other employee had been timed by management. Accordingly, this statement constitutes an independent violation of Section 7116(a)(1).

4. Paragraph 5(d) of the July 29 Complaint (Case No. 9-CA-30242)

The complaint alleges that Respondent, by Saunders, subjected John Mack to disparate treatment when he called in to request sick leave. Saunders called another manager to ascertain whether Mack's wife was at work in another office on that day. The Complaint alleges that this action was taken for the purpose of discouraging John Mack from engaging in activities protected by section 7102 of the Statute.

The test established by the Authority to determine unlawful interference is not the employer's intent, nor the subjective perceptions of the employee, but whether, under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate the employee or, in the case of a statement, whether the employee could have reasonably drawn a coercive inference from the statement. Federal Mediation and Conciliation Service, 9 FLRA 199; Army and Air Force Exchange Service, Ft. Carson, Colorado, 9 FLRA 620 (1982). A manager has the responsibility of insuring that employees abide by leave regulations and must have discretion to initiate appropriate investigations and exchange pertinent information with other managers. I credit Ms. Saunders' explanation for her inquiry. Her inquiry was discreet and directed only to another manager. She made no effort to communicate to Mack on his wife that they were under some kind of investigation. She promptly dropped the matter. In my view, a preponderance of the evidence does not establish unlawful interference with protected activities in this respect.

B. Alleged Discrimination Against the Union Representatives; Alleged Refusal to Honor Designation of Union Representatives; Alleged Bypass

1. Alleged Critical Appraisal of John Mack on February 23, 1983 in Violation of Section 7116(a)(1) and (2) (Case No. 9-CA-30242)

Section 7102 of the Statute guarantees an employee's right to form, join, and assist a labor organization. The abridgement of this right by discrimination in connection with hiring, tenure, promotion or other conditions of employment is an unfair labor practice under Section 7116(a)(1) and (2). See, U.S. Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA 715, 5 FLRA No. 97 (1981). In order to establish a violation of sections 7116(a)(2) and (4) there must be a showing that the alleged discriminatee was engaged in protected activity, that the Respondent had knowledge of such activity, and that the Respondent took action against the discriminatee because of its anti-union animus. Veterans Administration Medical Center, Buffalo, New York, 13 FLRA No. 46 (1983); Department of Transportation, Federal Aviation Administration, Boston Air Route Traffic Control Center, Nashua, New Hampshire, 11 FLRA No. 67 (1983).

Respondent's knowledge of Mack's union activities was clearly established and is not in dispute. During the period covered by his February 23 DPR, Mack spent from 20 to 25% of his total work time on representational activities. Notwithstanding this knowledge, Respondent issued Mack a DPR on February 23 establishing a productivity goal that he take 25% of the interviews in a four person unit, which took no account of the 20 to 25% of work time Mack was then spending on Union activities. The DPR further stated that Mack would have to increase his current productivity to remain fully satisfactory.

Respondent claims that the productivity goal was merely a baseline from which future official time would be discounted. However, given the purpose of the progress review, which is to identify and resolve problems in the employee's performance at intervals during the appraisal period, this explanation is unconvincing. Saunders admitted that the productivity goal set forth therein should have, but did not, take Mack's union activities into account.

Discrimination is further apparent from a comparison of Mack's DPR with those simultaneously issued his three co-workers, none of whom had any involvement in Union activities. None of the other DPR's contain a fixed, numerical productivity goal but rather reference a more subjective "fair share" standard. It is well established that disparate treatment of Union representatives evinces a discriminatory motive. See, *Veterans Administration Medical Center, Shreveport, Louisiana*, 5 FLRA 216, 5 FLRA No. 27 (1981).

The timing of Mack's February 23 DPR, during a period when he was involved in the processing of three dozen or so grievances and an equal number of unfair labor practice charges against Office management, further demonstrates Respondent's discriminatory intent. Respondent was fully aware of these activities and had authorized Mack official time to perform them. The concurrence of protected activity and the critical appraisal warrants an inference of discriminatory motive. *Veterans Administration Medical and Regional Office Center, White River Junction, Vermont*, 6 FLRA 381, 6 FLRA No. 68 (1981); *Norton Concrete Co.*, 249 NLRB 1270, 104 LRRM 1347 (1980). Saunders' animus toward Mack is further established by her complaints about him to the Union official authorized to terminate Mack's appointment as a Union representative immediately following Mack's disagreement with her policies during a staff training meeting.

Although Mack's DPR ultimately contained a satisfactory rating, the satisfactory rating is totally irrelevant to the discriminatory production goals established by the DPR and to Allard's statement therein that Mack's failure to meet these goals would result in an unsatisfactory rating.

In summary, the discriminatory nature of Mack's February 23 DPR is established in this record by the document itself, Saunders' own admissions, the evidence of disparate treatment, and by the suspicious timing of the action. Accordingly, the DPR is violative of Section 7116(a)(1) and (2) of the Statute.

2. Alleged Discriminatory Denial of Official Time to John Mack to Represent Mary O'Malley; Alleged Discriminatory Denial to O'Malley of the Right to be Represented by the Union at Formal Grievance Meetings; Alleged Refusal to Bargain in Good Faith By Refusing to Honor O'Malley's Designation of Mack as Union Representative and Afford Mack Prior Notice of Grievance Meeting (Case No. 9-CA-30344)

These alleged unfair labor practices arise out of Respondent's refusal to grant official time to John Mack to represent O'Malley in her grievances. The refusal was based on Respondent's interpretation of Article 30, Appendix F, the official time provision of the collective bargaining agreement negotiated pursuant to section 7131(d) of the Statute. The contract is subject to arguable and variable interpretations in this respect, and relief for alleged violation of such negotiated rights would be available through the parties' negotiated grievance procedure. In these circumstances, the denial of official time to John Mack, a contractual right, did not rise to the level of interference with rights guaranteed by the Statute, e.g. the right to form, join, or assist a labor organization, or constitute discrimination to discourage the exercise of such rights. Cf. *Department of the Air Force, Base Procurement Office, Vandenburg Air Force Base, California*, A/SLMR No. 485, 5 A/SLMR 112, FLRC No. 75A-25, 4 FLRC 587 (1976); *Iowa National Guard and National Guard Bureau*, 8 FLRA No. 101, 8 FLRA 500, 512-513 (1982).

Since the alleged refusal to bargain with Mack regarding O'Malley's grievance and the alleged refusal to provide Mack with prior notice of the grievance meetings also arise out of this basic disagreement over official time, I conclude that a preponderance of the evidence also does not establish these as unfair labor practices. O'Malley's grievances on their face were not strictly personal grievances, but dealt with her use of official time as a Union representative. O'Malley is an intelligent and well-informed primary local Union representative. Under all the circumstances, she either was well aware, or should have been well aware, that the dispute with management was not over her right to have a representative at the meetings, but on that representative's use of official time. She had notice of the meetings and, as the primary representative, could have designated a representative to attend these sessions on her or the Union's behalf on other than official time.

3. Paragraph 11(b) of the July 29 Complaint (Case No. 9-CA-30351); Paragraph 8(a) of the September 30 Complaint (Case No. 9-CA-30395); Alleged Refusal to Honor the Union's Designation of Mack as Its Bargaining Representative.

The record reflects that when O'Malley, the local representative, was out of the office, Respondent did not fail to deal with Mack, the alternate representative. However, when O'Malley was in the office, Respondent refused to honor O'Malley's designation of Mack as the Union's bargaining representative. The General Counsel argues that Respondent's refusal to honor the Union's designation of Mack is indefensible and violative of section 7116(a)(1) and (5) of the Statute.

Respondent defends on the basis of its interpretation of Article 30, Appendix F of the collective bargaining agreement whereby the parties provided for a formalized bargaining relationship at the national, regional, and local level and official time for various Union officials. Respondent contends that at the local level, the Union, through the agreement, made a commitment to utilize the local representative as the individual with whom management should deal regarding labor relations matters and that it should deal with the alternate representative (Mack) only when the local representative is out of the office. The General Counsel replies that the contractual provisions fall far short of a clear and unmistakable waiver of the Union's statutory right to designate its own bargaining representatives.

The Union's statutory right to designate its own representatives in negotiations is well settled. Department of the Air Force, 915th Tactical Fighter Group, Homestead Air Force Base, 13 FLRA 135, 13 FLRA No. 33 (1983). However, here the parties have provided in their collective bargaining agreement for a formalized bargaining relationship. See, American Federation of Government Employees, AFL-CIO and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 4 FLRA No. 39 (1980). The parties take opposite positions as to the meaning to be attached to the contractual language, and the contract is not clear on its face in this regard. Thus, the appropriate avenue for resolution of the dispute is through the parties' mutually agreed upon contractual grievance and arbitration procedures rather than through the unfair labor practice procedures. Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90, 11 FLRA 516 (1983) (citing numerous cases).

4. Paragraphs 11(d) and (e) of the July 29 Complaint (Case No. 9-CA-30348); Alleged Bypass

The record reflects that Allard met with a bargaining unit employee, Betty Heavey, and agreed at this meeting to further changes in its proposed Title XVI reorganization. While Allard could not avoid Heavey's coming to him with a suggestion for change, Allard's agreement with Heavey affected the general conditions of employment of other unit employees and constituted negotiations by management directly with a unit employee in derogation of the Union's status as the collective bargaining representative. This conduct of negotiating or otherwise dealing directly with a unit employee over conditions of employment inherently undermines the status of the Union and constitutes an unlawful bypass under the Statute. See, Internal Revenue Service, Washington, D.C., 4 FLRA 488, 4 FLRA No. 68 (1980); 915th Tactical Fighter Group, supra.

It is undisputed that after hearing Heavey's suggestions regarding the Title XVI reorganization, Respondent immediately amended its first memorandum to employees regarding the change by issuing a second memorandum incorporating Heavey's suggestions. The credible evidence establishes the Union was given no prior notice of either Allard's meeting with Heavey at which agreement was reached concerning her proposal or Respondent's subsequent implementation of Heavey's suggestions.

Respondent's bypass of the Union and unilaterally implementation of further changes in working conditions as a direct result of such bypass violates Section 7116(a)(1) and (5) of the Statute.

C. Alleged Refusal to Bargain in Good Faith Regarding the Title XVI Reorganization in Violation of Sections 7116(a)(1) and (5)

1. Paragraphs 11(a) and (c) of the July 29 Complaint (Case No. 9-CA-30348)

Immediately upon receiving notice of Respondent's proposed staffing changes in the Title XVI Initial Claims Unit, the Union requested bargaining and submitted proposals thereon. The changes involved a reallocation of aged and disability workloads within the unit as well as the transfer of one experienced claims representative out of the unit and a new claims representative trainee into the unit. The proposal raised several impact/implementation issues. The Union's concerns about the effect of the reorganization on prior agreements to rotate the aged claims workload, the equity of the distribution of the workload, and the opportunity for employee input concerning the changes were all embodied in its revised bargaining proposals submitted on April 7. It is undisputed that Respondent refused to bargain on all of the Union's proposals.

It is well established that an activity's failure to bargain on the impact and implementation of work assignments and staffing changes is an unfair labor practice in violation of Section 7116(a)(1) and (5). *Federal Correctional Institution*, 8 FLRA 604, 8 FLRA No. 111 (1982); *Bureau of Governmental Financial Operations Headquarters*, 11 FLRA 334, 11 FLRA No. 68 (1983). Respondent asserts in defense of its refusal to bargain that the changes had insubstantial impact and/or the Union's proposals were non-negotiable. The reassignment clearly had adverse impact on bargaining unit employees. Specifically, Heavey was reassigned to aged claims, a workload undisputedly more difficult than disability claims due to restrictive time limits, increased reviewability, and complex eligibility issues. O'Malley's reassignment to post entitlement work took her out of payment authorization, a grade determining factor for claims representatives. Furugori was being denied the opportunity to learn the more complex aged workload which had potential impact on her promotion opportunities with the agency. The Union's proposal requiring employee input prior to final assignment decisions being made was negotiable inasmuch as the proposal merely required management to give consideration to the stated preferences of the employees regarding the assignments but reserved for management the right to assign work or to select any particular employee. Social Security Administration, 11 FLRA 608, 11 FLRA No. 103 (1983). Respondent refused to view the proposed employee assignments as an expression of employee preferences for its consideration only. Similarly, the Union's proposal that the assignments be fair and equitable established a general, non-quantitative requirement by which management's assignment of work could be evaluated. It did not interfere with management's right to make assignments based on personnel requirements and was therefore within the duty to bargain. U.S. Marshals Service, 8 FLRA 268, 8 FLRA No. 62 (1982). The Union was clearly entitled to obtain management's position regarding the effect of the changes on prior rotation agreements before Respondent's unilateral implementation of what appeared to be a breach of such agreements.

Finally, there is no evidence of any overriding exigency which required the proposed changes to be implemented only two workdays after the Union's submission of its revised proposals on April 7. Absent such exigency, the duty to bargain in good faith required Respondent to bargain with the Union to agreement or impasse on its negotiable proposals. See, Bureau of Government Financial Operations, supra; Bureau of Prisons, Lewisburg Penitentiary, 11 FLRA 639, 11 FLRA No. 111 (1983).

In summary, Respondent was obligated to bargain in good faith with the Union regarding the impact and implementation of the proposed Title XVI reorganization. Its refusal to do so was violative of Section 7116(a)(1) and (5) of the Statute.

E. Alleged Refusal to Bargain in Good Faith Regarding the Title II Reorganization in Violation of Section 7116(a)(1) and (5) (Case No. 9-CA-30395).

1. Paragraph 8(d) of the September 20 Complaint

Commencing on April 27 and continuing through April 29, Respondent implemented a major reorganization of the Title II work units in the Office. The reorganization resulted in the merger of three separate Title II work units and transformed Title II claims representatives from specialists handling only one type of Title II case to generalists responsible for all three types of Title II cases. Respondent does not dispute that the reorganization had a substantial impact on existing working conditions, but rather claims it reached agreement on the changes prior to implementation. The credible evidence establishes that no agreement had been reached and the Union was awaiting management's final proposals at the time the reorganization was unilaterally implemented.

The changes were substantial in nature and clearly required the activity to bargain upon the Union's request. The Union repeatedly requested bargaining on these changes and at no time reached any agreement with management thereon or acquiesced in any of management's proposals. The Union reminded Respondent of its desire to bargain on the changes as late as the same day of implementation and was given every reason to believe management intended to submit a final set of proposals and bargain prior to implementation. Management's failure to do so absent any evidence of overriding exigency constitutes bad faith bargaining in violation of Section 7116(a)(1) and (5). Department of Defense, Naval Ordnance Station, 4 FLRA No. 100 (1980); Department of the Air Force, Scott Air Force Base, 5 FLRA No. 2 (1981).

2. Paragraphs 8(b) and (c) of the September 20 Complaint; Alleged Formal Discussions Without Prior Notice to the Unions.

The April 20 and 21 meetings held by management with unit employees were formal meetings within the meaning of Section 7114(a)(2)(A). However, the credible evidence establishes that the Union was provided prior notice and the opportunity to select its own representative at these meetings as required by Section 7114(a)(2)(A). Accordingly, these meetings were not violative of Section 7116(a)(1)(5) and (8) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland shall:

1. Cease and desist from:

   (a) Making unilateral changes in general conditions of employment for employees exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE), such as the reorganization of the Title II and Title XVI initial claims units in its South Seattle Branch Office, without notifying AFGE of the proposed change and, upon request, negotiating with AFGE to the extent required by the Federal Service Labor-Management Relations Statute.

(b) Bypassing the AFGE and dealing directly with unit employees represented by the AFGE concerning conditions of employment.

(c) Telling an AFGE representative that the Branch Manager wants his next Documented Progress Review (DPR) to reflect Union activity in a negative way; threatening a Performance Improvement Plan (PIP) and stating that the Branch Manager is timing the AFGE representative's interviews with the public in order to interfere with or discourage AFGE representatives in the exercise of rights accorded by the Statute.

(d) Discriminating against employees because of their union activities by evaluating said employees in a Documented Progress Review or other work review in an adverse manner for lower work production resulting from official time spent on union activities.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, bargain with the AFGE concerning the impact and implementation of changes implemented in Title II on or about May 2, 1983, stemming from the reassignment of a Title II employee to Title XVI, and in Title XVI on or about April 11, 1983, stemming from the reassignment of an Initial Claims Unit employee to the Post Entitlement Unit.

(b) Rescind the Documented Progress Review issued to John Mack in March 1983 and re-evaluate Mack, taking into consideration Mack's time spent on approved official time for labor-management relations, when assessing his level of production for purposes of that Documented Progess Review.

(c) Post at its facilities at the South Seattle Branch Office copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the District Manager and shall be posted and maintained by the District Manager for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region IX, Federal Labor Relations Authority, 530 Bush Street, Room 542 San Francisco, California 94108, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

It is further ordered that the remaining allegations of the complaints as to which no violations have been found be, and they hereby are, DISMISSED.

CARVIN LEE OLIVER
Administrative Law Judge

Dated: May 2, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change conditions of employment for employees exclusively represented by the American Federation of Government Employees, AFL-CIO (AFGE) without notifying AFGE of our proposed change and, upon request, negotiating with AFGE to the extent required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT bypass AFGE by dealing directly with employees represented by AFGE regarding proposed changes in conditions of employment.

WE WILL NOT tell an AFGE representative that the Branch Manager wants his next Documented Progress Review (DPR) to reflect Union activity in a negative way, threaten a Performance Improvement Plan (PIP) or state that the Branch Manager is timing the AFGE representative's interviews with the public in order to interfere with or discourage AFGE representatives in the exercise of rights accorded by the Statute.

WE WILL NOT discriminate against our employees because of their union activities by evaluating said employees in a Documented Progress Review or other work review in an adverse manner for lower work production resulting from official time spent on union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain with the American Federation of Government Employees concerning the impact and implementation of the changes implemented in Title II on or about May 2, 1983, stemming from the reassignment of a Title II employee to Title XVI, and in Title XVI on or about April 11, 1983, stemming from the reassignment of an Initial Claims Union employee to the Post Entitlement Unit.

WE WILL rescind the Documented Progress Review issued to John Mack in March 1983, and re-evaluate Mack, taking into consideration Mack's time spent on approved official time for labor-management relations, when assessing his level of production for purposes of that Documented Progress Review.

(Agency or Activity)

Dated: ______________ By: ______________ (Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Room 542, San Francisco, California 94108 and whose telephone number is: (415) 556-8106.

22 FLRA No. 11

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

162nd TACTICAL FIGHTER GROUP
ARIZONA AIR NATIONAL GUARD
TUCSON, ARIZONA

Respondent

and

Case Nos. 8-CA-30098
8-CA-30099
8-RO-30002
(18 FLRA No. 73)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

Charging Party/Petitioner

DECISION AND ORDER
ON MOTION FOR RECONSIDERATION

I. Statement of the Case

This matter is before the Authority on a motion by the Charging Party/Petitioner for reconsideration of a portion of the Authority's decision in 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona, 18 FLRA No. 73 (1985).

II. The Authority's Decision

On June 21, 1985, the Authority issued its Decision and Order in the above-entitled consolidated proceeding. The Authority found that: (1) the objections to the election in Case No. 8-RO-30002 of the consolidated proceeding were all without merit; (2) certain comments made by the Respondent's Commanding Officer in Case No. 8-CA-30099 did not constitute a violation of section 7116(a)(1) of the Statute; and (3) certain remarks made by a management official of the Respondent in Case No. 8-CA-30098 were violative of section 7116(a)(1) of the Statute.

In reaching its conclusion with respect to Case No. 8-CA-30099, the Authority found as follows:

> Noting our adoption of the Judge's finding (supra under Objection No. 6) that the Union waived its right to distribute literature during the campaign, and noting that the statements which the Judge finds were made by Union supporters to supervisor Carpenter denying the Union's role in the posting of that literature, the Authority finds that the Commanding Officer's comments with regard to the distribution of such literature served to "correct the record with respect to [a] false or misleading statement made by any person." Accordingly, since the Commanding Officer's comments were within the ambit of the above cited language of section 7116(e) of the Statute, the Authority agrees with the Judge's finding that the comments did not violate section 7116(a)(1) of the Statute.[3]

III. The Motion for Reconsideration

By timely motion dated July 3, 1985, the Charging Party/Petitioner (the Union) seeks reconsideration of the Authority's decision as it pertains to Case No. 8-CA-30099 and to a portion of Case No. 8-RO-30002, contending that the Authority's decision in certain respects was based upon an error in its findings of fact.

The Union argues that the Commanding Officer's statement in Case No. 8-CA-30099 could not have been meant to "correct the record" within the meaning of section 7116(e) of the Statute[*] because the statements that the Authority found the Commanding Officer was correcting (as noted above) had not yet been made at the time he held the December 10 meeting with the employees. The Union further argues that the Authority should thus find a violation in Case No. 8-CA-30099, and should further sustain Objection No. 13 in Case No. 8-RO-30002, as the conduct in Case No. 8-CA-30099 is properly a part of this objection.

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[3] These comments were not the subject of objections to the election.

[*] Section 7116(e) provides:

(e) The expression of any personal view, argument, opinion or the making of any statement which--

(Continued)

Section 2429.17 of the Authority's Rules and Regulations provides, in part, that a "party . . . who can establish . . . extraordinary circumstances . . . may move for reconsideration" of an Authority decision. Upon review of the Union's motion, the Authority concludes that reconsideration of the decision as it pertains to Case No. 8-CA-30099 should be granted, as review of the record shows and we now find that in fact certain comments made by Union supporters to supervisor Carpenter, and relied upon by the Authority in reaching its original conclusion, were made subsequent to the Commanding Officer's December 10 meeting with the employees, thus calling into question the basis for the Authority's original conclusion.

(Continued)

> (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
>
> (2) corrects the record with respect to any false or misleading statement made by any person, or
>
> (3) informs employees of the Government's policy relating to labor-management relations and representation,
>
> shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

IV. Analysis on Reconsideration

A. Case No. 8-CA-30099

The complaint in Case No. 8-CA-30099 alleged that the Respondent's Commanding Officer made certain statements at a meeting of its employees five days before an election which violated section 7116(a)(1) of the Statute. The Judge found that the Commanding Officer did not make two of the statements attributed to him, i.e., (1) that the employees did not need outside influences because the Guard was one big happy family, and (2) that the Union officials acted in poor taste or in an underhanded manner in distributing union election material, and the Authority reaffirms its adoption of the Judge's finding in this regard.

The Judge additionally found that the Commanding Officer did state that he was disappointed about the distribution of literature by the Union in that it demonstrated a lack of good faith, since an agreement had been made between the parties not to campaign on the premises. The Judge concluded, however, that the statement did not violate section 7116(a)(1) of the Statute.

In its decision, the Authority, noting certain statements made to one of management's supervisors, found that the Commanding Officer's comments at the December 10 meeting with regard to the distribution of union literature were permissible under section 7116(e) of the Statute, because such comments served to "correct the record," and therefore did not violate the Statute.

A review of the record shows that the statements the Authority noted in reaching its conclusion were in fact made after the Commanding Officer's December 10 meeting and therefore could not serve as the justification for the Commanding Officer's statements. However, upon review of all the facts in this case, we again conclude that the Commanding Officer's comments did serve to "correct the record."

The Authority notes, as found by the Judge, that: (1) the Union, by a pre-election agreement, waived its right to distribute campaign literature on the base during the election campaign; (2) after the parties reached that agreement Major Kyzer, a representative of management, advised the Commanding Officer of the Union's agreement;

(3) despite the agreement, management discovered that campaign literature, on behalf of the Union, had been posted on bulletin boards and walls throughout the base prior to the election; (4) Major Kyzer notified Union President Michael Coiro that campaign literature had been so posted; (5) Coiro advised Kyzer that the literature would be removed, and it was removed by Union and management representatives; (6) Coiro disclaimed Union authorization of or responsibility for the posting.

Beyond the Judge's findings, the undisputed record evidence also reveals that: (1) Kyzer, following his conversation with Coiro, advised the Commanding Officer of the results of this conversation, including Coiro's disclaimer; (2) the literature (examples of which are in evidence) was clearly "official" AFGE literature, containing the official AFGE logo and other Union identifiers; (3) employee Jon Webb, who was very active in supporting the Union's campaign, posted the AFGE literature referred to above, along with other employees; and (4) Webb had been given that literature by Union President Coiro for the purpose of distribution and/or posting at various break room locations on the base.

The Commanding Officer, in response to a question at the hearing concerning why he had mentioned anything to employees at the December 10 meeting regarding the campaign agreement, stated in part:

> There were voluntary statements made by . . . people representing the Union side that there would not be campaigning on the base. [Given such] [w]e had not expected that there would be campaigning on the base.
>
> And then, just short of that Friday, the 10th of December, I saw a great escalation of Union literature appearing about the base. I was concerned about it, given the fact that there had been a statement there would not be campaigning on the base. . . . I mentioned that I was disappointed . . . that the agreement essentially was that there would not be, and . . . there was, and I thought that demonstrated a lack of good faith on the Union's part.

when shown the examples of the AFGE literature in evidence, the Commanding Officer testified that that was the type of literature he had seen appearing with increasing frequency about the base. Additionally, the Commanding Officer stated, in response to a question, that he did not indicate at the December 10 meeting that the Union may have had a different understanding of the agreement because he believed that the Union had the same understanding of the agreement as he did; that he based this position on his discussions with Kyzer, who had been directed by the Commanding Officer to contact the Union and who, after doing so, informed the Commanding Officer that the Union "said that they were wrong" and the literature "would come down."

It is clear, then, that the Commanding Officer knew of the Union's agreement not to campaign, knew and observed that seemingly official Union literature had been posted around the base, and knew of the Union's disclaimer of responsibility. In these circumstances, the Authority finds that the Commanding Officer had a basis for making the comments with regard to the distribution of literature. The Authority concludes that the Commanding Officer's comments served to "correct the record with respect to [a] false or misleading statement made by any person" specifically with respect to the Union's disclaimer of responsibility for the distribution of campaign literature in the face of its agreement not to do so. In view of the additional record facts set forth above, it is apparent that had Coiro not supplied Webb with the Union literature, albeit for limited distribution, it would not have been posted throughout the base. Under these circumstances, Coiro's disclaimer of the Union's responsibility for or authorization of the literature in question was at best misleading.

B. Case No. 8-RO-30002 (Objection No. 13)

We originally found that the comments that are the subject of Case No. 8-CA-30099 were not the subject of any of the objections to the election, and we are not presented with anything by this motion for reconsideration that would warrant reconsideration of that original decision.

V. Conclusions

A. Case No. 8-CA-30099

Accordingly, as the Commanding Officer's comments were permissible under section 7116(e) of the Statute, the Authority reaffirms its conclusion that the comments did not violate section 7116(a)(1) of the Statute.

B. Case No. 8-RO-30002 (Objection No. 13)

Accordingly, the instant motion for reconsideration as it pertains to Case No. 8-RO-30002 (Objection No. 13) is denied, and the Regional Director is again directed to take further appropriate action consistent with this decision.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by impliedly threatening them with reprisal because of their activities on behalf of the American Federation of Government Employees, Local 2924, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at the 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the complaint in Case No. 8-CA-30098, to the extent that they have been found not violative of the Statute, be, and they hereby are, dismissed.

IT IS FURTHER ORDERED that the allegations of the complaint in Case No. 8-CA-30099 be, and they hereby are, dismissed in their entirety.

IT IS FURTHER ORDERED that the objections to the election in Case No. 8-RO-30002 be, and they hereby are, dismissed in their entirety.

Issued, Washington, D.C., June 10, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 11]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our employees by impliedly threatening them with reprisal because of their activities on behalf of the American Federation of Government Employees, Local 2924, AFL-CIO, or any other labor organization.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Activity)

Dated:____________________ By: ________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 S. Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 798-3805.

22 FLRA No. 12

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION
Union

Case No. 0-NG-956

and

DEPARTMENT OF ENERGY
Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of the following underlined portion of the Union proposal:1/

Article 22, Reduction in Force, Part III(e)

The employer will prepare a report on each RIF, as soon as practicable, with the following information:

(a) numbers and series of employees reassigned

(b) numbers and series of employees downgraded

1/ The Union has withdrawn from this appeal two proposals concerning performance appraisal and one proposal concerning reduction-in-force. Union Statement of Position at 1. These proposals will not be considered further in this case.

(c) numbers and series of employees separated

(d) six months after a RIF, the numbers and series of employees rehired by the Employer

(e) cost of the RIF, such as administrative costs, severance pay, and pay retention.

II. Positions of the Parties

The Agency contends that the proposal is nonnegotiable because information as to the administrative costs of a reduction-in-force (RIF) does not concern the conditions of employment of unit employees. The Union argues that such information is necessary to the performance of its representational responsibilities and, thus, is directly related to matters affecting unit employees' conditions of employment.

III. Analysis and Conclusion

The disputed portion of the proposal, as interpreted by the Union, would require the Agency to provide the Union with information regarding the costs of each reduction-in-force affecting unit employees, particularly administrative costs such as severance pay. The Agency contends that information on the costs of a RIF does not concern the conditions of employment of unit employees and that the relationship of such costs to conditions of employment is wholly "speculative." The Union argues that such information is necessary to its representation of employees who are challenging RIF actions through statutory appeals procedures or through the negotiated grievance procedure. The Union also claims that the information is necessary to future negotiation of contract provisions relating to reduction-in-force and, thus, directly relates to the conditions of employment of unit employees.

The basic scope of the duty to bargain under the Statute extends to matters affecting the working conditions of employees in a unit of exclusive recognition. See, for example, National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769, 771 (1980), aff'd sub nom. National Treasury Employees Union v.

Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982). The Authority has consistently held that matters pertaining to a RIF concern the conditions of employment of affected employees. See, for example, Department of the Treasury, U.S. Customs Service and National Treasury Employees Union and All NTEU Customs Chapters, 19 FLRA No. 128 (1985); Federal Trade Commission and American Federation of Government Employees, Local 2211, AFL-CIO, 15 FLRA 994 (1984); American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3, 5-6 (1982) (Union Proposal 2), aff'd as to other matters sub nom. Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 54 U.S. Law Week 4408 (April 29, 1986). Thus, information concerning the costs of a RIF constitutes a matter affecting the conditions of employment of unit employees. The question of whether information as to the costs of a RIF concerns conditions of employment, however, is not dispositive of the relevance of that information but, rather, addresses only the nature of the subject matter involved. As a matter pertaining to the conditions of employment of unit employees, the Union's proposal is within the duty to bargain under the Statute notwithstanding the fact that the information provided for in the proposal might in part pertain to nonunit employees. See Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38, 39 (1984); National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275, 284 (1981).

An agency is required under section 7114(b)(4) of the Statute to provide a union with information which is relevant and necessary to the performance of its representational activities. United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio and National Federation of Federal Employees, Local 801, 16 FLRA 52, 54 (1984). A determination as to whether the information sought is relevant and necessary is made on a case-by-case basis. National Treasury Employees Union, Chapter 91 and Department of the Treasury, Internal Revenue Service, Southwest Region, 17 FLRA 534, 536 (1985). The Union's proposal certainly includes a requirement that the Agency provide it with relevant and necessary information concerning the administrative costs of a reduction-in-force. The Union demonstrates on the record how such information would relate to the processing of employee grievances and the negotiation in the future of contract provisions concerning reduction-in-force.[2] But the proposal is more broadly worded than that. It would also require the Agency to disclose information regardless of whether a case-by-case analysis would show that it is relevant and necessary to the Union's performance of its representational function. That fact does not render the proposal nonnegotiable.

Section 7114(b)(4) is a statutory "floor" and not a "ceiling." The language and the legislative history of that provision do not indicate that Congress intended to prohibit an agency from providing a union with information other than that which is relevant and necessary. Rather, Congress meant that provision to establish the minimum information which must be disclosed to a union.[3] Thus, nothing in section 7114(b)(4) prevents a union from negotiating with an agency for the disclosure of information concerning the conditions of employment of unit employees beyond what it is entitled to under the Statute. Of course, the disclosure of such information must otherwise be consistent with law. See Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado and American Federation of Government Employees, AFL-CIO, Local 1345, 17 FLRA 624, 627 (1985).

For the foregoing reasons, the Union's proposal is consistent with law and within the Agency's duty to bargain. It is distinguishable from National Treasury Employees Union, Chapter 91, cited above, because the proposal in that case concerned information which did not relate to the conditions of employment of unit employees.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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[2] Union Response to Agency Statement of Position at 2-3.

[3] See H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 48 (1978).

Agency shall upon request (or as otherwise agreed to by the parties) bargain on the Union's proposal.[4]

Issued, Washington, D.C., June 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In deciding that the proposal is within the duty to bargain, the Authority expresses no opinion as to the merits of the proposal.

contract provisions concerning reduction-in-force.[2] But the proposal is more broadly worded than that. It would also require the Agency to disclose information regardless of whether a case-by-case analysis would show that it is relevant and necessary to the Union's performance of its representational function. That fact does not render the proposal nonnegotiable.

Section 7114(b)(4) is a statutory "floor" and not a "ceiling." The language and the legislative history of that provision do not indicate that Congress intended to prohibit an agency from providing a union with information other than that which is relevant and necessary. Rather, Congress meant that provision to establish the minimum information which must be disclosed to a union.[3] Thus, nothing in section 7114(b)(4) prevents a union from negotiating with an agency for the disclosure of information concerning the conditions of employment of unit employees beyond what it is entitled to under the Statute. Of course, the disclosure of such information must otherwise be consistent with law. See Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado and American Federation of Government Employees, AFL-CIO, Local 1345, 17 FLRA 624, 627 (1985).

For the foregoing reasons, the Union's proposal is consistent with law and within the Agency's duty to bargain. It is distinguishable from National Treasury Employees Union, Chapter 91, cited above, because the proposal in that case concerned information which did not relate to the conditions of employment of unit employees.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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[2] Union Response to Agency Statement of Position at 2-3.

[3] See H.R. Rep. No. 95-1403, 95th Cong., 2nd Sess. 48 (1978).

Agency shall upon request (or as otherwise agreed to by the parties) bargain on the Union's proposal.[4]

Issued, Washington, D.C., June 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In deciding that the proposal is within the duty to bargain, the Authority expresses no opinion as to the merits of the proposal.

9/Case 372

Federal Labor Relations Authority

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NUMBER 372 REPORT OF CASE DECISIONS JUNE 20, 1986

U. S. GOVT. PUBS. DEPOSITORY 376

NEGOTIABILITY CASE

22 FLRA No. 13 (June 12, 1986)

National Federation of Federal Employees, Local 2059 and U.S. Department of Justice, U.S. Attorney's Office, Southern District of New York, New York, New York, Case No. 0-NG-1125

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 17 (June 13, 1986)

United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine and National Association of Agriculture Employees, Branch #15, Case No. 6-CA-50090

22 FLRA No. 18 (June 18, 1986)

United States Air Force, Lowry Air Force Base, Denver Colorado and National Federation of Federal Employees, Local 1497, Case Nos. 7-CA-30459 and 7-CA-30584; United States Air Force, Lowry Air Force Base, Denver, Colorado and American Federation of Government Employees, AFL-CIO, Local 1974, Case No. 7-CA-30543

ARBITRATION CASES

22 FLRA No. 14 (June 13, 1986)

Department of Defense Dependents Schools and Overseas Education Association (Kaplan, Arbitrator), Case No. 0-AR-1024

22 FLRA No. 15 (June 13, 1986)

U.S. Army Corps of Engineers, Kansas City District and National Federation of Federal Employees, Local 29 (Madden, Arbitrator), Case No. 0-AR-1111

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22 FLRA No. 16 (June 13, 1986)

U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO (Smith, Arbitrator), Case No. 0-AR-1077

22 FLRA No. 19 (June 18, 1986)

American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center (Golob, Arbitrator), Case No. 0-AR-933

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

June 13, 1986

0-AR-1131 0-AR-1125

June 18, 1986

0-AR-1132 0-AR-1134

Federal
Labor Relations
Authority

22 FLRA No. 13

__NFFE, Local 2059__ and __Dep't of Justice, U.S. Attorney's Office, Southern District of New York, N.Y., N.Y.__, Case No. 0-NG-1125 (Decided June 12, 1986)

__SUBJECT MATTER INDEX ENTRIES__

- Negotiability
  - Health and Safety Committee
    - Designation of a Member Not a Position Assignment
    - Investigation of Unsafe Working Conditions
    - Participation of Union Representative Not Official Duties
    - Uncertified Committee [E.O. 12196]
  - Management Rights
    - Assign Employees
      - Health and Safety Committee
    - Assign Work
      - Health and Safety Committee
    - Emergency Action
      - "Emergency" Definition in Contact Provision
    - Internal Security Practices
      - Health and Safety Committee

__STATUTE__

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A), (B) and (D)

__DIGEST NOTES__

A provision is negotiable which provides that both the agency and the union shall appoint two members to a safety and health committee and that one of the functions of the committee shall be to investigate unsafe working conditions. The committee is not intended to be certified by the Secretary of Labor under E.O. 12196, thereby enabling the agency among other things to avoid unannounced inspections by the Occupational Safety and Health Administration. As an uncertified committee, it is intended to be a constructive forum to address health and safety issues. The committee's functions do not replace or conflict with the agency's responsibilities, and the committee is not intended to bypass management in the health and safety area. Contrary to the agency's assertion, the provision does not interfere with management's right to assign employees or assign work under § 7106(a)(2)(A) and (B) nor determine its internal security practices under § 7106(a)(1). The designation of an employee to serve on the health and safety committee does not constitute an

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ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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assignment to a position and is not, therefore, inconsistent with the agency's right to assign employees. Since the participation of union representatives on the committee does not concern official, prescribed duties, the provision does not involve the assignment of "work". Finally, nothing in the provision would prevent the agency from determining that an unsafe working condition or accident scene should be examined by personnel of its choice, including officials from outside the agency, prior to an investigation by the committee. Since, therefore, the provision does not interfere with the agency's discretion and judgement concerning its investigatory responsibilities, the provision does not interfere with the agency's right to determine its internal security practices. (provision 1)

A provision is outside the duty to bargain that by defining the term "emergency", limits the exercise of management's § 7106(a)(2)(D) right to those situations falling within the definition. By precluding the agency from independently assessing whether an emergency exists, the provision limits management's right to act in emergencies. (provision 2)

Federal
Labor Relations
Authority

22 FLRA No. 14

DOD Dependent Schools and Overseas Education Association (Kaplan, Arbitrator), Case No. 0-AR-1024 (Decided June 13, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Employee Indebtedness to Government
    - Recapture
  - Exceptions Asserted in Appeal
    - Award Contrary to 5 U.S.C. § 5514 [Debt Collection Act of 1982]
    - Award Contrary to 5 C.F.R. § 550.1104
    - Award Contrary to 5 C.F.R. Part 550, subpart K
  - Grievance Procedure
    - Impact on Uniform Application of Reg. to Non-Unit Employees
    - Scope
      - As an Alternative to Other Statutory Appeals Procedures
      - Where Another Statutory Appeals Procedure is Exclusive
  - Remedy
    - Cancellation of Demand for Payment of Alleged Indebtedness

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 56 (1978)
H.R. Rep. No. 95-1717, 95th cong., 2d Sess. 157 (1978)
S. Rep No. 95-969, 95th Cong., 2d Sess. 110 (1978)

STATUTE

7103(a)(9)
7121(d) and (e)
7122(a)

DIGEST NOTES

The grievance in this case concerns the administratively determined indebtedness of the grievant, a school counselor, in the amount of $7,574 for allegedly misrepresenting that he supported a student. As a result of the misrepresentation, the student received two years of tuition-free education at the Bitburg American High School. Subsequent to disciplining the grievant for making false statements, the activity sought the repayment and the grievant filed the grievance contesting the claim of indebtedness. As his award, the arbitrator sustained the grievance, finding that the grievant was not indebted for the student's tuition costs, and ordered management to cancel the demand for payment.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exception, the agency contended that the award was contrary to law and regulation pertaining to the recovery through salary offset of certain debts owed the United States by Federal Employees. The agency argued that administratively determined indebtedness is not subject to resolution under a grievance procedure negotiated in accordance with the Statute and must be determined pursuant to 5 U.S.C. § 5514. The agency also argued that to permit the grievance and arbitration over such matters is contrary to 5 C.F.R. part 550, subpart K.

The Authority found that the provisions of 5 U.S.C. § 5514 does not preclude an arbitrator from ruling on and overturning an assessment of administratively determined indebtedness against an employee. Collective bargaining agreements negotiated under § 7121 must contain a grievance procedure and that procedure, except as provided in § 7121(d) and (e), is the exclusive procedure for resolving grievances which fall within its coverage. Thus, the negotiated grievance procedure may be invoked to settle disputes within its coverage despite the existence of internal agency appeal procedures or statutory appeal procedures which also cover the matter at issue.

Both the courts and the Authority have determined that Federal law outside the Statute can limit the scope of the negotiated grievance procedure. In cases where the courts and the Authority have found that outside law limits the scope of the negotiated grievance procedure, there have been clear specific indications that the statutory procedures were intended to be exclusive. But the agency in its exception cited no such provisions in § 5 U.S.C. § 5514.

The Authority also found that the agency's arguments provided no basis for finding the award contrary to 5 C.F.R. part 550, subpart K. The agency argued that because the negotiated grievance procedure is available only to bargaining-unit employees, use of the negotiated grievance procedure necessarily precludes uniformity and consistency of application of agency regulations governing the collection of debts, in violation of 5 C.F.R. § 550.1104. However, the means of dispute resolution that may be available to individual employees has not been shown to preclude the uniform and consistent application to all employees of the substantive terms of agency regulations governing the collection of debts.

Federal
Labor Relations
Authority

22 FLRA No. 15

Army Corps of Engineers, Kansas City District and NFFE, Local 29 (Madden, Arbitrator), Case No. 0-AR-1111 (Decided June 13, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to § 7103(a)(9)
  Grievance
    Controlling Definition in Collective Bargaining Agreement
      Statutory Employment Discrimination Complaint [29 C.F.R. part 1613]
  No Basis for Review
    Disagreement with Arbitrator's Interpretation of CBA
    Disagreement with Arbitrator's Reasoning and Conclusions
  Travel and Per Diem
    Controlling Provision in Collective Bargaining Agreement

STATUTE

7103(a)(9)
7114(a)(2)(A)
7122(a)

DIGEST NOTES

The parties submitted to arbitration the issues of whether a statutory employment discrimination complaint under 29 C.F.R. part 1613 is a grievance as defined by the parties' collective bargaining agreement and whether their agreement required the activity to pay travel and per diem expenses of a union official representing an employee in a statutory employment discrimination complaint. The arbitrator ruled that a statutory employment discrimination complaint was not a grievance as defined by the parties' agreement. Based on his interpretation of the collective bargaining agreement, the arbitrator ruled that travel and per diem expenses of a union official were not payable for representation of an employee in a statutory employment discrimination complaint.

In its exception, the union contended that the award was deficient because the arbitrator mistakenly interpreted § 7103(a)(9) which defines for purposes of the Statute the term "grievance". The Authority concluded that the union's exception fails to establish that the award was deficient. The arbitrator in no manner misinterpreted § 7103(a)(9) since neither the award nor his discussion even cites that section much less misinterprets

it. Rather, the union's exception primarily constitutes nothing more than disagreement with the arbitrator's interpretation and application of the parties' agreement which does not provide a basis for finding the award deficient. In addition, to the extent the union argued that the award was deficient because of the arbitrator's case citations, this constitutes nothing more than disagreement with the arbitrator's reasoning and conclusions which does not provide a basis for finding the award deficient.

Federal
Labor Relations
Authority

22 FLRA No. 16

HHS, SSA and AFGE (Smith, Arbitrator), Case No. 0-AR-1077 (Decided June 13, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Contrary to Federal Travel Regulations
  - Exceptions Asserted in Appeal
    - Arbitrator's Authority to Resolve the Issue was Terminated by a Memorandum of Understanding
    - Arbitrator Conducted Himself and the Hearing in an Arbitrary and Capricious Manner
    - Arbitrator Exceeded his Authority by:
      - Accepting and Ruling on a Prospective Claim
      - Ruling on Claims that Were Not Properly Before him
    - Arbitrator Extended his Remedy to Nongrievants
    - Award Contrary to Law
    - Award Contrary to 5 U.S.C. §§ 5542 and 5543
    - Bench Awards Was a Capricious Departure from an Earlier Award
  - Official Time
    - Travel and Per Diem
  - Remedy
    - Official Time
    - Travel and Per Diem

STATUTE

7122(a)
7131(d)

DIGEST NOTES

The parties submitted to the arbitrator a dispute concerning official time for representational activities in the agency's field offices. A two-phase arbitration process was established to resolve the basic dispute and the resulting numerous individual grievances. The first phase of the process involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement. In the second phase, the arbitrator held hearings to resolve, by bench decisions when practicable, specific grievances pending in the various agency regions. In those decisions, the arbitrator generally ruled that by denying official time and related travel and per diem expenses for union officials for the representational purposes involved, the agency violate the parties' agreement.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

which had been negotiated consistent with the Statute. Accordingly, the arbitrator awarded reimbursement for wrongfully denied official time at appropriate straight-time rates and travel and per diem expenses.

The agency first excepted to the award of travel and per diem expenses to union representatives for preparation prior to the future arbitration hearings to be held in the agency's various regions. The Authority held that the arbitrator effectively determined that the agency agreed to pay the travel and per diem expenses related to the labor-management relations activities covered by the official time provision of the parties' agreement. Thus the agency's arguments constituted nothing more than disagreement with the arbitrator's interpretation of the parties' agreement which does not provide a basis for finding the award deficient. However, the Authority modified the award to provide for agency determination of the propriety of particular travel and per diem expenses consistent with the requirements of the Federal Travel Regulations

In its second exception, the agency contended that the award was contrary to law. The Authority held that the agency failed to establish that awards was contrary to law. The arbitrator with respect to each bench decision essentially found that the denial of official time was in violation of the parties' collective bargaining agreement which had been negotiated consistent with the Statute. Thus the arbitrator effectively found that all the conditions of § 7131(d) had beem met. Moreover, in his award the arbitrator was merely requiring the agency "to the maximum extent practicable" to schedule the union representative's future travel during normal working hours consistent with 5 U.S.C. § 6101(b)(2). Finally while two grievants were not union representatives engaged in union representational activities, § 7131(d)(2) expressly provides for official time for bargaining unit employees "in connection with any other matter covered by this chapter." The arbitrator by his award effectively found the dispute was a "grievance" covered by the Statute and that under the parties' agreement one grievant was entitled to official time and another grievant was entitled to restoration of annual leave and that therefore the conditions of § 7131(d) had been met.

In numerous other exceptions, the agency essentially contended that: (1) the bench awards were a capricious departure from the earlier final award of the arbitrator; (2) the arbitrator exceeded his authority by ruling on claims that were not part of the grievance before him; (3) the arbitrator extended his remedy to nongrievants; and, (4) the arbitrator conducted himself and the hearing in an arbitrary and capricious manner. The Authority found that the agency failed to establish that the arbitrator's award was in any way deficient.

Federal Labor Relations Authority

22 FLRA No. 17

Dep't of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine and National Association of Agriculture Employees, Branch # 15, Case No. 6-CA-50090 (Decided June 13, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - No Change in Past Practice
  - Discipline
    - AWOL for Arriving at Work Late
  - Procedure
    - Forums
      - Selection of Grievance or ULP Proceedings [§ 7116(d)]
        - Different Issues

STATUTE

7116(a)(1) and (5)
7116(d)
7118

DIGEST NOTES

The activity did not change its past practice of charging employees with AWOL who arrived late to work although their tardiness may have been based on confusion caused by frequent changes in work schedules. The activity's shift schedules covered two week periods and were posted one week prior to their effective dates. Employees were allowed to make shift changes, in most cases without restriction. The activity had for several years a written policy which required employees be charged with AWOL whenever their absence from duty was not authorized or approved. If later the employee submitted acceptable evidence, the AWOL could be retroactively changed to annual leave or sick leave. Although the General Counsel cited approximately five instances during a three year period where employees confused their respective shifts and were allowed to take annual leave or readjust their shifts rather than being charged AWOL, the Judge found that this evidence was insufficient to support by a preponderance of evidence that the activity changed the past practice. Accordingly, the Judge found, in a decision adopted by the Authority, that the activity did not change the past practice and did not violate § 7116(a)(1) and (5) when it charged an employee with AWOL for being two hours late in circumstances where he claimed to have been confused about his schedule.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The filing of a grievance concerning the merits of charging an employee with AWOL for arriving at work late did not bar a complaint concerning an alleged change in past practice regarding AWOL. The Judge found that since the issues were different, § 7116(d) did not serve as a bar to processing the complaint.

Federal Labor Relations Authority

22 FLRA No. 18

U.S. Air Force, Lowry Air Force Base, Denver, Colo. and NFFE, Local 1497, Case Nos. 7-CA-30459 and 7-CA-30584; U.S. Air Force, Lowry Air Force Base, Denver, Colo. and AFGE, Local 1974, Case No. 7-CA-30543 (Decided June 18, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Seat Belt Policy
  - Collective Bargaining
    - Implementation of Last Best Offer Following Impasse
    - Responsibility to Timely Request FSIP's Assistance
  - Waiver of Rights
    - Clear and Unequivocal Waiver of Bargaining Rights Absent From:
      - Request to Exclude Unit Employees From New Policy
      - Request to Negotiate as Soon as Possible

STATUTE

7106(a)(2)(A) and (B)
7116(a)(1) and (5)
7118

DIGEST NOTES

The activity did not violate § 7116(a)(1) and (5), the Authority found, in agreement with the Judge, because the parties engaged in good faith bargaining concerning the change in the activity's seat belt policy. The activity provided both exclusive representatives with five days advance notice that it would change its seat belt policy to a policy that provided for 30-day suspensions of employees for failure to use seat belts on its air base. Although bargaining did not take place until after the announced implementation date of the new policy, the new policy was not put into effect for bargaining unit employees until after the completion of negotiations. Negotiations proceeded for about three months with help from the Federal Mediation and Conciliation Service. The parties agreed on a number of matters, but some issues remained unresolved. Thereafter, the activity notified both unions that it would implement its last best offer concerning the seat belt policy in six days. Yet the unions did not request the assistance of FSIP until after the activity implemented its last best offer. The Authority found that several proposals over which the activity refused to bargain were nonnegotiable. Thus the Authority found that the activity negotiated in good faith on all proposals submitted by the unions which were within its duty to bargain.

The unions did not waive its right to negotiate over a change in the activity's seat belt policy prior to implementation of the change, the Authority held, contrary to the Judge. A request to bargain as soon as possible and a request to exclude bargaining unit employees from the change until the parties reached agreement did not constitute a waiver of the unions' right to bargain prior to implementation. The activity notified both unions on a Friday that a new seat belt policy would be implemented the following Wednesday. The unions' response was timely and, given the circumstances, contained no language which would serve as a clear and unequivocal waiver of their right to bargain prior to implementation of the change.

Federal Labor Relations Authority

22 FLRA No. 19

AFGE, Local 1760 and SSA, Northeastern Program Service Center ([illegible]ob, Arbitrator), Case No. 0-AR-933 (Decided June 18, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7121(e)
Back Pay Act [5 U.S.C. § 5596]	7122(a)
"Unjustified or Unwarranted Personnel Action"	
Determination that Suspension Was Not for Just Cause	
"But For" Test	
Arbitrator's Award Directing Reimbursement of Grievant	
Discipline	
Standards Governing Review by Arbitrator	
Harmful Error Rule [5 U.S.C. §§ 7512 and 7513]	
Just Cause [5 U.S.C. §§ 7503(a) and 7513; 5 C.F.R.§ 752.202(a)]	
"Such Cause as Will Promote the Efficiency of the Service" [5 U.S.C. §§ 7503(a) and 7513; 5 C.F.R.§ 752.202(a)]	
Suspension, 10 Days	
Exceptions Asserted in Appeal	
Award is Contrary to 5 U.S.C. § 5596	
Award is Contrary to 5 U.S.C. § 7503(a)	
Remedy	
Backpay	
Suspension Rescinded	
5 U.S.C. § 7701(a), (c)(2)(A)	

DIGEST NOTES

The arbitrator determined that the 10 day suspension of the grievant was not for just cause and directed that the suspension be rescinded and the grievant be reimbursed for all losses caused by the suspension.

In its first exception, the agency contended that the award was contrary to 5 U.S.C. § 7503(a). Specifically, the agency argued that the award was deficient because the arbitrator failed to make the finding, alleged by the agency to be required by § 7503, that the violation of the agreement constituted "harmful error" and because the arbitrator applied a standard of "just cause" rather than the statutory standard in § 7503(a) of "such cause as will promote the efficiency of the service." The Authority concluded that the exception provided no basis for

finding the award deficient. The arbitrator was not
find that the violation of the parties's agreement by
constituted harmful error, a requirement that is appl
more serious adverse actions enumerated in 5 U.S.C. §
the phrase "just cause" as it appears in the parties'
constituted the parties' capsulation of the of the st
requirement that for an arbitrator to set aside the s
there be a specific finding that the suspension "did
the efficiency of the service."

In its second exception the agency contended tha
of backpay to the grievant was contrary to the Back Pa
5 U.S.C. § 5596. The Authority concluded that this e
failed to establish that the award was deficient as al
the arbitrator expressly determined that the suspensio
for just cause as required by the agreement, the perso
of the grievant's suspension was rendered an "unjusti
unwarranted personnel action" within the meaning of th
Act. Also, when the arbitrator directed that the grie
reimbursed for all losses caused by the unwarranted su
his award effectively constituted the finding, require
Back Pay Act and the decisions of the Authority, that
unwarranted suspension, the grievant would not have su
withdrawal or reduction of his pay allowances, or diff

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22 FLRA No. 13

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 2059

Union

and

Case No. 0-NG-1125

U.S. DEPARTMENT OF JUSTICE
U.S. ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, NEW YORK

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two provisions of a negotiated agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute.

II. Provisions

The dispute concerns the underlined portion of provision 1 and all of provision 2:

Provision 1
(Article XXX, Section 2)

Health and Safety Committee: The Employer and the Union shall each designate a minimum of two (2) members to serve on the Safety and Health Committee. The Safety and Health Committee shall perform the following functions:

a. Investigate, report and recommend corrective action for unsafe working conditions referred to the committee.

b. Meet quarterly.

Provision 2
(Article III, Section 13)

> Emergency: A situation which imposes sudden, immediate requirements for the Employer as a result of natural phenomena or other circumstances beyond the Employer's reasonable control or ability to anticipate.

A. Positions of the Parties

1. Health and Safety Committee

The Agency argues that by requiring it to (1) appoint two members to the Committee, and (2) assign the investigation of unsafe working conditions to the Committee, the provision is inconsistent with its reserved management rights under section 7106(a)(2)(A) and (B) of the Statute to assign employees and assign work. The Agency also contends that the Committee could hamper investigations by others, including outside experts, so as to interfere with its section 7106(a)(1) right to determine its internal security practices.

The Union asserts that the provision neither requires the appointment of particular management employees to the Committee nor precludes the Agency from assigning investigatory responsibilities to persons who are not on the Committee. Thus, the Union maintains that the provision is not inconsistent with the Agency's rights to assign employees and work. The Union did not file a reply brief in this case. Accordingly, the Union did not address the Agency's argument, which was not contained in its written assertion of nonnegotiability, concerning internal security practices.

2. Definition of Emergency

The Agency contends that by defining "emergency," the provision limits and is, therefore, inconsistent with its reserved right under section 7106(a)(2)(D) of the Statute to take "whatever actions may be necessary to carry out the agency mission during emergencies." Since the term "emergency" is not defined in the Statute and has not been defined by the FLRA through case decisions, the Agency maintains that it is free to act in what it perceives to be emergencies, subject to FLRA review through the unfair labor practice procedures.

The Union's position is that the parties may agree to a definition of a word or phrase as long as the word or phrase is not explicitly defined in the Statute or case law. It asserts that the provision both permits the Agency to exercise its rights during an emergency and prevents the Agency from "abusing the concept of an 'emergency'" in order to circumvent collective bargaining obligations. Union Petition for Review at 2.

B. Analysis

1. Health and Safety Committee

Provision 1 provides that the Committee, to which the Agency and the Union each appoint two members, shall have as one of its functions the investigation of unsafe working conditions. The Agency argues that the provision is inconsistent with its rights to assign employees, assign work, and determine its internal security practices.

The Authority has consistently held that the right to assign employees means the right to assign them to positions in the agency. See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981). The designation of an employee to serve on the Health and Safety Committee does not constitute an assignment to a position and is not, therefore, inconsistent with the Agency's right to assign employees. See American Federation of Government Employees, AFL-CIO, Local 2761 and U.S. Department of the Army, U.S. Army Adjutant General Publication Center, St. Louis, Missouri, 14 FLRA 438 (1984).

As for the Agency's right to assign work, the participation of Union representatives on the Committee does not concern official, prescribed duties. Accordingly, it does not involve the assignment of "work" within the meaning of section 7106(a)(2)(B) of the Statute. See National Federation of Federal Employees, Local 541 and Veterans Administration Hospital, Long Beach, California, 12 FLRA 270 (1983). Further, the provision neither requires the Agency to appoint particular individuals to the Committee nor prevents it from changing its designations. The Agency's contentions concerning its right to select the individuals to represent its interests, therefore, lack merit, and its citation of the Authority's decision in National Federation of Federal Employees, Local 78 and Veterans Administration Regional Office, Indianapolis, Indiana, 9 FLRA 819 (1982), as support for its argument is inapposite. In the latter case, the proposal in question prescribed specific duties to particular employees. Such is not the case here.

Finally, as for the Agency's contention that the provision interferes with its right to determine its internal security practices, nothing in the provision would prevent the Agency from determining that an unsafe working condition or accident scene should be examined by personnel of its choice prior to an investigation by the Committee. In fact, the Union concedes that nothing in the provision grants the Committee "sole province" over the investigation of unsafe working conditions. Union Petition for Review at 2. The Agency has not established how the provision would interfere with its discretion and judgment concerning its investigatory responsibilities. Compare National Treasury Employees Union and NTEU Chapter 61 and Department of the Treasury, Internal Revenue Service, Albany District, New York, 7 FLRA 304 (1981), in which the Authority determined that a proposal to delay investigative searches was not inconsistent with management's right to determine its internal security practices.

The Authority has issued decisions concerning the negotiability of proposals for both "certified" and "uncertified" health and safety committees. The Agency does not argue and it does not appear from the record that the Committee is intended to be "certified" by the Secretary of Labor under E.O. 12196, thereby enabling the Agency among other things to avoid unannounced inspections by the Occupational Safety and Health Administration, as was the safety and health committee the establishment of which was found to be nonnegotiable in National Treasury Employees Union and Department of the Treasury, Bureau of Government Financial Operations, 21 FLRA No. 83 (May 8, 1986). Thus, the law and regulations applicable to the discussion of "certified" committees in that case are not pertinent here.

As for "uncertified" committees, the Union makes clear that the Committee's investigative function is not intended to preclude the Agency from assigning investigative work to others, including officials from outside the Agency. Union Petition for Review at 2. The Union states that the Committee is intended to provide a "constructive forum" in which to address health and safety issues. Union Petition for Review at 1. Accordingly, the Committee's functions do not replace or conflict with the Agency's responsibilities, and the Committee is not intended to bypass management in the health and safety area. As such, the provision differs from the proposal for an "uncertified" committee found to be nonnegotiable in American Federation of Government Employees, AFL-CIO, Local 2786 and Defense Mapping Agency, 20 FLRA No. 26 (September 20, 1985)(Provision 3). Since the provision concerns a Committee which constitutes a forum for the expression of concerns over health and safety matters and the development of recommendations concerning them rather than a forum enabling the Union to interject itself into the decisionmaking process through which the Agency exercises its reserved rights under the Statute, it is consistent with the proposal for an "uncertified" committee found to be negotiable in American Federation of Government Employees, AFL-CIO, Council of Prison Locals and Department of Justice, Bureau of Prisons, 11 FLRA 286 (1983)(Provision 2). Further, unlike the proposal in American Federation of Government Employees, Local 644 and U.S. Department of Labor, Mine Safety and Health Administration, 21 FLRA No. 122 (May 29, 1986) (Proposal 3), the wording of Provision 1 and the parties' statements clearly set forth the nature and functions of the Committee. In Mine Safety and Health Administration, the proposal providing union participation on a safety and health inspection team and the parties' statements were not sufficiently specific as to the functions of the team or the nature of the union's participation to enable the Authority to decide whether the proposal was negotiable.

Moreover, the provision is also consistent with Authority decisions that proposals for joint labor-management committees concerned with other matters are negotiable. See, for example, U.S. Army Adjutant General Publication Center, where the Authority found negotiable a proposal for a joint labor-management committee to develop the agency's training program, and noted that the committee would only provide the union with an opportunity to express its views rather than mandating joint determination of the substantive aspects of the program; and American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981)(Proposal 6), where the Authority found negotiable a proposal to create a joint labor-management committee with the limited power to recommend changes in the performance appraisal system, and determined that the agency retained its discretion to accept or reject any of the committee's recommendations.

2. Definition of Emergency

Provision 2 provides a definition for the term "emergency," a term which is used in three portions of the parties' collective bargaining agreement: (1) Article IV, Section 1 b. 4, concerning management's rights; (2) Article XXV, Section 2, concerning notice periods prior to changes in tours of duty; and (3) Article XXVI, Section 1 f, concerning postings of overtime schedules. The Agency argues that the provision limits its right under section 7106(a)(2)(D) of the Statute to "take whatever actions may be necessary to carry out the agency mission during emergencies." The Union disagrees, stating that the provision would "in no way limit management's freedom of action in the event of an emergency." Union Petition for Review at 3.

The Authority agrees with the Agency. Provision 2 would limit the exercise of management's section 7106(A)(2)(D) right to those situations falling within the definition of "emergency." As such, the provision is similar to Provision 1 in Association of Civilian Technicians, Inc., Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania, 7 FLRA 346 (1981), reversed as to other matters sub nom. Adjutant General, Department of Military Affairs, Pennsylvania v. FLRA, 685 F.2d 93 (1982), which the Authority found nonnegotiable because it would have limited management's right to act during emergencies to situations where the emergency was verified and declared by the activity supervisor. By precluding the Agency from independently assessing whether an emergency exists, Provision 2 in this case also limits management's right to act in emergencies and, as a result, is nonnegotiable.

C. Conclusions

For the reasons stated above, Union Provision 1 is not inconsistent with management's rights under section 7106 of the Statute to assign employees, assign work, and determine its internal security practices, as alleged by the Agency. Provision 1, therefore, is within the duty to bargain.*/ Union Provision 2 is inconsistent with management's right to take actions which may be necessary to carry out the Agency's mission during emergencies. Accordingly, Union Provision 2 is outside the duty to bargain.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of Union Provision 1 which was bargained on and agreed to by the parties at the local level; IT IS FURTHER ORDERED that the petition for review as to Union Provision 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

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*/ In deciding that the provision is within the duty to bargain, the Authority makes no judgment as to its merits.

22 FLRA No. 14

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

Agency

and

Case No. 0-AR-1024

OVERSEAS EDUCATION ASSOCIATION

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Roger Kaplan filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the administratively determined indebtedness of the grievant, a school counselor, in the amount of $7,574. The amount represents two years of tuition-free education the Activity claimed was provided a student as the result of misrepresentations by the grievant. According to the Arbitrator, the grievant and the student's mother had entered into an agreement transferring guardianship of the student from the mother to the grievant in order for the student to be eligible for tuition-free education at Bitburg American High School. When the grievant failed to submit a court decree approving the guardianship agreement, the grievant was required to submit a sworn statement that he had assumed "in loco parentis" status and was supporting the student. On the basis of the grievant's statements, the student was provided the two years of tuition-free education. Subsequently, after an investigation, the Activity proposed to remove the grievant based upon charges that his statements regarding his support of the student had been false. The charges against the grievant were sustained and he was ultimately suspended for 14 days and reassigned. It was on the basis of these sustained charges that the indebtedness of the grievant was determined. The grievant thereafter filed the grievance contesting the claim of indebtedness and the grievance was submitted to arbitration. As his award, the Arbitrator sustained the grievance, finding that the grievant was not indebted for the student's tuition costs, and ordered management to cancel the demand for payment.

III. EXCEPTION

A. Contentions of the Agency

In its exception the Agency contends that the award is contrary to law and regulation pertaining to the recovery through salary offset of certain debts owed the United States by Federal employees. The Agency argues that administratively determined indebtedness is not subject to resolution under a grievance procedure negotiated in accordance with the Statute and must be determined pursuant to 5 U.S.C. § 5514.[1] In particular, the Agency argues that to permit the grievance and arbitration over such indebtedness is contrary to section 5514. The Agency also argues that to permit the grievance and arbitration of such matters is contrary to 5 CFR part 550, subpart K, providing for collection by salary offset from indebted employees. Specifically, the Agency maintains that the use of the negotiated grievance procedure is contrary to 5 CFR § 550.1104 which requires each agency to assure that its regulations governing the collection of debts are uniformly and consistently applied to all employees. The Agency asserts that because the negotiated grievance procedure is available only to bargaining-unit employees, use of the negotiated grievance procedure necessarily precludes uniformity and consistency of application in violation of 5 CFR § 550.1104.

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[1] 5 U.S.C. § 5514 is set forth in the Appendix.

B. Opposition of the Union

In its opposition to the Agency's exception, the Union primarily argues that 5 U.S.C. § 5514 and 5 CFR part 550, subpart K are not applicable to bar the grievance or the Arbitrator's award because collection of the claimed indebtedness was not sought by salary offset.

IV. ANALYSIS AND CONCLUSIONS

For the reasons which follow, the Authority finds that the provisions of 5 U.S.C. § 5514 do not preclude an arbitrator from ruling on and overturning an assessment of administratively determined indebtedness against an employee. Collective bargaining agreements negotiated under section 7121 of the Statute must contain a grievance procedure and that procedure, except as provided in section 7121(d) and (e),2/ is the exclusive procedure for resolving grievances which fall within its coverage.3/ Thus, the negotiated grievance procedure may be invoked to settle disputes within its coverage despite the existence of internal agency appeal procedures or statutory appeal procedures which also cover the matter at issue. As to certain statutory or appellate

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2/ Section 7121(d) and (e) provide the aggrieved employee in the specified matters, none of which include the matter involved in this case, an option of raising the matter under the negotiated grievance procedure, if the matter has not been excluded by the parties, or under applicable statutory or appellate procedures.

3/ The term "grievance" is defined in section 7103(a)(9) to include any complaint by any employee concerning any matter relating to the employment of the employee or concerning any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. Section 5 of the Debt Collection Act of 1982 amended 5 U.S.C. § 5514 to provide the Government with the authority to take offset against the salaries of Federal employees in order to collect any debts owed the United States, and the Office of Personnel Management has prescribed regulations governing the collection of such debts by salary offset. Pub. L. No. 97-365, 96 Stat. 1749; 5 U.S.C. § 5514; 5 CFR part 550, subpart K. Any complaint by an employee about such an indebtedness or collection action would be a "grievance" and would be covered by the negotiated grievance procedure unless excluded by law or by the parties.

procedures, section 7121(d) and (e) of the Statute, as noted, demonstrate that Congress was aware of other statutory appeal procedures when it provided in the Statute for negotiated grievance and arbitration procedures. It is clear that Congress intended the negotiated procedures to be an alternative to those specified statutory and appellate procedures.[4] As to internal agency procedures and statutory procedures not specified in section 7121(d) and (e), Congress intended that the negotiated grievance procedure replace those procedures.[5] Consequently, unless it can be shown that the procedures governing the collection by salary offset of any debts owed the United States are intended to be the exclusive procedures for resolving these matters, such matters are within the scope of the negotiated grievance procedure prescribed by the Statute.

Both the courts and the Authority have determined that Federal law outside the Statute can limit the scope of the negotiated grievance procedure. See American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 21 FLRA No. 34 (1986) (proposal 2 and cases cited in the decision). Consequently, notwithstanding that the Activity had not expressly determined to proceed to collect the indebtedness from the grievant by salary offset, the Authority has examined the provisions cited by the Agency to determine whether the provisions are the exclusive procedures available to Federal employees to challenge indebtedness to the United States so as to overcome section 7121 of the Statute. In disagreement with the Union, we find that the provisions must be examined in this respect because they generally apply to the grievant's situation of being determined to be indebted to the United States and as a Federal employee, at least, being subject to salary offset in the collection of that debt.

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[4] See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 56 (1978); S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978).

[5] See H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978); S. Rep. No. 95-969, 95th Cong. 2d Sess. 110 (1978).

In the cases where the courts and the Authority have found that outside law limits the scope of the negotiated grievance procedure, there have been clear specific indications that the statutory procedures were intended to be exclusive. *Headquarters, AFLC*, slip op. at 6-7. For example, in each instance, statutory provisions covering those procedures provided that they should take effect "notwithstanding" any other law. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276 (3rd Cir. 1982); *Veterans Administration Medical Center, Minneapolis, Minnesota v. FLRA*, 705 F.2d 953 (8th Cir. 1983). The Agency in its exception cites no such provisions in section 5514. Therefore, the Authority finds that none of the Agency's arguments provide a basis for concluding that the grievance in this case protesting the Activity's determination of indebtedness is excluded by law from the coverage of the negotiated grievance procedure.

Similarly, the Authority finds that the Agency's arguments provide no basis for finding the award contrary to 5 CFR part 550, subpart K. The Agency has argued in its exception that permitting the use of the negotiated grievance procedure in these matters, which is available only to bargaining-unit employees under a collective bargaining agreement, necessarily precludes uniformity and consistency of application of agency regulations to all employees as required by 5 CFR § 550.1104. However, the means of dispute resolution that may be available to individual employees has not been shown to preclude the uniform and consistent application to all employees of the substantive terms of agency regulations governing the collection of debts. Furthermore, the Agency's argument that there cannot be uniformity and consistency because grievance and arbitration is not available to nonbargaining-unit employees is without merit and provides no basis for finding the award deficient. Such an effect is precisely the result contemplated by the terms and provisions of the Statute.

V. DECISION

Accordingly, for these reasons, the Agency's exception provides no basis for finding the award deficient as contrary to law or regulation, and the exception is denied.

Issued, Washington, D.C., June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

5 U.S.C. § 5514 provides:

> § 5514. Installment deduction for indebtedness to the United States
>
> (a)(1) When the head of an agency or his designee determines that an employee, member of the Armed Forces or Reserve of the Armed Forces, is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination by the head of an agency or his designee, or is notified of such a debt by the head of an agency or his designee, or is notified of such a debt by the head of another agency or his designee the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals, by deduction from the current pay account of the individual. The deductions may be made from basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay. The amount deducted for any period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted upon the written consent of the individual involved. If the individual retires or resigns, or if his employment or period of active duty otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned.
>
> (2) Except as provided in paragraph (3) of this subsection, prior to initiating any proceedings under paragraph (1) of this subsection to collect any indebtedness of an individual, the head of the agency holding the debt or his designee, shall provide the individual with--
>
>> (A) a minimum of thirty days written notice, informing such individual of the nature and amount of the indebtedness determined by such agency to be due, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under this subsection;

(B) an opportunity to inspect and copy Government records relating to the debt;

(C) an opportunity to enter into a written agreement with the agency, under terms agreeable to the head of the agency or his designee, to establish a schedule for the repayment of the debt; and

(D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph (C), concerning the terms of the repayment schedule.

A hearing, described in subparagraph (D), shall be provided if the individual, on or before the fifteenth day following receipt of the notice described in subparagraph (A), and in accordance with such procedures as the head of the agency may prescribe, files a petition requesting such a hearing. The timely filing of a petition for hearing shall stay the commencement of collection proceedings. A hearing under subparagraph (D) may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than sixty days after the filing of the petition requesting the hearing.

(3) The collection of any amount under this section shall be in accordance with the standards promulgated pursuant to sections 3711 and 3716-3718 of title 31 or in accordance with any other statutory authority for the collection of claims of the United States or any agency thereof.

(4) For the purposes of this subsection--

(A) "disposable pay" means that part of pay of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld; and

(B) "agency" includes the United States Postal Service and the Postal Rate Commission.

(b)(1) The head of each agency shall prescribe regulations, subject to the approval of the President, to carry out this section and section 3530(d) of title 31. Regulations prescribed by the Secretaries of the military departments shall be uniform for the military services insofar as practicable.

(2) For purposes of section 7117(a) of this title, no regulation prescribed to carry out subsection (a)(2) of this section shall be considered to be a Government-wide rule or regulation.

(c) Subsection (a) of this section does not modify existing statutes which provide for forfeiture of pay or allowances. This section and section 3530(d) of title 31 do not repeal, modify, or amend section 4837(d) or 9837(d) of title 10 or section 1007(b), (c) of title 37.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY CORPS OF ENGINEERS,
KANSAS CITY DISTRICT

Activity

and Case No. 0-AR-1111

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Stanford C. Madden filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The parties submitted to arbitration the issues of whether a statutory employment discrimination complaint under 29 CFR part 1613 is a grievance as defined by Article 3 of the parties' collective bargaining agreement and whether Article 7 of the parties' collective bargaining agreement required the Activity to pay travel and per diem expenses of a union official representing an employee in a statutory employment discrimination complaint. As to the first issue, the Arbitrator interpreted the parties' agreement and ruled that a statutory employment discrimination complaint is not a grievance as defined by Article 3 of the collective bargaining agreement. As to the second issue, the Arbitrator noted that Article 7 of the collective bargaining agreement pertinently provides that to be eligible for the payment of travel and per diem expenses, union officials must be on "representational business of mutual interest to the employees and the [Activity]." The Arbitrator interpreted this language of the agreement and ruled that a statutory employment discrimination complaint was not business of a mutual interest within the meaning of the agreement. In the course of interpreting the agreement, the Arbitrator noted that two decisions gave a fair reading to section 7114(a)(2)(A) of the Statute.*/ As his award in this respect, the Arbitrator determined that travel and per diem expenses of a union official were not payable under the collective bargaining agreement for representation of an employee in a statutory employment discrimination complaint.

III. EXCEPTION

In its exception the Union contends that the award is deficient because the Arbitrator mistakenly interpreted section 7103(a)(9) of the Statute which defines for purposes of the Statute the term "grievance." Specifically, the Union argues that the Arbitrator's interpretation of the Statute is erroneous because the collective bargaining agreement contains its own definition of grievance and because the Arbitrator's interpretation of section 7103(a)(9) is contrary to NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985), which reversed the Authority decision cited by the Arbitrator and which should be adopted by the Authority.

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*/ The reference to the Statute is apparently to the provision providing that an exclusive representative shall be given the opportunity to be represented at a formal discussion concerning any grievance. The Arbitrator cited Internal Revenue Service, Fresno Service Center, Fresno, California v. FLRA, 706 F.2d 1019 (9th Cir. 1983) and Bureau of Government Financial Operations, Headquarters, 15 FLRA 423 (1984). The Authority's decision in Bureau of Government Financial Operations, Headquarters was reversed in NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985) where the court also questioned the IRS, Fresno Service Center court decision.

IV. ANALYSIS AND CONCLUSIONS

The Authority concludes that the Union's exception fails to establish that the award is deficient. Contrary to the contention of the Union, the Arbitrator has in no manner misinterpreted section 7103(a)(9) of the Statute. Indeed, neither the Arbitrator's award nor his discussion concerns or even cites section 7103(a)(9) much less misinterprets it. Instead, as indicated by the Union, the parties' collective bargaining agreement "contains its own definition of grievance" and the interpretation and application of that provision of the agreement and Article 7 of the agreement were the issues submitted to the Arbitrator. Thus, the Union's exception primarily constitutes nothing more than disagreement with the Arbitrator's interpretation and application of the collective bargaining agreement and such disagreement provides no basis for finding the award deficient. As the Authority expressly held in Department of Health and Human Services, Social Security Administration, Louisville, Kentucky District and National Federation of Federal Employees, Local 1790, 10 FLRA 436, 437 (1982), the interpretation and application of the collective bargaining agreement is a question solely for the arbitrator in that it is the arbitrator's construction of the agreement for which the parties have bargained. In addition, to the extent the Union argues that the award is deficient because of the Arbitrator's case citations, this constitutes nothing more than disagreement with the Arbitrator's reasoning and conclusions in reaching the award interpreting and applying the collective bargaining agreement and likewise provides no basis for finding the award deficient. National Treasury Employees Union and U.S. Customs Service, 16 FLRA 377 (1984).

V. DECISION

For these reasons the Union's exception is denied.

Issued, Washington, D.C., June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 16

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1077

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Justin C. Smith filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.[1]

II. BACKGROUND AND ARBITRATOR'S AWARD

According to the record before the Authority, this case involves a dispute submitted by the parties to the Arbitrator concerning official time for representational activities in the Agency's field offices. By agreement of the parties, a two-phase arbitration process was established to resolve the basic dispute and the resulting numerous individual grievances. The first phase of the process involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement. In the second phase, the Arbitrator held hearings to resolve, by bench decisions when practicable, specific grievances pending in the various regions of the Agency. The exceptions in this case have been filed to bench decisions of the Arbitrator rendered on December 2, 1985. In those decisions, the Arbitrator generally ruled that by denying official time and related travel and per diem expenses for union officials for the representational purposes involved, the Agency violated the parties' agreement, which had been negotiated consistent with the Statute. Specifically, the Arbitrator sustained the individual grievances and awarded reimbursement for wrongfully denied official time at appropriate straight-time rates for the time spent by the grievants in performing the representational activities. He also awarded travel and per diem expenses.

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[1] In its opposition the Union contends that several of the exceptions should be dismissed as untimely. However, except for the Agency's exception to the award of travel and per diem expenses to Union representative Teefy, the Authority has determined that the exceptions were timely filed under the Statute and the Authority's Rules and Regulations. The Authority has determined that on September 18, 1985, the Arbitrator issued a bench award on the issue of Mr. Teefy's travel and per diem expenses. Therefore, under section 7122(b) of the Statute and section 2425.1 of the Authority's Rules and Regulations, any exceptions to the bench award had to be filed no later than the close of business on October 17, 1985. However, the exceptions were not filed with the Authority until December 31, 1985. Accordingly, as the Agency's exception in this respect was untimely filed, it is dismissed.

III. FIRST EXCEPTION

A. Contentions

The Agency excepts to the Arbitrator's award of travel and per diem expenses to Union representative Reiter for preparation prior to the future arbitration hearings to be held in the Agency's various regions. The Agency argues that the Arbitrator exceeded his authority by accepting and ruling on a prospective claim, that the bench award is a capricious departure from an earlier award rendered by the Arbitrator, and that the Arbitrator's authority to resolve issues of travel and per diem expenses was terminated by the parties' execution of a memorandum of understanding which in effect provided official time would be allowed consistent with past practice.

B. Analysis and Conclusions

The Authority has previously held that an agency may exercise, through negotiations, its discretion to determine whether travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for the purposes of reimbursement of related travel expenses. National

Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2, slip op. at 6 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986). In this case, the Arbitrator effectively determined that the Agency agreed to pay the travel and per diem expenses related to the labor-management relations activities covered by the official time provision of the parties' agreement. Thus, the Agency's arguments constitute nothing more than disagreement with the Arbitrator's interpretation of the parties' agreement and do not provide a basis for finding the award deficient. The Philadelphia Regional Office, District Office Operations, Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3186, 15 FLRA 211 (1984). However, any payment of travel and per diem expenses must be consistent with the provisions of the Federal Travel Regulations (FTRs).[2] In this case, the Arbitrator in directing the payment of travel and per diem expenses in connection with the covered activities did not provide for the Agency to determine the propriety of particular travel and per diem expenses under the FTRs. Consequently, the Authority must modify the award to assure that it is consistent with the requirements of the FTRs. See National Treasury Employees Union and NTEU Chapter 224 and Office of Hearings and Appeals, Social Security Administration, 21 FLRA No. 49 (1986).

IV. Second Exception

A. Contentions

The Agency contends that the Arbitrator's awards of official time are contrary to law on three grounds.

1. The Agency argues that the Arbitrator's awards ordering compensation at the appropriate straight-time rates for time spent performing representational functions outside duty hours are contrary to law because a prerequisite to an award of compensation for a denial of official time is that there be a request for official time. Since there were no

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[2] The FTRs, 41 CFR part 101-7, have been held to be Government-wide rules or regulations within the meaning of the Statute. National Federation of Federal Employees, Local 29 and U.S. Army Engineer District, Kansas City, Missouri, 13 FLRA 23, 24 (1983).

requests for official time, the Agency could not have made wrongful denials and the remedy ordered by the Arbitrator is not authorized in the circumstances of this case. The Agency further argues that certain of the grievants to whom the Arbitrator awarded compensation had 100 percent of their duty time approved for union representational activities and were thus ineligible for compensation. Lastly, the Agency contends that 5 U.S.C. §§ 5542 and 5543 precluded the remedy ordered by the Arbitrator.

2. The Agency argues that the portion of the Arbitrator's award in which he ordered that Union representative DeJulius would not be required to travel during nonduty hours is contrary to law in that it seeks to establish a contractual right for all future travel to be scheduled during normal working hours.

3. The Agency argues that the Arbitrator's award of official time to grievants Larmer and Rupp are contrary to law because neither are union representatives.

B. Analysis and Conclusions

With respect to the three grounds asserted by the Agency in this exception for finding the award contrary to law, the Authority finds as follows:

1. The Authority has previously indicated that section 7131(d) of the Statute[3] expressly authorizes the parties to negotiate for the granting of official time for the performance of the specified representational activities and that the Statute effectively provides a remedy when

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[3] Section 7131(d) provides:

> (d) Except as provided in the preceding subsections of this section--
> (1) any employee representing an exclusive representative, or
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

official time under section 7131(d) is wrongfully denied. Specifically, the Authority determined that where official time, authorized by the official time provisions of a collective bargaining agreement consistent with section 7131(d) of the Statute, is wrongfully denied and representational functions are thereafter performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. Social Security Administration and American Federation of Government Employees, AFL-CIO, 19 FLRA No. 104 (1985); U.S. Department of the Air Force, Headquarters Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916, 19 FLRA No. 105 (1985); Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3231, 19 FLRA No. 109 (1985); Local 1164, American Federation of Government Employees, AFL-CIO and Social Security Administration, Boston Region, 19 FLRA No. 110 (1985). In this case, as has been noted, the Arbitrator with respect to each bench decision essentially found that the denial of official time was in violation of the parties' collective bargaining agreement which had been negotiated consistent with the Statute. Thus, the Arbitrator effectively found that all the conditions of section 7131(d) had been met. Consequently, the Agency has failed to establish that the bench awards granting the grievants compensation for the amount of time spent performing union representational activities on nonduty time which the Arbitrator ruled should have been performed on official time are contrary to law. Accordingly, this exception must be denied.

2. The Authority finds that the Agency has failed to establish that the Arbitrator's award is contrary to law. In this regard, 5 U.S.C. § 6101(b)(2) requires agencies to schedule employee travel during hours of duty "to the maximum extent practicable." Thus, in his award the Arbitrator was merely requiring the Agency "to the maximum extent practicable" to schedule Union representative DeJulius' future travel during normal working hours consistent with section 6101(b)(2). Accordingly, this exception must be denied.

3. The Authority finds that the Agency has failed to establish that the Arbitrator's award is deficient as alleged. In a recent decision, American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986), the Authority reiterated its previous

indications that section 7131(d) of the Statute expressly authorizes parties to negotiate for the granting of official time for the performance of specified activities and that the Statute effectively provides a remedy when official time under section 7131(d) is wrongfully denied. Thus, where official time, authorized by provisions of a collective bargaining agreement consistent with section 7131(d) of the Statute, is wrongfully denied and the covered activities are thereafter performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. In this case, while the grievants were not engaged in union representational activities, section 7131(d)(2) of the Statute expressly provides for official time for bargaining unit employees "in connection with any other matter covered by this chapter." The Arbitrator by his award effectively found the dispute was a "grievance" covered by the Statute and that under the parties' agreement grievant Larmer was entitled to official time and grievant Rupp was entitled to restoration of annual leave and that therefore the conditions of section 7131(d) had been met. Accordingly, this exception must be denied.

V. OTHER EXCEPTIONS

A. Contentions

In numerous other exceptions, the Agency essentially contends that: (1) the bench awards are a capricious departure from the earlier final award of the Arbitrator; (2) the Arbitrator exceeded his authority by ruling on claims that were not part of the grievance before him; (3) the Arbitrator extended his remedy to nongrievants; and, (4) the Arbitrator conducted himself and the hearing in an arbitrary and capricious manner.

B. Analysis and Conclusions

The Authority finds that the Agency has failed to establish that the Arbitrator's award is in any way deficient. It is clear that the Agency is attempting to relitigate the merits of the case before the Authority and that the thrust of the Agency's assertions essentially constitutes nothing more than disagreement with the Arbitrator's findings of fact and his specific reasoning and conclusions based on the evidence and testimony before him, and generally with his interpretation and application of the parties' agreement. Consequently, the exceptions do not provide any basis for finding the award deficient. *See Pederal Correctional Institution, Petersburg, Virginia and American Federation of Government Employees, Local 2052, Petersburg, Virginia*, 13 FLRA 108 (1983).

VI. DECISION

Accordingly, pursuant to section 2425.4 of the Authority's Rules and Regulations and for the reasons stated above, the Agency's exceptions are denied but the award directing payment of travel and per diem expenses to Union representative Reiter is modified to provide that Ms. Reiter is entitled to payment of travel and per diem expenses for preparation prior to future arbitration hearings insofar as consistent with applicable requirements of the Federal Travel Regulations.

Issued, Washington, D.C., June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH INSPECTION SERVICE
PLANT PROTECTION AND QUARANTINE

Respondent

and Case No. 6-CA-50090

NATIONAL ASSOCIATION OF AGRICULTURE
EMPLOYEES, BRANCH #15

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. The General Counsel and the Charging Party filed exceptions to the Judge's Decision with supporting briefs.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommended Order.

The Authority agrees with the Judge's finding that the complaint alleging a violation of section 7116(a)(1) and (5) of the Statute must be dismissed because the record does not establish that the Respondent changed its past practice with respect to leave charged to employees arriving late to work, and therefore the Respondent had no duty to notify the Union and bargain as alleged. The Authority notes that the complaint in this case did not allege a section 7116(a)(2) violation involving discriminatory treatment against the unit employee in question, whose request to have his AWOL charge removed was denied.

[22 FLRA No. 17]

ORDER

IT IS ORDERED that the complaint in Case No. 6-CA-50090 be, and it hereby is, dismissed.

Issued, Washington, D.C. June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, PLANT PROTECTION AND QUARANTINE

Respondent

and

Case No. 6-CA-50090

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES, BRANCH #15

Charging Party

Susan E. Jelen, Esquire
For the General Counsel

Stanley E. Kensky
John A. Vigil
For the Respondent

Judy Jenkin
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on October 26, 1984, by the National Association of Agriculture Employees, Branch #15 (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on

February 12, 1985, by the Regional Director for Region VI, Federal Labor Relations Authority, Dallas, Texas. The Complaint alleges that the United States Department of Agriculture, Animal and Plant Health Inspection Service, Protection and Quarantine (hereinafter called the Respondent or Department of Agriculture), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by virtue of its action in changing an existing policy with respect to allowing employees who confused their scheduled work shifts and reported late for work to take annual leave or to adjust their respective hours of work rather than be charged with being absent without leave (AWOL), without first giving the Union notice of the change and an opportunity to request bargaining over the manner of implementation and the impact of the change on adversely affected employees.

A hearing was held in the captioned matter on March 26, 1985, in El Paso, Texas. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on May 28, 1985, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union[1] is the exclusive representative of Respondent's "Professional Plant Protection and Quarantine Officers" (PPQ) stationed in El Paso, Texas. The PPQ's regulate the movement of plant and animal products into and out of the United States in an effort to prevent the dissemination of injuries insects and disease. The El Paso, Texas port includes three international bridges, the airport and a railroad yard.

The approximately 25 unit employees employed in El Paso work on various shifts from 6 a.m. to midnight, seven days a week. Nine shifts were scheduled for Monday through Saturday[2] and seven shifts were scheduled for Sunday which was counted as an overtime day.[3]

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[1] The record reveals that the "Federal Plant Quarantine Inspector's National Association" is the duly recognized exclusive representative on a nationwide basis and that Local #15 is responsible for servicing the El Paso, Texas office of the Respondent. The record further discloses that while there has been no official name change, the "Federal Plant Quarantine Inspectors Association" has been operating or doing business under the name of "The National Association of Agriculture Employees." In fact the most recent agreement between the parties lists the District Director, El Paso, Texas, and National Association of Agriculture Employees, Branch #15 as signatories.

A shift schedule covers a two week period and is posted one week prior to its effective date. Employees are assigned to various shifts and report to different locations. Employees are allowed to make shift changes, in most cases without restriction. There are certain required shifts that employees work eight days out of the two week period without being able to trade. After PPQ's agree to trade shifts, they sign a form which is then approved by a supervisor. The trade is then posted on the shift schedule.

The Animal and Plant Health Inspection Service (APHIS) Directive dated October 7, 1982 dealing with "Leave" provides in Part 3, Article III, Absence Without Official Leave (AWOL) as follows:

> "Employees whose absence from duty was not authorized or approved or whose leave request has been denied is charged on the T&A as AWOL. An employee on AWOL cannot receive pay for such absence. If an employee later submits acceptable evidence that the absence without prior authorization was excusable or that the employee was ill, the AWOL charge may be retroactively changed to annual or sick leave or leave without pay . . . ."

On April 28, 1984, PPQ Officer Joseph Gross who was scheduled to be off work on April 30, 1984, agreed to trade shifts with a fellow employee and work the 11:30 a.m. to 8:00 p.m. shift on April 30, 1984. In accordance with the existing practice, Mr. Gross submitted a change in work schedule to the appropriate supervisor which was subsequently approved.

On April 30, 1984, Mr. Gross, having confused his scheduled hours of work for that day, reported for work at 1:30 p.m., two hours past his scheduled starting time. Upon his arrival, Mr. Nick Silva, a supervisor, informed Mr. Gross that he was two hours late and that he, Mr. Silva, was charging him two hours AWOL for this period of time. Mr. Gross then took the matter up with Mr. Ruben Garcia, Assistant Officer in Charge. In his meeting with Mr. Garcia, Mr. Gross took the position that he had confused his shift and felt that he should be charged with annual leave instead of AWOL. However, Mr. Garcia and and Mr. Silva refused to change the two hours from AWOL to annual leave on the ground that since the change in schedule had occurred only two days earlier he, Mr. Gross, should have remembered his new schedule. Mr. Gross then appealed the matter to Mr. John Vigil, Officer in Charge. Mr. Gross informed Mr. Vigil that there should be a definite policy concerning what type of leave would be assigned an employee when he arrived at the wrong time and that there should be uniformity among the supervisors with respect to the type of leave an employee was charged with when he confused the starting time of his shift. According to Mr. Gross, this was the first time in his twenty-two years of employment that he had been charged AWOL for confusing the starting time of a scheduled shift. Mr. Gross could not recall how many times in the past that he had confused the starting time of a shift, but stated that he was sure he had done it in the past.

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[2] 6 a.m. to 2:30 p.m., 8 a.m. to 4:30 p.m., 8:30 a.m. to 5 p.m., 9:30 a.m. to 6 p.m., 11:30 a.m. to 8 p.m., 1:30 p.m. to 10 p.m., 3:30 p.m. to midnight, 2 p.m. to 10 p.m., and 6 a.m.

[3] 6 a.m. to noon, 8 a.m. to 2 p.m., 10 a.m. to 4 p.m., noon to 6 p.m., 2 p.m. to 8 p.m., 4 p.m. to 10 p.m., and 6 p.m. to midnight.

According to Mr. Gross, this was the second time in his twenty-two year career that he had been charged AWOL. The first time he was charged AWOL was on March 30, 1984, when he reported back from lunch late.

Mr. Gross subsequently filed a grievance based upon his being charged AWOL on March 30, 1984 and April 30, 1984. In support of his grievance he alleged that he was being discriminated against because other named PPQ's were allowed to take annual leave in lieu of LWOP when they confused the starting times of there rescheduled shifts. The grievance did not involve the issue of a change in an existing past practice without prior notice to the Union.

Ms. Judy Jenkin, a former vice-president of Local 15, who had worked in El Paso for approximately four and one-half years before being transferred to Baltimore, Maryland on March 17, 1985, testified that prior to April 30, 1984, when Mr. Gross was given an AWOL for confusing the starting time of his shift, employees who confused their respective shifts were allowed to take annual leave or readjust their hours of work. In support of her testimony, Ms. Jenkin pointed out that on October 10, 1982, she confused her shift starting time and reported to work fifteen to twenty minutes past the scheduled 8 a.m. starting time for her shift and was paid from 8:15 without any discussion.

Ms. Jenkin further testified that employee Mr. Norman Bebon, who was scheduled to work the 8:30 to 5 p.m. shift on October 7, 1982, confused his shift and reported late after being called by his supervisor. Mr. Bebon was allowed to take one hour of annual leave. According to the testimony of Ms. Jenkin; Mr. Ramon Alvarez was allowed to work different shift hours on April 4, 1984, when he confused the starting time of his shift, and reported in late. He was allowed to work an 8:30 a.m. to 5 p.m. tour of duty rather than his scheduled 6 a.m. to 2:30 p.m. tour of duty.

Mr. Bob Eads was not charged AWOL when he confused his shift and failed to show up for work thereby forcing another supervisor to be called in to work his shift. Mr. Ysobel Medrano was allowed to take annual leave when he confused his shift in early 1982.[4]

Ms. Jenkin acknowledged in her testimony that two employees, Mr. Ernest Elliot and Mr. Lazaro Holquin were given AWOL's in 1981 and on November 6, 1984, respectively, when they confused their shift starting times and failed to report for work.

Mr. Ronald Joseph Venezia, a PPQ officer in El Paso testified that he once confused his work schedule in October of 1981, a Sunday, and that upon reporting to work two hours late he was allowed to work the remainder of his scheduled shift.

Mr. Aaron Miller a PPQ officer in El Paso testified that once in the four and one-half years that he had been in El Paso he confused the starting time of his shift by two hours and was allowed to take two hours annual leave by his supervisor Sam Longanecker. Mr. Miller testified that he was allowed to take two hours annual leave only after Mr. Longanecker checked the schedules and noted that his 6 a.m. to 2 p.m. shift had been sandwiched in between two 8:30 a.m. to 5 p.m. shifts and that his other assigned weekly shifts were all 8:30 a.m. to 5 p.m.

Mr. John A. Vigil, the Officer in Charge of the El Paso Area testified that he has always adhered to the APHIS policy on absences, tardiness and AWOL and that he has delegated his discretionary responsibility to his three first line supervisors. According to Mr. Vigil if an employee had not been granted leave in advance the employee is considered AWOL when he fails to show up for his scheduled shift. The decision to subsequently allow an employee to charge his absence to annual leave as opposed to being AWOL is decided on a case by case basis. In the case of Mr. Gross, Mr. Vigil refused to change Mr. Gross' AWOL to annual leave because Mr. Gross had been warned and counseled in the past about being late, had received an AWOL a few weeks earlier and had personally requested the shift change only two days earlier. Accordingly, in view of all the circumstances Mr. Vigil was of the opinion that the AWOL notation for the April 30, 1984 incident was justified.

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[4] Ms. Jenkin acknowledges in her testimony that she was not aware of the discussions that occurred with the respective supervisors of the above named employees prior to allowing the employees to reschedule their shifts and/or take annual leave. With respect to the incident involving Ms. Jenkin, the record indicates that October 10, 1982 was a Sunday, an overtime day, for which an employee could not be charged AWOL for not working as scheduled.

Mr. Nick Silva who has been a supervisor in El Paso for twelve years testified that awarding an employee an AWOL for confusing his schedule is not a change in past practice. According to Mr. Silva the awarding of annual leave rather than AWOL depends on whether the excuse for confusing a shift is acceptable. Based upon the facts underlying Mr. Gross' action in confusing his shift as well as his, Mr. Gross', past record, he decided that Mr. Gross should be given an AWOL rather than being allowed to take annual leave for confusing his shift on April 30, 1984.

Mr. Charles Parker who has been a supervisor in El Paso for eleven years testified that it has always been his practice to consider an employee AWOL when he does not arrive as scheduled. If an acceptable excuse is later given he will and usually does utilize his discretion and allows the employee to take annual leave.

Mr. Samuel Longanecker who had been a supervisor in El Paso for approximately five years testified that confusing a scheduled tour of duty is not a common occurrence. He further testified to an instance when he gave an employee an AWOL for failing to report for her shift. When the employee later called in with an acceptable excuse he changed the AWOL to annual leave. According to Mr. Longanecker the test for allowing the use of annual leave in lieu of AWOL is an acceptable excuse for confusing the work schedule.

Discussion and Conclusions

The General Counsel, citing approximately five instances during the past three years where employees confused their respective shifts and were allowed to take annual leave or readjust their shifts rather than being charged AWOL, takes the position that Respondent's action in awarding Mr. Gross an AWOL for confusing his shift on April 30, 1984, amounted to a change in past practice. Further, according to the General Counsel, in such circumstances the Respondent was under an obligation to give the Union prior notice of the change and an opportunity to request bargaining over the impact and manner of implementation of the change. Having failed to give the Union prior notice of the change and an opportunity to so bargain, it is the General Counsel's position that Respondent violated Sections 7116(a)(1) and (5) of the Statute.

The Respondent on the other hand takes the position that there was no change in past practice and that the complaint should therefore be dismissed in its entirety. According to Respondent it has always been the practice to consider an employee AWOL when he confused his shift and failed to appear on time for the start of his shift. To the extent that the five employees cited by the General Counsel had in the past been allowed to either take annual leave and/or readjust their respective shifts rather than be charged with an AWOL, Respondent points out that in accord with the existing APHIS Directive such action was only taken after the affected employees had proffered an acceptable excuse to their respective supervisors for their tardiness, etc.

Respondent further contends that the instant complaint is barred by Section 7116(d) of the Statute since the same issues underlying the complaint were raised in Mr. Gross' earlier grievance filed with the Respondent.

Contrary to the contention of the Respondent, I find that the issues included in the grievance are different than the issues underlying the instant complaint. The grievance concerned the merits of awarding Mr. Gross an AWOL for confusing the starting time of his shift, while the instant complaint concerns a change in past practice without giving prior notice to the Union and an opportunity to request impact and implementation bargaining thereon. In such circumstances, I find that Section 7116(d) of the Statute does not serve as a bar to the processing of the instant complaint. Cf. United States Air Force, Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio, 4 FLRA No. 70 (1980).

Turning now to the merits of the instant complaint, I find that the General Counsel has failed to sustain the burden imposed upon him by Section 2423.18 of the Authority's Rules and Regulations, namely to prove the allegations of the complaint by a preponderance of the evidence.

In reaching this conclusion it is noted that the General Counsel has only established that in the past three years some six employees, including Mr. Gross, were allowed to take annual leave or readjust their schedules when they confused the starting times of their respective shifts and reported late for work.[6] With respect to Mr. Alvarez, Mr. Eads, Mr. Bebon and Mr. Medrano, the record is barren of any evidence concerning the circumstances underlying their respective supervisors' actions in allowing them to take annual leave or readjust their shifts in lieu of being charged AWOL. In the case of Mr. Miller, his testimony establishes that he was allowed to take annual leave only after his supervisor, Mr. Sam Longanecker checked out Mr. Miller's weekly schedule and past attendance record and satisfied himself that Mr. Miller had an acceptable reason for having confused his schedule and shown up late for work.

In view of the foregoing and particularly in the absence of any other probative evidence contradicting the mutually corroborative and credited testimony of the four supervisors in the El Paso office of the Respondent to the effect that the granting of annual leave or allowing employees to readjust their respective schedules in lieu of being charged AWOL when they confused their schedules had never been automatic but rather dependent on the proffer of an acceptable excuse, I find that the record evidence does not establish, as alleged by the General Counsel, that Respondent's action in awarding Mr. Gross an AWOL for confusing his schedule on April 30, 1984, amounted to a change in past practice over which Respondent was obligated to give the Union prior notice and an opportunity to bargain over the impact thereof and the manner of implementation.

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[6] Mr. Miller, Mr. Eads, Mr. Bebon and Mr. Medrano. Inasmuch as Ms. Jenkin and Mr. Venezia confused their respective shifts on Sundays, an overtime day when there could be no AWOL penalty, I find the fact that they were allowed to readjust their shifts to be of no probative value.

Having concluded that the Respondent did not violate the Statute, it is hereby recommended that the Authority issue the following Order dismissing the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED, that the Complaint should be, and hereby is, dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: June 12, 1985
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES AIR FORCE
LOWRY AIR FORCE BASE
DENVER, COLORADO

Respondent

and

Case Nos. 7-CA-30459
7-CA-30584

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1497

Charging Party

UNITED STATES AIR FORCE
LOWRY AIR FORCE BASE
DENVER, COLORADO

Respondent

and

Case No. 7-CA-30543

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1974

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent filed an opposition to the General Counsel's exceptions. The consolidated complaint in this case alleged a violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) (1) on June 15, 1983 when the Respondent issued a memorandum setting forth a new seat belt policy; (2) on July 1, 1983 when the Respondent issued a memorandum changing the delegation of authority to suspend employee driving privileges; and (3) on September 26, 1983 when the Respondent implemented certain procedures concerning the new seat belt policy.

II. Facts

The facts are fully set forth in the Judge's Decision. Briefly stated, the essential facts giving rise to the consolidated complaint are as follows:

The Respondent notified the Charging Parties (Unions) on June 10, 1983, that beginning on June 15, employees who failed to wear available seat belts while driving privately owned vehicles (POVs) on Lowry Air Force Base would receive a 30-day suspension of driving privileges and that the driver of any POV would be subject to a 30-day suspension of driving privileges if any passenger failed to wear a seat belt. Prior to this announced change, employees who failed to wear seat belts did not receive mandatory suspensions until the third infraction. On June 14, the Unions submitted requests to the Respondent to negotiate as soon as possible but no later than June 21, 1983. Negotiations commenced on June 21, and also took place on June 28 and several days in July and September. The record reveals that implementation of the new seat belt policy was delayed insofar as bargaining unit employees were concerned until after negotiations were completed. Once negotiations began, the Respondent issued a memorandum on July 1, announcing that senior officers in each of Respondent's commands had been granted the authority to suspend employee driving privileges. Prior to this change, the authority to suspend seat belt violators was at the Base Commander or Deputy Commander level.

The parties failed to reach agreement during the June and July negotiations with Respondent declaring certain of the Unions' proposals to be nonnegotiable. They later sought help from the Federal Mediation and Conciliation Service (FMCS). Thereafter, the parties entered into negotiations with the assistance of FMCS in September 1983. The parties agreed on a number of matters on September 15, 1983, but some issues remained unresolved. Thereafter, on September 20, the Respondent notified the Unions that it would implement its last best offer concerning the seat belt policy on September 26, 1983.

III. Judge's Decision

The Judge concluded, in Case No. 7-CA-30459, that the Respondent had not failed to meet its statutory bargaining obligation prior to June 15, 1983, but rather that evidence established a waiver by the Union of the right to bargain prior to June 15. The Judge further concluded that the new seat belt policy was not applied to bargaining unit employees on June 15, 1983, but was deferred pursuant to agreement of the parties. As to the July 1 change in delegation of authority to suspend driving privileges, the Judge concluded that the Respondent had deferred implementation of the new seat belt policy and there was no evidentiary basis for finding that Respondent implemented the July 1 delegation as alleged in the complaint.

The Judge concluded in Case Nos. 7-CA-30584 and 7-CA-30543 that the Respondent did not act unlawfully when it implemented the new seat belt policy on September 26. In this regard the Judge found that Respondent had bargained to impasse on all issues relating to the September 26 implementation of the policy and that the Unions did not request Panel assistance until after Respondent had served notice and implemented its last best offer.

In view of the above, the Judge recommended that the consolidated complaint be dismissed in its entirety.

IV. Positions of the Parties

The General Counsel filed a number of exceptions to the Judge's findings and conclusions. In particular the General Counsel disputed the factual determinations that Respondent did not implement the new seat belt policies on June 15, 1983, and did not implement delegation of the suspension/appeal authority for seat belt violations on July 1, 1983, and that bargaining unit employees suffered no adverse impact from the July 1 change. Additionally, the General Counsel excepted to the conclusion that NFFE waived its right to pre-implementation bargaining over the June 15 seat belt policy; that Respondent bargained in good faith to impasse before implementing the new seat belt policies on September 26, 1983; and that the policies implemented on September 26, 1983 were Respondent's last best offers.

In its opposition to the General Counsel's exceptions the Respondent argued that no evidence supported the General Counsel's theory that Respondent implemented the new seat belt policies on June 15, 1983; that record evidence supported the conclusion that Respondent did not implement the delegation of the suspension/appeal authority for seat belt violations on July 1, 1983; and that there was no evidence of adverse impact on bargaining unit employees based on the July 1 change. Further, the Respondent argued that the Judge correctly determined that NFFE waived its right to pre-implementation bargaining; that Respondent bargained in good faith to impasse before implementing the new seat belt policies; and that the Respondent acted in good faith in implementing the change in seat belt policy on September 26, 1983.

V. Analysis

In concluding that the Respondent did not violate section 7116(a)(1) and (5) of the Statute, the Authority finds, in agreement with the Judge, that the parties engaged in good faith negotiations concerning the change in the seat belt policy. The record establishes that the Respondent notified the Unions that it was going to implement a change in the seat belt policy on June 15, 1983. Thereafter, the Unions requested negotiations and bargained on all negotiable aspects of the change. Although bargaining did not take place until after June 15, the record is clear that the new policy was not put into effect for unit employees until after the completion of negotiations.*/

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*/ Contrary to the Judge, the Authority finds that NFFE's request on June 14 to bargain as soon as possible, but no later than June 21, 1983, did not constitute a waiver of the Union's right to bargain prior to the implementation of the change. Similarly, the Authority finds that AFGE's request on June 14 to exclude the employees in its unit of exclusive recognition from the change until the parties reached agreement did not constitute a waiver of AFGE's right to bargain prior to implementation of the change. In this regard, the Authority notes that Respondent first notified the Unions of the proposed change on June 10, and proposed June 15 as the implementation date. The Authority takes administrative notice that June 10, 1983, was a Friday and that the Unions' response was made by the following Tuesday.

(Continued)

Furthermore, the Authority finds that the proposals over which the Respondent refused to bargain prior to implementing its change in seat belt policy were nonnegotiable as the Respondent contended. Three of the Unions' proposals would restrict the disciplinary actions which agency management could take and would limit management's right to discipline employees within the meaning of section 7106(a)(2)(A) of the Statute. _See American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky_, 19 FLRA No. 95 (1985) (union proposal I). The Authority finds that another proposal dealing with appeals of suspensions by non-bargaining unit employees is also outside the duty to bargain, as it is well established that the duty to bargain does not extend to matters concerning positions and employees outside the bargaining unit. _International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C._, 8 FLRA 212 (1982), and cases cited at note 5 of that decision. Finally, the Authority finds that the Unions' proposal dealing with paying employees for the time it takes them to transit between the Activity entrance and their actual job site at the start and end of the work day is nonnegotiable. This proposal would result in management being precluded from assigning duties during those portions of the work day during which employees were in transit between the Activity and the job site. Thus, the proposal would violate management's right to assign work under section 7106(a)(2)(B) of the Statute. _National Association of Government Employees, Local R-12-33 and National Association of Federal Employees, Local 1374 and Pacific Missile Test Center, Point Mugu, California_, 14 FLRA 275 (1984). Thus the Authority finds that the Respondent complied with its duty to negotiate and negotiated in good faith with regard to all proposals submitted by the Unions which were within its duty to bargain.

(Continued)

Thus, the Unions' response was timely and, given the circumstances, contained no language which would serve as a clear and unequivocal waiver of their right to bargain prior to implementation of the change. Moreover, the Authority notes that subsequent to receiving the Unions' request, the Respondent delayed implementation until after it had satisfied its bargaining obligation.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order except as noted in the footnote. We therefore conclude that Respondent did not violate section 7116(a)(1) and (5) of the Statute by refusing to bargain over changes in the Respondent's seat belt policy. Rather the Authority finds that the parties engaged in good faith negotiations with regard to all negotiable proposals concerning the change in the seat belt policy. Accordingly the complaint shall be dismissed in its entirety.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 7-CA-30459, 7-CA-30584 and 7-CA-30543 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 18]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES AIR FORCE
LOWRY AIR FORCE BASE
DENVER, COLORADO

Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1497

Charging Party

Case Nos. 7-CA-30459
7-CA-30584

UNITED STATES AIR FORCE
LOWRY AIR FORCE BASE,
DENVER, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1974

Charging Party

Case No. 7-CA-30543

Lt. Col. Wade B. Morrison, USAF
For the Respondent

Joseph Swerdzewski, Esquire
Daniel Minahan, Esquire
For the General Counsel

Ms. Joyce Coxson
For the National Federation of
Federal Employees, Local 1497

Mr. Dariel Case
For the American Federation of
Government Employees, AFL-CIO, Local 1974

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

These cases arose as unfair labor practice proceedings under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The consolidated complaint, as amended at the hearing, alleged that Lowry Air Force Base (Respondent or LAFB) committed the following unfair labor practices within the purview of the Statute:

Case No. 7-CA-30459

On or about June 15, 1983, the Respondent violated Sections 7116(a)(1) and (5) of the Statute by issuing to all personnel at LAFB, a memorandum announcing that failure to wear available seat belts in privately owned vehicles (POVs) operated on LAFB would result in a 30 day suspension of driving privileges, and that the driver of any POV would be subject to a 30 day suspension of driving privileges if any passenger failed to wear seat belts.

On or about July 1, 1983, the Respondent violated Sections 7116(a)(1) and (5) of the Statute by issuing to all units and activities a memorandum announcing that senior officers in each of Respondent's commands had been granted the authority to suspend employee driving privileges.

It was alleged that the June 15, 1983 and July 1, 1983 memorandums constituted unilateral changes in conditions of employment of bargaining unit employees represented by the National Federation of Federal Employees (NFFE) Local 1497; a failure to provide NFFE Local 1497 notice of such change; a failure to bargain in good faith;[1] and interference, restraint and coercion of such employees in the exercise of rights guaranteed by the Statute.

Case No. 7-CA-30584

On or about September 26, 1983, the Respondent violated Sections 7116(a)(1) and (5) of the Statute by implementing certain procedures and arrangements concerning the enforcement of policy requiring drivers and passengers to wear seat belts in POVs operated on LAFB. It was alleged that the September 26, 1983 implementation constituted unilateral changes in conditions of employment of bargaining unit employees represented by NFFE Local 1497, and interference, restraint and coercion of such employees in the exercise of rights guaranteed by the Statute.

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[1] The complaint alleged a failure to bargain in good faith concerning the substance and impact and implementation of the June 15, 1983 memorandum, and a failure to bargain concerning the impact and implementation of the July 1, 1983 memorandum.

Case No. 7-CA-30543

On or about September 26, 1983, the Respondent violated Sections 7116(a)(1) and (5) of the Statute by implementing certain procedures and arrangements concerning the enforcement of policy requiring drivers and passengers to wear seat belts in POVs operated on LAFB. It was alleged that the September 26, 1983, implementation constituted unilateral changes in conditions of employment of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO (AFGE), Local 1974, and interference, restraint and coercion of such employees in the exercise of rights guaranteed by the Statute.[2]

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including exhibits, and other relevant evidence adduced at the hearing,[3] and briefs filed by counsel representing the Respondent and General Counsel, I make the following findings of fact, conclusions and recommendations.

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[2] Allegations in Case No. 7-CA-30543, involving AFGE Local 1974, are set forth in Paragraphs 5, 14, and 17 of the consolidated complaint. Counsel representing the Respondent moved to strike portions of the General Counsel's post-hearing brief because of a perceived attempt to expand the allegations of the consolidated complaint to include other alleged unfair labor practices perpetrated against AFGE Local 1974, but not specifically pleaded in the consolidated complaint. Counsel representing the General Counsel filed an opposition to the motion to strike. Since only specifically pleaded allegations relating to AFGE Local 1974 may be considered as a basis for any possible remedy which might inure to the benefit of AFGE Local 1974, and since statements reflected in a post-hearing brief are not evidence, and do not otherwise operate to amend the consolidated complaint, the motion to strike is denied.

[3] Counsel representing the General Counsel moved to correct errors in the hearing transcript. Under authority reflected in 5 C.F.R. § 2423.19(r), the proposed corrections are approved with the exception of the proposed correction at Tr. 6:9. An examination of this reference in the transcript reflects no error of the type noted in the motion. Other errors noted on this transcript page were described as appearing at Tr. 6:22, 23 and 24 respectively; however, these errors appeared at Tr. 6:19, 22 and 23 instead.

Findings of Fact

Notice of Changes Relating to Seat Belt Policy

By memorandum dated June 10, 1983, Darvin H. Koehler, Respondent's Civilian Personnel Officer, advised Joyce Coxson, President of NFFE, Local 1497, that on June 15, 1983, the Respondent intended to begin strict enforcement of Air Force regulations relating to seat belt use in POVs operated on LAFB by military personnel, dependents and civilian personnel (Tr. 57; G.C. Exh. No. 10). Although dated June 10, 1983, the memorandum was personally delivered to Ms. Coxson on June 9, 1983 (Tr. 57-58).[4] It announced that the new policy would involve a 30 day suspension of LAFB driving privileges for a first offense; that vehicle drivers would be subject to the 30 day suspension rule for a first offense if any passenger in a vehicle failed to wear a seat belt; and that suspended drivers would be allowed to drive their cars on LAFB only to the extent of parking their cars in a designated parking area situated near a LAFB entrance gate.

Department of Air Force Regulation 127-7, dated June 3, 1980 required the wearing of seat belts. The following general language formed the basis of this requirement:

> . . . All military personnel and civilians operating or riding in private motor vehicles on a DOD installation will wear seat belts if available. (G.C. Exh. No. 4 at page 2).

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[4] As a result of delivery of the memorandum on June 9, 1983, NFFE Local 1497, received approximately six days notice of the change. A statement to the contrary in the General Counsel's Brief is not supported by the record (G.C. Brief at page 20).

Counsel for the General Counsel attempted to derive some benefit from the fact that an incomplete account of the proposed change was reported in the "Lowry Airman," a LAFB newspaper (G.C. Exh. No. 9). It was argued that the new policy was announced in the newspaper as a *fait accompli* on June 10, 1983. However, Jt. Exh. No. 10 reflects notice of the proposed change, and there was no showing that the Respondent was responsible for issuance of the incomplete newspaper account, or that such publication was otherwise intended to be a unilateral implementation of a new seat belt policy on June 10, 1983. Argument that the new policy went into effect without notice on June 10, 1983, is not supported by the record.

This rule had not been strictly enforced. Those found in violation of the seat belt rule during random checks by security personnel were not issued citations directly. Their names were recorded by security personnel and they were informed of their failure to comply. They were then advised that their names would be forwarded to their commanders for appropriate action. This procedure was followed for the first two infractions of the rule, and after the third offense those found to be in violation were supposed to receive a mandatory suspension of driving privileges. However, the record reflected that the mandatory suspension rule was not followed by the Respondent. It was acknowledged that a repeated failure to wear seat belts could have led to formal discipline; however, records of seat belt violations were not included in employee personnel files.

On June 14, 1983, the day preceding the proposed implementation, Ms. Coxson, on behalf of NFFE, Local 1497, delivered a request to negotiate concerning the proposed change "as soon as possible, but not later than 21 June 1983." (G.C. Exh. No. 11). The request noted an awareness of the duty to bargain prior to implementation, but did not specifically request a delay in implementation.[5] Ms. Coxson's testimony established that despite the impending proposed implementation date she and a labor relations specialist representing the Respondent agreed to negotiate "as requested" on June 21, 1983, or six days after the proposed implementation date (Tr. 59-60).

The "last minute" filing of the request to negotiate on the day preceding proposed implementation; Ms. Coxson's unequivocal acceptance of June 21, 1983, as the date to commence bargaining; and the fact that negotiations actually commenced on June 21, 1983; all lead to the factual finding that Ms. Coxson's June 14, 1983 bargaining request conferred upon the Respondent the option to defer negotiations until after June 15, 1983, the date proposed by Respondent for implementation of the new seat belt policy.

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[5] On the same date (June 14, 1983), a similar bargaining request was supplied to Mr. Koehler on behalf of AFGE Locals 1974 and 2040, as they also were interested in joint bargaining concerning the change. It did not include a request for delay in implementation, and did not mention a specific date to begin negotiations. These Locals requested Koehler to reply to the request "before the end of the week to set up a bargaining session . . . ." (G.C. Exh. No. 12). The week in question ended on June 17, 1983, two days after the proposed June 15, 1983 implementation.

This document, plus other evidence in the record shows that the three Unions did not specifically contemplate bargaining prior to implementation. Instead the parties agreed that post-implementation bargaining might ensue. However, at or about the same time it was also agreed that no enforcement action under the new policy would be initiated against bargaining unit employees until after Respondent met statutory bargaining obligations.

The policy spelled out in the June 10, 1983 memorandum by Mr. Koehler was in fact implemented on June 15, 1983, by the issuance of a memorandum dated June 15, addressed to LAFB personnel by Colonel Leslie A. Hobgood, Base Commander, LAFB (G.C. Exh. No. 13). The memorandum announced that the policy would be applicable to "both military personnel/dependents and civilian personnel." However, the record is clear that the term "civilian personnel" was not construed by the parties to include bargaining unit members represented by NFFE or other unions recognized by the Respondent. That is, the parties agreed that bargaining unit employees would not then be affected by the policy. The unions were orally assured that bargaining unit members would not be subjected to the new sanctions prior to completion of negotiations, and further that the new policy would be imposed in a manner consistent with Respondent's bargaining obligation.

As in the period prior to June 15, 1983, the names of those violating seat belt policy were recorded; however, new policy relating to the suspension of driving privileges was not effectuated with respect to bargaining unit employees. The record clearly indicated that implementation was withheld insofar as all bargaining unit employees were concerned.[6]

The implementation of the new policy did result in an increase in the number of random checks by security personnel to determine whether or not drivers and passengers in POVs were wearing seat belts. However, Counsel for the General Counsel acknowledged that this increase was not relied upon as a basis for the complaint (Tr. 210-211).[7] The record revealed that the names of individuals were recorded on revised forms not previously utilized by security personnel (G.C. Exh. No. 16). However, the forms were not disseminated, or otherwise utilized as a basis for action, and were used solely for the purpose of recording the identity of those in violation of the rule. This minor administrative change was not alleged as a basis for the complaint, and did not otherwise alter the previously existing practice of recording the names of those in violation of seat belt rules.

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[6] The Respondent deferred action against all civilian employees including those represented by NFFE, the exclusive representative of bargaining unit members identified in Case No. 7-CA-30439, because it was not possible for security personnel to determine which civilian employees were bargaining unit members. The record indicates that by design the new suspension policy was not effectuated so as to affect bargaining unit employees until after September 26, 1983.

[7] The complaint does not rely upon a change in the degree of attention given to the use of seat belts in POVs. It refers to alleged changes relating specifically to penalties to be imposed for violation of rules requiring seat belts in POVs, and changes relating to the delegation of authority to suspend driving privileges.

Negotiations Concerning Seat Belt Policy

The Respondent agreed to bargain concerning seat belt policy in accordance with union requests (Tr. 125, 132-133). The negotiating teams included representatives of LAFB, NFFE Local 1497, AFGE Local 1974, and AFGE Local 2040. NFFE Local 1497 was represented by Dr. Edgar Smith. He also took a leading role on behalf of the AFGE Locals. Dariel Case, President of AFGE Local 1974, also took a leading role on behalf of the two AFGE Locals. LAFB was represented at the outset by Colonel Donald W. Swain, Vice Commander, LAFB; and thereafter by Colonel John A. Johnson, who replaced Colonel Swain.

On June 21, 1983, six days after issuance of Colonel Hobgood's June 15, 1983 memorandum to all LAFB Personnel, Ms. Coxson wrote to Mr. Koehler on behalf of NFFE Local 1497, and outlined a series of issues which she felt should form the basis of negotiations (G.C. Exh. No. 14). This document reflects that, despite limited implementation with respect to non-bargaining unit employees and others earlier in June, she requested that any negotiations occur prior to implementation. In view of the agreement to negotiate on June 21, 1983, a date after the partial implementation on June 15th, and in view of the agreement to exempt bargaining unit employees, it may be concluded that this request was merely a demand to continue deferral of implementation of policy with respect to NFFE bargaining unit employees. The record reflects no reason to conclude that the new penalty policy was effectuated so as to affect them.

Negotiations actually commenced on June 21, 1983, and more serious bargaining concerning the subject occurred on June 28, July 6, and July 15, 1983, prior to mediation. A total of about eight to twelve hours was spent by the parties at these meetings. On June 27, 1983, Dr. Smith submitted to management a list of additional subjects for negotiation (G.C. Exh. No. 15). Thereafter, on either June 28 or July 6, 1983, the three Locals participating in negotiations supplied a new consolidated list of fifteen proposals to the LAFB negotiating team (G.C. Exh. No. 17).

By memorandum dated July 1, 1983, the Respondent through Colonel Swain, then LAFB Vice Commander, reiterated the 30 day suspension rule made applicable previously to all but bargaining unit members. He assigned suspension/appeal authority to LAFB organizational commanders. As a result of this change organizational commanders were assigned to hear appeals arising from members of their own commands following citation of such individuals for failure to wear seat belts (G.C. Exh. No. 16). The authority was vested in officers with the rank of colonel or higher. However, the record indicates that the delegation policy was not then made applicable to bargaining unit employees because of the exemption previously arranged for bargaining unit employees. Such authority had in the past always been exercised at the Base Commander or Deputy Commander level.[8]

Counsel representing the General Counsel argued that the delegation of authority to organizational commanders was a change which affected the terms and conditions of employment of bargaining unit members in NFFE Local 1497. It was assumed that the policy would not be equitably administered by the various commanders; and that the effectuation of policy would be more consistent if suspensions were imposed at the Base Commander level (Tr. 102). It was assumed, without evidentiary basis, that organizational commanders would be much more strict in their imposition of sentences (Tr. 188). However, as noted this segment of the new seat belt enforcement policy was not implemented with respect to any bargaining unit employee because of the agreement to defer all enforcement actions until after completion of negotiations.

During negotiations on July 15, 1983, the Respondent introduced a proposed "Seat Belt Policy Implementation Guidance" reflecting nine counterproposals (G.C. Exh. No. 19, Tr. 137). These were submitted in response to those submitted jointly on behalf of the three Locals participating in negotiations. They may be summarized as follows:

1. The designation of parking areas on LAFB for suspended drivers.
2. Civilian employees found to be in violation of seat belt rules since June 15, 1983, will serve a 30 day suspension not earlier than August 15, 1983.[9]
3. Safety films will be available through the unit or union safety official.
4. If a passenger is found without a seat belt, the driver of the vehicle will receive a written warning for a first offense, and a 30 day suspension for any subsequent offense.

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[8] The three Locals first became aware of the delegation of authority at the July 6, 1983 negotiating session.

[9] The Respondent sought agreement on this point from the three Locals participating in negotiations in order to apply the stricter sanction against all civilian employees found to be in violation after June 15, 1983. However, by design the Respondent never did proceed against bargaining unit employees, and did not otherwise enforce the new policy against bargaining unit employees until after September 26, 1983.

5. The appeal authority in case of suspension will be sufficiently removed from the employee to provide a fair and equitable review. Revocation/appeal authority has been established by letter dated July 1, 1983 addressed to all Lowry Technical Training Center units by Colonel Swain (G.C. Exh. No. 16).

6. For the first and each subsequent offense a 30 day suspension will be imposed.

7. Any person found driving on base while in a suspension status will be subject to appropriate administrative action by his/her supervisor.

8. Seat belt and shoulder harness restraint devices are to be worn when installed in the vehicle.

9. If for medical reasons, one should not wear a restraint device, the person should submit a medical waiver to his/her supervisor.

By memorandum dated July 25, 1983, addressed to the three Locals, Colonel Richard White, Deputy Base Commander explained Respondent's position in support of the nine counterproposals offered on July 15, 1983, and also explained Respondent's reasons for rejecting a number of the fifteen proposals previously submitted by the union Locals (G.C. Exh. No. 20). Colonel White's letter noted that the Respondent rejected union proposals numbered 3, 9, and 13 as an encroachment on management's right to discipline under Section 7106(a)(2)(A) of the Statute. Remaining proposals were either rejected, acceded to, or described as having been addressed in Respondent's nine counterproposals.

On July 22, 1983, Dr. Smith, submitted seventeen final counterproposals on behalf of NFFE and the two AFGE Locals (G.C. Exh. No. 21).[10] Representatives of the Respondent reviewed these, and on August 18, 1983, Colonel Roger K. Taylor, Base Commander[11] wrote to Ms. Coxson, President of NFFE Local 1497, to advise that union counterproposals numbered 1, 2, 3, 7, and 11 interfered with management rights. Remaining counterproposals were either rejected or adopted.

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[10] The memorandum notes that the two AFGE Locals reserved the right to "add to and/or modify" the counterproposals submitted.

[11] Colonel Taylor replaced Colonel Hobgood as Base Commander during the interim period.

Counterproposals 1, 2 and 3 were rejected as an interference with management's right to take disciplinary action because they dealt with penalties associated with noncompliance and/or the imposition of responsibility for noncompliance. Union counterproposal 7, was described as being outside management's obligation to bargain because it was believed that the proposal would result in a violation of federal law. Union counterproposal 11 was rejected because it interfered with management's right to assign work.

In his August 18, 1983 letter, Colonel Taylor advised NFFE that further impact and implementation negotiations would be nonproductive, and that on August 22, 1983, he intended to implement proposals reflecting areas of agreement, together with any other proposals advanced by the Respondent on July 15, 1983.[12] In this context Colonel Taylor was referring to the Respondent's initial list of nine counterproposals.

Mediation Requested

As early as July 13, 1983, AFGE Local 2040 wrote to the Federal Mediation and Conciliation Service (FMCS) for the purpose of alerting that agency to the possible need to assign a mediator to help resolve issues involved in the negotiations (G.C. Exh. No. 18). AFGE Local 1974 contacted the FMCS between August 8 and 18, 1983, for the same purpose, and on September 1, 1983, a representative of the Respondent sought the services of the FMCS. By mutual agreement of the parties the FMCS entered negotiations. Further intensive bargaining occurred on September 9, 12, and 15, 1983, under the guidance of Thurman M. Sanders, Commissioner, FMCS, Denver, Colorado.[13] Ms. Coxson served as the chief representative of NFFE during this phase of negotiations. Deriel S. Case, President of AFGE Local 1974 continued to represent AFGE Local 1974.

The record established that all issues were negotiated during the mediation phase (Tr. 145). During this phase the parties specifically negotiated concerning the possibility of reducing the penalties for not complying with the seat belt rule, but could not reach agreement.[14]

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[12] The record at this point reflects a stated intent to implement on August 22, 1983. However, it was clear that no steps toward implementation were initiated on this date (Tr. 69).

[13] Following the July 15, 1983 bargaining session the parties did not commence actual negotiating meetings again until September 9, 1983.

[14] However, the parties did come close to agreement at one point during mediation (Tr. 249).

During the final mediation session on September 15, 1983, the parties reached tentative agreement on a number of key issues, and initialed their respective copies of a proposed tentative agreement to indicate the specific issues resolved by the parties. The proposed tentative agreement reflecting the initials of union representatives participating in negotiations was subsequently transmitted to the participants in the negotiations (G.C. Exh. No. 23).[15] The proposed tentative agreement was not adopted by the parties because of the failure to adopt all elements of the document. However, the record shows that the parties negotiated thoroughly with respect to all subject areas mentioned in the tentative agreement proposed by the mediator (Tr. 71, 74, 143-144). Items agreed to by the Respondent reflect significant concessions in a number of instances. Out of a total of nine numbered paragraphs reflecting nine issues, the parties reached agreement on all paragraphs except the eighth which provided for a written warning for a first offence and a 30-day suspension for subsequent violations.[16] It was clear to the parties that the paragraphs agreed to reflected the Respondent's best offer relating to subjects covered threin (Tr. 198).

In addition to issues outlined in the proposed tentative agreement the record also reflects that during mediation the parties negotiated again concerning the question of retroactive enforcement of the new seat belt policy. That is, management proposed that the Respondent retroactively enforce the seat belt policy against all civilian employees found to be in violation after June 15, 1983 (Tr. 199). However, in addition to disagreement over penalties to be imposed, the parties were unable to reach agreement on the issue of retroactive enforcement (Tr. 144).

Thus, after agreeing in a number of areas on September 15, 1983, unresolved issues remained. The mediator declared that an impasse had been reached, and the parties agreed that this was indeed true (Tr. 77,

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[15] This exhibit reflects only the initials of officials representing the three union Locals. However, both the letter of transmittal prepared by the mediator, and the hearing transcript reflect that representatives of the Locals, and representatives of the Respondent reached agreement on paragraphs initialed. The apparent absence of initialing by a representative of the Respondent is explained by testimony to the effect that agreement on each paragraph was followed by the parties initialing paragraphs on their copies of the proposed tentative agreement (Tr. 142).

[16] The record copy of the tentative agreement considered by the parties reflects interlineations which may be disregarded as not a part of the exhibit (Tr. 77, 146-147).

183). According to Ms. Cosson's testimony, representatives of the three Locals were informed that they would have to go to the Federal Service Impasses Panel (Panel) for any further resolution of the matter (Tr. 77). Union negotiators did not then indicate whether they would pursue the matter before the Panel.

Respondent Implements New Seat Belt Policy

On September 20, 1983, five days after the final mediation session, the Respondent wrote to the three Locals to advise that on September 26, 1983, the Respondent intended to implement Respondent's last best offer concerning the new seat belt policy (G.C. Exh. No. 24). The letter was hand delivered to the three Locals on September 20th (Tr. 236). The eight areas of agreement in the tentative agreement were identified as a significant portion of the implementation intended. The Respondent also noted an intent to implement the 30 day penalty for first and subsequent offenses, except that passengers found in violation would be issued a warning for a first offense. The proposed policy also allowed for exceptions in cases wherein there was "acceptable justification" for a failure to wear seat belts. It was noted that as of September 26th, persons cited for seat belt infractions after June 15, 1983, would during the week of September 26th, be issued notification of suspension of driving privileges.

There was no reason to question evidence to the effect that the implementation proposed was in fact the Respondent's last best offer prior to reaching an impasse in negotiations. On September 26, 1983, the new POV seat belt policy was implemented so as to specifically apply to both military and civilian personnel (G.C. Exh. No. 25). Despite some seeming ambiguity, evidence adduced indicates that no bargaining unit members were ever suspended. By design, bargaining unit employees were not retroactively affected by implementation of the policy. The proposed policy was not implemented so as to affect bargaining unit employees until September 26th (Tr. 235, 251-252).[17]

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[17] Counsel representing the General Counsel endeavored to show that the absence of bargaining unit employee suspensions was the result of chance rather than design. However, it appeared that only nonbargaining unit employees cited after June 15, 1983, were suspended after September 26th. By design bargaining unit employees were not affected until after September 26th.

However, despite the foregoing, the parties did, as previously noted, generally discuss and disagree on a proposal to apply the policy retroactively to all civilian employees found to be in violation of the seat belt rule after June 15, 1983.

On September 30, 1983, four days after implementation, Mr. Case, writing as the President of AFGE Local 1974, and as a representative of NFFE Local 1497, and AFGE Local 2040, wrote to the Panel for assistance (G.C. Exh. No. 26). The Respondent did not become aware of the request filed until October 4, 1983 (Tr. 236). The record clearly established that the parties bargained to impasse on issues implemented, and those raised before the Panel by the three Locals (Tr. 95-96, 182-184, 187-188).[18]

As of September 30th, the date of the request for Panel assistance, charges had been filed in each of the unfair labor practice cases referred to in the consolidated complaint. The complaint in Case No. 7-CA-30459 was also issued on September 30th (G.C. Exh. No. 1(g)). After September 30th the proceedings initiated followed their respective courses. The Panel proceeding was pending at the time of hearing and was of concern because of the then existing possibility of conflicting decisions and remedies.[19] However, on February 1, 1984, after the close of the hearing record, the Panel declined jurisdiction because of the pending unfair labor practice cases involved in this litigation. Department of the Air Force, Lowry Air Force Base, Colorado, and Locals 1974 and 2040, AFGE, and Local 1497, NFFE, Case No. 84 FSIP 1.

Following the hearing counsel representing the General Counsel moved to add the Panel decision to the hearing record, or alternatively, that official notice be taken of the Panel decision. Counsel representing the Respondent objected to the introduction of the Panel decision as a General Counsel Exhibit on the ground that the record was closed. However, official notice of the decision was not precluded, and the record indicates that it would be necessary to take official notice of any Panel action in order to avoid the possibility of conflicting decisions threatened by the fact that this matter was pending before the Panel at the time of hearing (Tr. 174-176). Accordingly, official notice is hereby taken of the Panel's February 1, 1984 decision.[20]

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[18] At an early stage of negotiations, prior to mediation, the Respondent interposed assertions of nonnegotiability relating to certain issues. These assertions were abandoned during later negotiations, but were subsequently revived in replies to a Panel request for a statement of position (G.C. Exh. No. 28 and 29). However, despite early assertions of nonnegotiability the Respondent bargained in good faith on all issues prior to impasse. Also, the complaint was not based upon any assertion of non-negotiability interposed by the Respondent during negotiations which ensued prior to mediation. It is therefore unnecessary to consider Respondent's early assertions of nonnegotiability for the purpose of determining whether unfair labor practices were established.

[19] The practice of simultaneously seeking Panel assistance and a remedy in an unfair labor practice proceeding to resolve substantially the same issues was condemned by the Authority in Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA No. 95, 13 FLRA 571 (1984).

Discussion and Conclusions

Case No. 7-CA-30459

It is alleged in Case No. 7-CA-30459 that the Respondent implemented a 30 day suspension of driving privileges for failure to wear seat belts in POVs, and that such implementation was a violation of Section 7116(a)(1) and (5) of the Statute. The record shows that the three Locals were interested in participating in negotiations and requested bargaining concerning this issue; however, all three permitted the Respondent to opt in favor of post-implementation bargaining. The record adduced showed that bargaining "as requested" by NFFE Local 1497 commenced on June 21, 1983, six days after June 15, 1983, the implementation date selected by the Respondent. Ms. Coxson's June 14, 1983, bargaining request gave to the Respondent the option of commencing negotiations as late as June 21, 1983, and negotiations which did in fact begin on this date were described by Ms. Coxson as having commenced "as requested" by her in her June 14, 1983 letter. Furthermore, the two AFGE Locals participating in joint negotiations also submitted a bargaining request which clearly contemplated the prospect of post-implementation bargaining. Under these circumstances there would be no basis for concluding that implementation of the new seat belt policy on June 15, 1983, constituted an unfair labor practice within the purview of the Statute. That is, allegations in the consolidated complaint resting upon an alleged failure of the Respondent to meet bargaining obligations in the statute prior to the June 15, 1983 implementation date were not supported by the record. Instead, the evidence establishes a clear and unmistakable waiver of the right to bargain prior to June 15, 1983. Department of the Treasury, United States Customs Service, Region I, Boston, Massachusetts, and St. Albans, Vermont District Office, 10 FLRA No. 100, 10 FLRA 566 (1982).

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[20] Although litigation of an unfair labor practice matter which goes to the heart of negotiations made the subject of Panel impasse procedures, has been condemned by the Authority, the fact remains that as of this date only this consolidated complaint is pending disposition. In view of this, and in light of the fact that other factors militate in favor of dismissal of the consolidated complaint, it is unnecessary to determine whether the simultaneous processing of this matter as both Panel and Authority proceedings would have given rise to any reason for dismissal.

In addition to the failure of proof outlined, the record shows that the imposition of the new and more severe penalty alleged in the consolidated complaint was not, on June 15, 1983, effectuated so as to affect NFFE Local 1497 bargaining unit employees, or bargaining unit members of other Locals. Instead, implementation of the policy with respect to bargaining unit employees was deferred. Introduction of the new policy, by agreement of the parties, was limited so as to exclude bargaining unit members. The Respondent did not administratively begin to apply the policy to bargaining unit members until September 26, 1983. The record shows that as a result of this method of proceeding no bargaining unit employee was suspended as a result of the application of the policy prior to September 26, 1983. This exemption was orally agreed to by the parties. These circumstances also reflect the absence of a rationale for an unfair labor practice based upon a June 15, 1983 imposition of a harsher penalty for violation of the seat belt rule.[21]

It is also alleged in Case No. 7-CA-30459, that the Respondent's July 1, 1983, delegation of authority to suspend driving privileges was a violation of Section 7116(a)(1) and (5) of the Statute.[22] The record reflects that the July 1 change alleged was not effectuated so as to have any affect upon bargaining unit employees. As of this date the participants in negotiations were operating under an agreement whereby implementation of the seat belt policy would be deferred with respect to all bargaining unit members. The policy was not effectuated so as to embrace bargaining unit members until September 26, 1983. No evidentiary basis exists for a finding that the Respondent implemented the July 1, 1983 delegation of authority as alleged in Case No. 7-CA-30459. Further, consideration of implementation of the delegation of authority on September 26, 1983, is reflected in discussion relating to Case Nos. 7-CA-30543 and 7-CA-30584.

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[21] The consolidated complaint indicates considerable uncertainty concerning the alleged date of implementation of the new seat belt rule. In Case No. 7-CA-30459, it is alleged that the Respondent implemented a new and harsher penalty on June 15, 1983; whereas in Case Nos. 7-CA-30543 and 7-CA-30584, it was alleged that such implementation commenced on September 26, 1983. As a result of the foregoing, it is clear that doubt concerning the date of implementation was built into the theory of the case. Discussion of the September 26, 1983 implementation follows herein in connection with consideration of Case Nos. 7-CA-30543 and 7-CA-30584.

[22] Duality in the prosecutive theory is also reflected by a comparison of this allegation with allegations set out in Case Nos. 7-CA-30543 and 7-CA-30584. In the latter cases it was alleged that implementation of the delegation of authority occurred on September 26, 1983.

In light of the foregoing it is unnecessary to determine whether or not the delegation of authority had an impact or a reasonably foreseeable impact upon employees within the meaning of U.S. Government Printing Office, 13 FLRA No. 39, 13 FLRA 203 (1983); and Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174, 15 FLRA 922 (1984).[23]

Case No. 7-CA-30584
Case No. 7-CA-30543

Conduct alleged as a basis for unfair labor practices in these two cases is substantially the same as that set out in Case No. 7-CA-30459. However, in these cases violations of Section 7116(a)(1) and (5) would rest upon alleged unilateral implementation of the 30 day penalty and delegation of adjudicatory authority on September 26, 1983, rather than June 15, 1983 and July 1, 1983. Presumably, counsel for the General Counsel is contending that if the policies in question were not implemented on the earlier dates, they were implemented in violation of Section 7116(a)(1) and (5) on September 26, 1983.

With respect to NFFE Local 1497 and AFGE Local 1974 bargaining unit employees involved in these two cases, as well as other bargaining unit employees represented by AFGE Local 2040, it was established that as of September 26th, the Respondent had bargained to impasse on all issues relating to the September 26th implementation of seat belt policy.

The specific issues underlying these two cases were addressed in detail during negotiations held before and/or during the mediation phase. This is clear from an examination of documents generated during bargaining and from the testimony of witnesses.

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[23] If an impact upon employees which is more than de minimus cannot reasonably be foreseen no bargaining obligation arises. Counsel representing the General Counsel argued that an adverse impact was foreseeable. It was noted that a greater number of individuals would be adjudicating cases involving violation of the seat belt rule. However, from this fact it would not be possible to conclude that bargaining unit employees would receive unfair or disparate treatment.

Similarly, it was contended that there would be an impairment of the exclusive representative's capacity to monitor the seat belt program, and to represent aggrieved employees. These assertions were speculative in nature. It cannot be presumed that this administrative change would have impeded efforts to monitor organizational commander adjudications, or that it would have interfered with the right of any exclusive representative to represent or assist bargaining unit employees. The mere assertion of these contentions by counsel representing the General Counsel, without more, would not demonstrate a factual basis for finding a foreseeable adverse impact as claimed.

The record establishes that prior to September 16th, all relevant issues were negotiated despite the existence of doubt concerning the Respondent's obligation to bargain concerning some of the proposals made by the three Locals.[24] The final bargaining session on September 15th, did not result in the adoption of the tentative agreement under discussion on that date, but it did nevertheless represent an extended session of good faith bargaining on issues reflected in the proposed tentative agreement, as well as other issues relating to the subject. On September 15th the negotiators recognized that an impasse had been reached, and the Charging Parties in these two cases were apprised of their right to seek Panel assistance by the mediator.

On September 20th the Respondent advised union Locals that Respondent's last best offer would be implemented on September 26th. The record reflects a basis for finding that the policies actually implemented on this date were in fact Respondent's last best offer. The Locals did not seek Panel assistance during the period intervening between September 20th and September 26th. Instead, the request for Panel assistance was not submitted until September 30, 1983, or four days after the Respondent made the new seat belt policies applicable to bargaining unit members. Since the Locals herein had a reasonable opportunity to invoke the services of the Panel after the parties reached impasse in their negotiations on September 15th, and after receiving Respondent's September 20th notice of intent to implement its last proposals on September 26th; and since there was a failure to request the services of the Panel prior to the announced date scheduled for implementation, it must be concluded that the Respondent did not act unlawfully when the new policies were implemented on September 26th. U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA No. 39, 5 FLRA 288 (1981); U.S. Customs Service, 16 FLRA No. 31, 16 FLRA 198, (1984); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA No. 32, 16 FLRA 217 (1984).

As a result of the conclusions outlined, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29.

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[24] This circumstance makes it unnecessary to determine the nature of the Respondent's bargaining obligation with respect to particular proposals raised by the Locals. Moreover, as previously noted, the complaint does not allege unfair labor practices based upon Respondent's interposing allegations of nonnegotiability.

ORDER

IT IS HEREBY ORDERED, that the consolidated complaint in Case Nos. 7-CA-30459, 7-CA-30584, and 7-CA-30543, be, and hereby is, dismissed.

Louis Scalzo

LOUIS SCALZO
Administrative Law Judge

Dated: November 16, 1984
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760

Union

and

Case No. 0-AR-933

SOCIAL SECURITY ADMINISTRATION,
NORTHEASTERN PROGRAM SERVICE CENTER

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Howard M. Golob filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The parties submitted to arbitration the issue of whether the suspension of the grievant for 10 workdays was for just cause. The arbitrator determined that the Activity failed to comply with a specific requirement of the parties' collective bargaining agreement by failing to place all records relied on for the suspension in the grievant's personnel file. For that reason he determined that the suspension was not for just cause. The arbitrator directed the suspension be rescinded and the grievant be reimbursed for all losses caused by the suspension.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award is contrary to 5 U.S.C. § 7503(a).[1] Specifically, the Agency argues that the award is deficient because the arbitrator failed to make the finding, alleged by the Agency to be required by section 7503, that the violation of the agreement constituted "harmful error" and because the arbitrator applied a standard of "just cause" rather than the statutory standard of section 7503(a) of "such cause as will promote the efficiency of the service."

B. Analysis and Conclusions

The Authority concludes that this exception provides no basis for finding the award deficient under the Statute. Contrary to the argument of the Agency, the harmful-error rule as it pertains to disciplinary actions applies only to the more serious adverse actions enumerated in section 7512[2] that are taken under section 7513; the rule does not apply to the actions enumerated in section 7502 that are taken under section 7503. See 5 U.S.C. §§ 7701(a), (c)(2)(A), 7121(e)(2); National Treasury Employees Union and Internal Revenue Service, 17 FLRA 1058 (1985). Thus, the arbitrator was not required by section 7503(a) to find that the violation of the parties' agreement by the Activity constituted harmful error, and his failure to do so accordingly provides no basis for finding the award contrary to law as alleged by the Agency.

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[1] Section 7503(a) pertinently provides:

> Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service . . . .

[2] 5 U.S.C. § 7512 applies to a removal, a suspension for more than 14 days, a reduction-in-grade, a reduction-in-pay, and a furlough of 30 days or less.

We turn next to the Agency's contention that the award is contrary to section 7503(a) because the arbitrator applied a standard of "just cause" rather than the statutory standard of "such cause as will promote the efficiency of the service" in reaching his decision on this grievance. At the outset it should be noted that section 7503(a) and section 7513 prescribe that a disciplinary or adverse action may be taken "only for such cause as will promote the efficiency of the service." Further, an implementing regulation provides that an agency may only suspend an employee for such cause as will promote the efficiency of the service. 5 C.F.R. § 752.202(a) (1985). The parties in this case had negotiated a provision in their collective bargaining agreement that provided:

> Article 23
> Disciplinary and Adverse Actions
> Section 1 - Statement of Purpose and Policy
>
> The parties agree that the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of progressive discipline designed primarily to correct and improve employees. Bargaining unit employees will be subject of disciplinary or adverse action only for just cause.

Moreover, the arbitrator stated that the "parties agree that the following questions, as proposed by the [arbitrator] are to be answered:

> Was the suspension of John Murphy on June 4 through June 15, 1984 for just cause? If not, what shall the remedy be?

The question for our determination is whether the arbitrator's application of the negotiated standard of "just cause" in the circumstances of this case was contrary to the statutory and regulatory requirement that an agency may only suspend an employee for such cause as will promote the efficiency of the service.

The Agency argues that because the arbitrator applied the "just cause" standard to which the Agency had previously agreed, both in its collective bargaining agreement and in the issue submitted to arbitration, the award is fatally flawed and must be set aside. The Agency contends that the award is so flawed because the arbitrator may not set aside the suspension absent a specific finding that it "did not promote the efficiency of the service."

We reject this argument. When the parties agreed to Article 23, Section 1, they incorporated the language of the statutory standard into their agreement. The phrase "just cause" which also appears in that same provision, and as interpreted and applied by the arbitrator herein, constituted the parties' capsulation of that statutory standard. Thus, the Authority concludes that when the arbitrator expressly found a violation of a mandatory procedural requirement of the parties' collective bargaining agreement by the Activity in arriving at its decision to suspend the grievant, and as a result, rescinded the suspension as not for just cause, this effectively constituted an affirmative finding by the arbitrator that the grievant's suspension was not for such cause as will promote the efficiency of the service.

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Agency contends that the award of backpay to the grievant is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that there is no clear and unambiguous finding by the arbitrator that the unjustified or unwarranted personnel action by the Activity of violating the provision of the collective bargaining agreement relating to records in the grievant's personnel file directly resulted in the grievant's loss of pay, allowances, or differentials. Thus, the Agency argues that the backpay is not authorized because it is not established, as required by the Back Pay Act, that but for the violation of the agreement, the grievant would not have been suspended.

B. Analysis and Conclusions

The Authority concludes that this exception fails to establish that the award is deficient, as alleged. With respect to the Back Pay Act, the Authority has uniformly stated that in order for an award of backpay to be authorized by the Act, the arbitrator must find that an agency personnel action with respect to the grievant was unjustified or unwarranted, that such unjustified or unwarranted personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, and that but for such action, the grievant otherwise would not have suffered such withdrawal or reduction of pay, allowances, or differentials. E.g., U.S. Army Aberdeen Proving Ground and Local 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, 19 FLRA No. 35 (1985). However, because the Agency has misapprehended the personnel action in dispute, no basis is provided for finding the award contrary to the Back Pay Act. The issue submitted to arbitration was whether the suspension of the grievant was for just cause as required by the parties' collective bargaining agreement. As his award, the arbitrator expressly determined that the suspension was not for just cause, expressly ordered the suspension rescinded, and expressly directed that the grievant be reimbursed for all losses caused by the suspension. Thus, the personnel action in dispute as pertaining to the arbitrator's award of backpay was the Activity's suspension of the grievant for 10 workdays. With the arbitrator expressly determining that the suspension was not for just cause as required by the agreement, the personnel action of the grievant's suspension was rendered an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *See* *Robinson v. Department of the Army*, MSPB Docket No. SF07528310135 (June 12, 1984). With the arbitrator directing that the grievant be reimbursed for all losses caused by the unwarranted suspension, this effectively constitutes the finding, required by the Back Pay Act and the decisions of the Authority, that but for the unwarranted suspension, the grievant would not have suffered a withdrawal or reduction of his pay allowances, or differentials. *National Labor Relations Board Union, Local 19 and Office of the General Counsel, National Labor Relations Board*, 7 FLRA 21, 26 (1981).

V. DECISION

Accordingly, for these reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., June 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

because the Agency has not provided [illegible] for finding the award conflicts with the Back Pay Act. The issue submitted to arbitration was whether the suspension of the grievant was for just cause as required by the parties' collective bargaining agreement. In his award, the arbitrator expressly determined that the suspension was not for just cause, expressly ordered the suspension rescinded, and expressly directed that the grievant be reimbursed for all losses caused by the suspension. Thus, the personnel action in dispute [illegible] was the suspension of the grievant for 10 workdays. With the arbitrator expressly determining that the suspension was not for just cause as required by the agreement, the personnel action of the grievant's suspension was rendered an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. See *Sonners v. Department of the Army*, MSPB Docket No. SF07528310135 [illegible] (1984). With the arbitrator directing that the grievant be reimbursed for all losses caused by the unwarranted suspension, [illegible] required by the Back Pay Act and the decisions of the Authority. [illegible] unwarranted suspension, the grievant would not have suffered a withdrawal or reduction of his pay, allowances, or differentials. [illegible] National Labor Relations Board, [illegible]

V. Decision

Accordingly, for the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1012

Union

and

Case No. 0-AR-1125

VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Julius J. Manson filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.*/

Issued, Washington, D.C., June 13, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ To the extent that the Union's exceptions constitute a request that the Authority enforce compliance with the Arbitrator's award. The Union is reminded that the Authority has consistently held that the unfair labor practice procedures of the Statute are the appropriate procedures for resolution of disputes concerning compliance with and enforcement of arbitration awards. *Social and Rehabilitation Service, Department of Health, Education, and Welfare and American Federation of Government Employees, Local 41, AFL-CIO*, 12 FLRA 257, 259 (1983).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1843

Union

and

Case No. 0-AR-1131

VETERANS ADMINISTRATION MEDICAL
CENTER, NORTHPORT, NEW YORK

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Theodore H. Lang filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., June 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PENSACOLA COMMISSARY STORE COMPLEX,
NAVAL AIR STATION

Activity

and

Case No. 0-AR-1132

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator James E. Fulford filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., June 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. PANAMA CANAL COMMISSION

Agency

and

Case No. 0-AR-1134

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
PANAMA CANAL PILOTS BRANCH

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Joseph M. Sharnoff filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., June 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case no. 373

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 373 REPORT OF CASE DECISIONS July 2, 1986

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 20 (June 23, 1986)

United States Army Adjutant General Publications Center, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 2761, Case No. 7-CA-40064

22 FLRA No. 22 (June 24, 1986)

National Treasury Employees Union and NTEU Chapter 229 and Department of Health and Human Services, Office of the Secretary, Headquarters, Case No. 3-CO-40029

22 FLRA No. 24 (June 25, 1986)

Internal Revenue Service, Philadelphia District Office and National Treasury Employees Union, Chapter 22, Case No. 2-CA-50267

22 FLRA No. 25 (June 25, 1986)

Office of the General Counsel, National Labor Relations Board and National Labor Relations Board Union, Case No. 3-CA-40176

22 FLRA No. 26 (June 25, 1986)

Department of Health and Human Services and Social Security Administration and American Federation of Government Employees, AFL-CIO, Case No. 9-CA-40337

NEGOTIABILITY CASE

22 FLRA No. 23 (June 24, 1986)

Antilles Consolidated Education Association and Antilles Consolidated School System, Case No. 0-NC-784

Y3.F31/21-3:

ARBITRATION CASE

22 FLRA No. 21 (June 23, 1986)

Puget Sound Naval Shipyard and Bremerton Metal Trades Council, Navy Yard Lodge 290 (Beck, Arbitrator), Case No. 0-AR-1153

22 FLRA No. 20

Federal Labor Relations Authority

U.S. Army Adjutant General
Publications Center, St.
Louis, Mo. and AFGE, Local
2761, Case No. 7-CA-40064
(Decided June 23, 1986),

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7116(a)(1), (5) & (8)
Procedure	7118
Finality of Award	7121(f)
Enforcement of Award	7122(a) and (b)

Arbitration
  Procedure
    Finality of Award
  Enforcement of Award
    § 7121(f) Matters in ULP Proceedings
Jurisdiction of the Authority
  Enforcement of Final Arbitration Awards re § 7121(f) Matters
Unfair Labor Practice
  Agency Violations
    Interfere, Coerce or Restrain
      Refusal to Comply with Arbitration Award
  Procedure
    Noncompliance with Award Concerning §§ 4303 &
    7512 Matters within Authority's Jurisdiction

DIGEST NOTES

The Authority has jurisdiction to review in an unfair labor practice proceeding the alleged noncompliance with an arbitration award involving a § 7121(f) subject matter (termination, for example) where it would not have jurisdiction under § 7122 to review the substance of the award. The statutory limitations on review of awards relating to § 7121(f) only extend to substantive review of such awards; when an arbitration award is final, the Authority may review compliance with the award without reference to the substance of the award.

Having resolved the threshold jurisdictional issue, the Authority found that the activity's refusal to comply with a final arbitration award interfered with, restrained and coerced bargaining unit employees in the exercise of their rights established under the Statute, in violation of § 7116(a)(1). The arbitrator had set aside the termination of the union president by the activity for striking a supervisor. The arbitrator also refused to respond to the activity's request for a clarification of the award and to consider what lesser penalty other than removal, if any, should be imposed on the grievant. Since this matter comes under the provisions of § 7121(f), agencies adversely affected or aggrieved by the arbitrator's award are not entitled to obtain judicial review. However, 5 U.S.C. § 7703(d) provides that the Director of the Office of Personnel Management may seek to obtain review. But the Director of OPM did not file a timely appeal for judicial review of the arbitrator's award and it became final and binding. Nevertheless, the activity suspended the union president for 60 days for the conduct that had originally led to his termination.

Federal
Labor Relations
Authority

22 FLRA No. 21

Puget Sound Naval Shipyard and Bremerton Metal Trades Council, Navy Yard Lodge 290 (Beck, Arbitrator), Case No. 0-AR-1153 (Decided June 23, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Procedure
    - Timeliness
      - Date Mailed vs. Date Received
      - National Office vs. Regional Office Filing

STATUTE

7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with §§ 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The union misfiled its exceptions with a regional office of the Authority rather than filing the exceptions with the Authority's national office. Also, contrary to the union's position, the period for filing exceptions to the arbitrator's award began on the date it was served on the filing party, that is, deposited in the mail (see § 2429.27(d) of the Authority's rules and regulations), and not on the date the award was received by that party.

READEX FICHE best copy available

22 FLRA No. 22

Federal Labor Relations Authority

NTEU and NTEU, Chapter 229 and HHS, Office of the Secretary, HQ, Case No. 3-CO-40029 (Decided June 24, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(b)(1) and (8)
Union Violations	7114(a)(1)
Interfere, Coerce or Restrain	7118
Union Statement re Discrimination b/t Members vs Nonmembers re Attorney Assistance in MSPB Appeals	
Otherwise Refuse to Comply	
§ 7114(a)(1)	

DIGEST NOTES

A statement that attorney assistance for unit employees filing and/or pursuing appeals to MSPB would only be provided to members of the union violates § 7116(b)(1). The statement was made by the local union, with the assistance of the national union, in a bulletin published on the national union's letterhead and then posted. The bulletin was issued in order to publicize the unions' efforts to dissuade management's plan to separate certain unit employees. No unit employee was later subjected to a RIF pursuant to management's program; while the national union gave advice to unit employees, they were not asked whether they were union members.

The Authority found that the statement in the bulletin, in all circumstances, created the impression that nonmember unit employees seeking union assistance would not be afforded the same standard of representation as members. Therefore, because the clear implication that nonmember unit employees would not receive the same level of assistance or standard of representation from the union as members reasonably tended to interfere with the protected right of employees under § 7102 to refrain from joining a labor organization, the Authority concluded, in agreement with the Judge, that the union violated the Statute. However, the Authority, contrary to the Judge, concluded that by posting the above statement the national union did not fail to comply with the requirements of § 7114(a)(1) to represent the interests of all unit employees without discrimination and without regard to labor organization membership, and thus did not violate § 7116(a)(8). In this regard, the Authority noted that the General Counsel did not assert--and the record did not establish--that the national union implemented a policy of discrimination subsequent to the posting of the bulletin, or that nonmember unit employees were ever denied the assistance of an attorney in connection with MSPB appeals. On the contrary, the record shows that any unit employee who requested advice or assistance was provided with such assistance without regard to membership in the union, although no unit employee subsequently filed an appeal with MSPB.

The Authority also adopted the Judge's finding that since the local union was acting only in a ministerial capacity, a separate violation can not be found.

22 FLRA No. 23

Federal Labor Relations Authority

Antilles Consolidated Education Association and Antilles Consolidated School System, Case No. 0-NG-784 (Decided June 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Inappropriate for Authority to Pass on Compelling Need
      - Where Outside Authority Is Not Inconsistent with Proposal
  - Conditions for Review
    - Proposal Inconsistent with Law
      - Puerto Rico Laws Annotated Tit. 13 § 6019 (1976)
      - 24 U.S.C. § 34
      - 24 U.S.C. § 35
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Access to Retail, Recreational and Medical Facilities
    - Non-Work Activities in Non-Duty Status
      - Access to Retail, Recreational and Medical Facilities
  - Duty to Bargain
    - Provide Representatives Who Are Empowered to Bargain

STATUTE

7103(a)(12) and (14)
7105(a)(2)(D) and (E)
7106
7114
7114(b)(2)
7117

DIGEST NOTES

A proposal that would give employees of the Federal school system in Puerto Rico access to retail, recreational and medical facilities during non-duty hours does not relate to the work situation or employment relationship of bargaining unit employees. For a proposal to be negotiable, it must relate to "conditions of employment" as defined in § 7103(a)(14). Basic factors involving "conditions of employment" are the proposal's relevance to bargaining unit employees and the proposal's effect on working conditions of those employees. Since there is not a direct connection between the proposal and the employees' work situation or employment relationship, the proposal does not concern working conditions of bargaining unit employees and, therefore, is outside the duty to bargain.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

An agency may not foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level within the agency different from the organizational level of recognition. Rather, under § 7114(b)(2), an agency is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the statutorily prescribed scope of negotiations.

It is inappropriate for the Authority to pass on the compelling need of a proposal where the parties did not address the issue of the apparent consistency between DOD Directive 1400.6 and the proposal, where the agency alleged that the DOD Directive (an outside authority within the meaning of the Authority's rules and regulations) required the agency's regulation barring negotiations on the proposal.

A proposal that would permit employees of the Federal school system in Puerto Rico to patronize on-post retail liquor stores is not inconsistent with Puerto Rico Laws [see Puerto Rico Laws Annotated tit. 13 § 6019 (1976)]. (part D of proposal)

A proposal that would permit employees of the Federal school system in Puerto Rico to use the local Navy hospital on a paid basis is inconsistent with 24 U.S.C. §§ 34 and 35. (part E of proposal)

22 FLRA No. 24

Federal Labor Relations Authority

IRS, Phila. District Office and NTEU, Chapter 22, Case No. 2-CA-50267 (Decided June 25, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Contract Execution
  - Procedure
    - Time Limits
      - Filing of a Charge

STATUTE

7116(a)(1) and (5)
7114(b)(5)
7118(a)(4)(A)

DIGEST NOTES

The Authority adopted the Judge's decision that an agency did not breach its duty imposed under § 7114(b)(5) when it failed or refused to execute an agreement regarding alternative work schedules (AWS) that had been negotiated with the union for bargaining unit employees in two work sections, the Data Services Staff (DSS) and Automated Collection Systems Branch (ACS).

Under § 7114(b)(5) an obligation is imposed upon an agency to execute an agreement reached with the exclusive representative. The statutory language of that section makes it clear that an imposition is placed upon a party to sign a document provided that an agreement is reached after negotiations thereon.

While a proposed agreement regarding AWS for the DSS section was drafted by the union stemming from the prior negotiations and submitted to management, management had continued to express doubts regarding the adaptability of AWS for the computer operators within that section. The Judge determined that the sentiment that all "seemed to be okay" expressed by management to the union concerning the status of the agreement, at most, indicated that there was a misunderstanding between the parties. The Judge found further that apart from the fact that the proposed terms were not initialed, the parties had not signified to each other that the dispute regarding the computer operators had been resolved. The Judge concluded, therefore, that no final agreement had been reached regarding AWS for the

DSS unit and, thus, the agency's refusal or failure to sign an agreement thereon was not violative of § 7116(a)(1) and (5).

In respect to the General Counsel's allegation that the agency was required to execute an agreement reached between the parties concerning AWS for the ACS section, management had stated at various bargaining sessions with the union that AWS for that unit would be part and parcel of an agreement embracing other conditions of employment concerning the ACS section. During these negotiations, the parties resolved all issues except three which were never resolved. Although a document, based upon mutually agreed-upon terms concerning AWS for the ACS section, was drafted and submitted by management to the union, management had indicated that there would be no separate agreement made regarding AWS for that section, but, rather, as previously noted, one completed agreement covering all the terms and conditions for the unit. In these circumstances, the Judge concluded the agency did not breach the duty imposed upon it under § 7114(b)(5) by failing or refusing to sign the agreement embodying AWS for the ACS unit.

The Judge rejected the agency's contention that the charge, upon which the complaint is based, was filed more than six months after March, 1984, the date that the alleged violation took place. The Judge found that the significant date for filing the charge herein was March 20, 1985, the date that the agency refused to execute the AWS agreement for ACS. Since the charge was filed within one month thereafter, it was timely filed under § 7118(a)(4)(A).

22 FLRA No. 25

Office of the General
Counsel, NLRB and NLRB
Union, Case No. 3-CA-40176
(Decided June 25, 1986)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1) and (5)
Agency Violations	7118
Refusal to Negotiate	7131(a)

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Mid-Term Bargaining
        Reopener Provision Not Exercised
      Travel and Per Diem Expenses
  Collective Bargaining Agreement
    Reopener Provision
      Based on Modification of Law by FLRA or Courts
  Remedy
    Make Whole Union and Employees for
      Travel and Per Diem Expenses
    Nationwide Posting of Remedial Notice Appropriate
5 U.S.C. §§ 5701 et seq. [Travel Expense Act]

DIGEST NOTES

The agency violated § 7116(a)(1) and (5) when it unilaterally discontinued all payments for travel and per diem expenses. Both the parties' prior agreement which continued in effect pending negotiations of a new agreement and a memorandum of understanding between the parties provided for payment of travel and per diem expenses on official time. However, the agreement provided "[i]n the event the FLRA or a court modifies the existing law, this Article will be reopened upon the request of either party regarding the employees['] entitlement to travel, per diem and other benefits." Following the U.S. Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), in which the Court found that § 7131 does not entitle employees on official time to the payment of travel and per diem expenses, the agency unilaterally discontinued such payments without requesting to reopen contract negotiations as required by the parties' agreement.

Subsequent to the Supreme Court's decisions, the Authority found that authorization of payment for travel and per diem expenses to be within the duty to bargain. Agencies have discretion under the Travel Expense Act, 5 U.S.C. § 5701 et seq., and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. Further, that determination would have to be made on a case-by-case basis. Thus, when the agency unilaterally terminated payment of travel and per diem expenses, it rejected the parties' agreement and violated § 7116(a)(1) and (5).

A nationwide posting of the remedial notice is appropriate for a § 7116(a)(1) and (5) violation where the agency unilaterally terminated payment of travel and per diem expenses for employees on official time. The union represents two nationwide units of agency employees, professional and nonprofessional, and therefore the agency's conduct in unilaterally repudiating provisions in the agreements covering the employees in those units can be effectively remedied only by an order which requires the posting of the remedial notices wherever the affected employees in such units are situated.

22 FLRA No. 26

Federal Labor Relations Authority

HHS and SSA and AFGE, Case No. 9-CA-40337 (Decided June 25, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Compliance with Award
      - Difficult and Complex Case Requiring a Year to Comply
    - Enforcement
      - Involving Matters Covered Under 5 U.S.C. § 4303
  - Remedy
    - Backpay
    - Reinstate Grievant
- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply with the Statute
      - § 7122(b)
  - Enforcement
    - Arbitration Award not Enforced
      - Difficult and Complex Case Requiring a Year to Comply

STATUTE

7103(a)(3) and (4)
7112
7116(a)(1) and (8)
7118(a)(7) and (8)
7121(f)
7122(b)

DIGEST NOTES

The agency did not violate § 7122(b), § 7116(a)(1) and (8) by taking more than a year to comply with an arbitration award in which compliance involved unusual, difficult and complex circumstances. The Authority noted particularly the Judge's findings, with which it agreed, that the agency fully complied with the arbitrator's award and did not engage in any dilatory tactics in implementing the award. The arbitration award was bifurcated, with the initial award coming five months before the final award. In the preliminary award, the grievant was found not to have been performing her job adequately at the time of her termination; but she was ordered reinstated without backpay whereas the final award included backpay. The agency promptly complied with the only portion of the arbitration award with a clear time frame -- receiving pay at the grievant's GS-7 rate beginning the Monday following the receipt of the preliminary opinion and award. The agency accomplished this by giving the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

grievant a temporary appointment, which was the most expeditious method available to comply with the award. The rest of the award concerned the restoration of pay and perquisites, with no indication of a time frame within which the agency was to act. Following reinstatement of the grievant, the agency had to resolve indisputably difficult, complex matters of restoring all perquisites and back pay over a period of several years, some of which involved a temporary appointment and leave without pay status.

The Authority has jurisdiction to order compliance with an arbitrator's final award in an unfair labor practice proceeding although the arbitrator's award may involve a matter under 5 U.S.C. § 4303 for which judicial review, if sought, would be governed by the provisions of § 7121(f). (footnote *)

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22 FLRA No. 20

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY
ADJUTANT GENERAL PUBLICATIONS
CENTER, ST. LOUIS, MISSOURI

Respondent

and

Case No. 7-CA-40064

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2761

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties who have agreed that no material issue of fact exists. The General Counsel filed a brief for the Authority's consideration.

The complaint alleges that the Respondent, the United States Army, Adjutant General Publications Center, St. Louis, Missouri, violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with an arbitration award which resolved a grievance filed under the terms of the negotiated grievance procedure between the Respondent and the American Federation of Government Employees, AFL-CIO, Local 2761 (the Union). The arbitrator's award dealt with the termination of the Union president. This case raises a question which has not been addressed previously by the Authority--whether the Authority has jurisdiction to review in an unfair labor practice proceeding the alleged noncompliance with an arbitration award involving a section 7121(f) subject matter (a termination), where it would not have jurisdiction under section 7122 of the Statute to review the substance of the award.

II. Facts

A grievance over the termination of Union president Dominic J. Licavoli by the Respondent for striking a supervisor was filed pursuant to the parties' negotiated grievance procedure and the matter was eventually submitted to arbitration. On August 5, 1983, Arbitrator Peter J. Maniscalco issued his decision and award setting aside Licavoli's termination on the ground that he had been provoked. On August 25, 1983, the Respondent sent the Arbitrator a letter requesting that he clarify his award. Specifically, the Respondent asked the Arbitrator to "reconsider your arbitration decision and modify your decision to consider what lesser penalty other than removal, if any, should be imposed upon the grievant." The Arbitrator responded in a letter dated August 30, 1983, in which he explained that he ". . . did consider the possibility of mitigation but I did not grant that, due to the fact that I felt this was a case where provocation was present and therefore, to have imposed any penalty would have been unjust." Notwithstanding the above, on October 17, 1983, the Respondent informed Licavoli that he was to be suspended for 60 days for the conduct that had originally led to his termination.

III. Positions of the Parties[1]

The General Counsel argues that the Respondent failed to comply with the Arbitrator's award when it informed Licavoli that he would be suspended for 60 days despite the Arbitrator's decision rejecting the imposition of any disciplinary action. Further, citing Authority precedent, the General Counsel argues that the Authority has jurisdiction to review an agency's noncompliance with an arbitrator's award involving an adverse action under 5 U.S.C. § 7512 when, as here, the agency has refused to comply with that award and has not sought to appeal it through the appropriate statutory procedures.

IV. Analysis

A. Statutory scheme for review under section 7122(a)

Under section 7122(a) of the Statute, either party to arbitration may file exceptions with the Authority to an arbitrator's award other than an award relating to a matter described in section 7121(f).[2] If a party fails or refuses to comply with an arbitrator's award following the Authority's denial of exceptions filed under section 7122(a), or if no timely exceptions to such award are filed but either party thereafter fails or refuses to comply with the award, the Authority will find that such conduct constituted an unfair labor practice. In such cases, the Authority has found that the party is failing to comply with the provisions of section 7122(b)[3] in violation of section 7116(a)(1) and (8) of the Statute.[4/] Department of Health and Human Services, Region II, 15 FLRA 710 (1984); United States Marshals Service, 13 FLRA 351 (1983), enforced sub nom. United States Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985); United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151 (1981), affirmed sub nom. Department of the Air Force, et al. v. FLRA, 775 F.2d 727 (6th Cir. 1985); and U.S. Department of Justice and Department of Justice Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA No. 5 (1985), enforced sub nom. U.S. Department of Justice and Department of Justice, Bureau of Prisons, et al. v. FLRA, Nos. 85-4167 and 85-4179 (2nd Cir. May 30, 1986).

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[1] The Respondent did not file a brief for the Authority's consideration.

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[2] Section 7121(f) of the Statute provides:

> § 7121. Grievance procedures
>
> . . . .
>
> (f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

[3] Section 7122(b) provides:

> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

B. Statutory scheme for review under section 7121(f)

Where the arbitrator's award involves a matter covered by section 7121(f), such as a termination, the Respondent is precluded by section 7122(a) of the Statute from filing exceptions to the award with the Authority.[5/] Under

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4/ Section 7116 provides in pertinent part:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

5/ See, for example, National Weather Service Employees Organization (MEBA, AFL-CIO) and National Weather Service, Western Region, 17 FLRA 622 (1985); U.S. Army Missile Command, Redstone Arsenal, Alabama and American Federation of Government Employees, AFL-CIO, Local Union 1858, 17 FLRA 377 (1985); and National Treasury Employees Union, Chapter 12 and Internal Revenue Service, Birmingham District, 17 FLRA 358 (1985).

section 7121(e) of the Statute,[6] matters involving adverse actions pursuant to section 7512 of title 5 of the United States Code may be raised under the appellate procedures of the Merit Systems Protection Board (MSPB) or under the parties' negotiated grievance procedure if such matters have not been excluded. Where, as here, the latter avenue is pursued and the matter eventually goes to arbitration, the arbitrator is to be governed by section 7701(c)(1) of title 5, United States Code, pertaining to the appellate procedures of MSPB. In addition, section 7121(f) of the Statute states that section 7703, which deals with judicial review of final MSPB decisions, also applies to arbitration awards pertaining to matters covered under sections 4303 and 7512. The courts have accepted review of an arbitrator's decision under section 7121(f).[7] Thus, it appears clear that matters covered by sections 7512 and 4303 were set off from other arbitration issues to assure conformity between arbitrators and the MSPB. In the House-Senate Conference Report No. 95-1717, October 5, 1978, the Conferees adopted the Senate's bill requiring arbitrators to "follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board . . . in order to promote consistency in the resolution of these issues, and to avoid forum shopping."[8]

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[6] Section 7121(e)(1) and (2) of the Statute provides:

> § 7121. Grievance procedures
>
> . . . .
>
> (e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.
>
> (2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

Pursuant to this framework for judicial review set forth in section 7121(f) and section 7703, agencies adversely affected or aggrieved by the arbitrator's award in these matters are not entitled to obtain judicial review. However, section 7703(d) provides that the Director of the Office of Personnel Management (OPM) may seek to obtain review "if the Director determines, in his discretion, that the Board [or arbitrator] erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's [or arbitrator's] decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." Where OPM seeks review, the granting of the petition is at the discretion of the U.S. Court of Appeals for the Federal Circuit.[9] In the instant case, only the Director of OPM and not the Respondent, as the employing agency, was entitled to seek judicial review. The courts have held "that the Director of the OPM loses his right to appeal final orders or decisions of the MSPB and arbitrators unless he files a petition for review within thirty days of the time he is put on notice of those decisions." Devine v. White, 697 F.2d 421, 430 (D.C. Cir. 1983). Since such a petition for review was not filed within the statutory time limit in this case (section 7703(b)(1)), the award must be considered final and binding and the only remaining issue here is whether the Authority has jurisdiction over matters of compliance with the award.

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[7] See, for example, Devine v. Levin, 739 F.2d 1567 (Fed. Cir. 1984); Devine v. Brisco, 733 F.2d 867 (Fed. Cir. 1984); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983); and Devine v. White, 697 F.2d 421 (D.C. Cir. 1983).

[8] Conference Report on S. 2640, Civil Service Reform Act of 1978, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2860, 2891.

[9] Civil Service Reform Act, 5 U.S.C. §§ 7703(b)(1) and 7703(d) (1982 & Supp. II 1984).

C. Compliance

As previously noted by the Authority, Congress has established a mechanism for challenging the propriety of arbitration awards covered by section 7122(a) of the Statute. In applying section 7122(b), where no exceptions have been filed, the Authority has held that it will not review the substance of the arbitrator's award in the unfair labor practice proceeding, but will find that noncompliance with the award is a violation. See Wright-Patterson Air Force Base, and United States Marshals Service, cited previously. If, under section 7122(b), a party fails to file exceptions during the 30 day period following the award, such award becomes final and binding and the Authority will not review the merits of the award in a subsequent unfair labor practice proceeding. The Authority stated that to allow for such a review would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards. See also Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina, 15 FLRA 686 (1984).

While it is clear that the Authority does not have jurisdiction to review exceptions to an arbitrator's award falling within section 7121(f) of the Statute, the question of jurisdiction over matters of compliance with such an award in an unfair labor practice proceeding has not been previously addressed by the Authority. However, like the Authority's decisions under section 7122(b) of the Statute, it seems clear that a final and binding arbitration award in an employee's favor relating to any of the matters covered by section 4303 or section 7512 could be enforced through the unfair labor practice procedures of the Statute without reference to the merits of the award. In the Authority's view, once such an award has become final and binding, regardless of the subject matter, the Authority's review concerning matters of compliance in an unfair labor practice proceeding without reference to the substance of the award does not conflict with Congressional intent or the specific statutory procedures for review as to the merits of the award. The Authority notes that there is no indication in the Statute or its legislative history that awards which involve section 7121(f) matters, once they have become final, are any less binding than awards under section 7122(b) which are reviewable by the Authority. Indeed, the Conferees supported the finality of arbitration awards. In this regard, as stated by the Committee on Conference in its Report which accompanied the bill ultimately enacted and signed into law:[10]

> The House provides that if no exception to an arbitrator's award is filed with the Authority, the award "shall be final and binding" (section 7122(b)). The Senate contained no comparable provision. The conferees adopted the House provision. The intent of the House in adopting this provision was to make it clear that the awards of arbitrators, _when they become final_, are not subject to further review by any other authority or administrative body, including the Comptroller General. [Emphasis added.]

Moreover, even though the first sentence of section 7122(b) refers to a failure to file an exception under subsection (a) which subsection specifically excludes section 7121(f) matters, there is no indication given the statutory scheme that the second sentence, "[a]n agency shall take the actions required by an arbitrator's final award," should not appropriately apply also to those awards that become final by reference to other law such as 5 U.S.C. § 7703(d). In other words, once an award becomes final and binding, any substantive differences or differences in review forum become meaningless.

Thus, in the Authority's view, the statutory limitations on review of awards relating to section 7121(f) only extend to substantive review of such awards and, where an arbitration award is final, Authority review of compliance with the award without reference to the substance of the award does not conflict with the concerns expressly stated by Congress. Therefore, the Authority finds, in the circumstances of this case, that inasmuch as the award in question became final and binding when no timely appeal was filed by the Director of OPM under section 7703(d) of title

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[10] Conference Report on S. 2640, _supra_ note 8, at 158.

5, United States Code, and review of compliance would not involve a determination concerning the merits of the award, the Authority has jurisdiction to order compliance with the arbitrator's award in this unfair labor practice proceeding.

Having resolved the threshold jurisdictional issue, the Authority further finds that the Respondent's refusal to comply with Arbitrator Maniscalco's award dated August 5, 1983, interferes with, restrains and coerces bargaining unit employees in the exercise of their rights established under the Statute, in violation of section 7116(a)(1).[11] In this regard, the Authority notes that it is well established that an employee's right to file and process grievances under a collective bargaining agreement is protected activity within the meaning of section 7102 of the Statute,[12] and that management's actions which tend to interfere with or restrain the exercise of such rights constitutes unlawful interference in violation of section 7116(a)(1) of the Statute. Social Security Administration, Baltimore, Maryland, 18 FLRA No. 33 (1985); Internal Revenue Service and Brooklyn District Office, 6 FLRA 642 (1981); United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980). Thus, an agency's failure to comply with an arbitrator's award would, in effect, prevent an employee from exercising such protected activity and constitute an unlawful interference with an employee's right to pursue a grievance in violation of section 7116(a)(1) of the Statute.

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[11] The General Counsel failed to allege a section 7116(a)(8) violation in the complaint, and therefore we do not decide whether the Respondent also committed such a violation. Further, in view of the above conclusion, the Authority finds it unnecessary to pass upon whether the Respondent also violated section 7116(a)(5) of the Statute.

[12] Section 7102 provides in pertinent part:

> § 7102. Employees' rights
>
> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.

V. Conclusion

The Authority has considered all of the facts and circumstances of this case, including the positions of the parties, and concludes as noted above that the Respondent violated section 7116(a)(1) of the Statute by refusing to comply with Arbitrator Maniscalco's award dated August 5, 1983.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Army, Adjutant General Publications Center, St. Louis, Missouri shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement Arbitrator Peter J. Maniscalco's arbitration award rendered on August 5, 1983 by imposing a 60 day suspension on Dominic J. Licavoli for the conduct that the Arbitrator found was provoked and for which no penalty should have been imposed.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator Peter J. Maniscalco's August 5, 1983 arbitration award by revoking the 60 day suspension leveled against Dominic J. Licavoli for the conduct that the Arbitrator found was provoked and for which no penalty should have been imposed.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the United States Army Adjutant General Publications Center, St. Louis, Missouri, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., June 23, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to fully implement Arbitrator Peter J. Maniscalco's August 5, 1983 arbitration award by imposing a 60 day suspension on Dominic J. Licavoli for the conduct that the Arbitrator found was provoked and for which no penalty should have been imposed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL fully comply with Arbitrator Peter J. Maniscalco's August 5, 1983 arbitration award by revoking the 60 day suspension leveled against Dominic J. Licavoli for the conduct that the Arbitrator found was provoked and for which no penalty should have been imposed.

____
(Agency or Activity)

Dated:__________________ By:____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region VII, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

22 FLRA No. 21

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PUGET SOUND NAVAL SHIPYARD

Activity

and

Case No. 0-AR-1153

BREMERTON METAL TRADES COUNCIL
NAVY YARD LODGE 290

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Michael H. Beck filed by the Union pursuant to section 7122(a) of the Federal Service Labor Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award, statement of fees and expenses, and cover letter are dated April 9, 1986, and, in the absence of evidence to the contrary, appear to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,1/ and section 2425.1 of the Authority's Rules and Regulations, as amended,2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on May 13, 1986. However, the Union misfiled its exceptions with the Authority's San Francisco Regional Office on May 13, 1986. Although forwarded by the Regional Office that same day, the exceptions were not filed with the Authority at its national office in Washington, D.C., until May 19, 1986.

On its copy of the Arbitrator's award, the Union highlighted that it did not receive the award until April 22, 1986. Nevertheless, as the period for filing exceptions to the Arbitrator's award began on the date it was served on the filing party, that is, deposited in the mail (see section 2429.27(d) of the Authority's Rules and Regulations), and not on the date the award was received by that party, the Union's exceptions were untimely filed.

Accordingly, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 23, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

22 FLRA No. 22

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 229

Respondent

and

Case No. 3-CO-40029

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF THE SECRETARY, HEADQUARTERS

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent. The complaint alleged that the Respondent, National Treasury Employees Union (NTEU) and NTEU Chapter 229 violated section 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to comply with section 7114(a)(1) of the Statute. The alleged violation is that NTEU promulgated a policy to provide attorneys to represent employees in appeals before the Merit Systems Protection Board (MSPB) based on whether or not such employees were Union members. The complaint also alleged that the Respondent violated these same sections of the Statute when it disseminated a newsletter entitled "RIF Bulletin #3" in which it stated that attorney assistance for unit employees filing and/or pursuing appeals to the MSPB would only be provided to members of the Respondent. The issue before the Authority is whether the Judge properly found that Respondent NTEU violated section 7116(b)(1) and (8) of the Statute.

II. Facts

During the period between June 1983, when NTEU was chosen to replace the incumbent exclusive representative by certain nonprofessional employees of the Charging Party, Department of Health and Human Services, Office of the Secretary, Headquarters (HHS), and June 1984, when NTEU was certified, HHS developed a plan regarding the Office of the Secretary which would have required a RIF affecting certain unit employees. Before NTEU was certified as the exclusive representative, it began to respond to management's proposal in several ways in order to try to dissuade HHS from separating employees. In order to publicize these efforts and get more employee support, NTEU Chapter 229, with the help and advice of NTEU's Assistant Counsel, issued a series of special bulletins which provided information on how employees could prepare for and oppose the impending RIF. Bulletins one, two, and four were published on the letterhead of the local chapter, while RIF Bulletin #3, the bulletin at issue, was published on NTEU letterhead. Bulletins one and two were issued prior to NTEU's certification, while three and four were issued after certification. Prior to the issuance of RIF Bulletin #3, NTEU's Assistant Counsel learned that a member was not aware that the Union was available to handle Merit Systems Protection Board (MSPB) appeals. Therefore, during her review of the bulletin, the Assistant Counsel added the following paragraph at the end of the bulletin, and under the heading, "If A RIF Occurs":

> The attorney assigned to NTEU Chapter 229 will be available to provide legal advice and/or assistance in filing and/or pursuing MSPB appeals to members of NTEU Chapter 229. There is no extra fee for such assistance. Your union dues will cover such legal assistance. (Emphasis in original.)

No unit employee was later subjected to a RIF pursuant to HHS' streamlining program; while NTEU gave advice to unit employees, they were not asked whether they were NTEU members. During the hearing, counsel for the General Counsel clarified his position by stating that the allegations contained in the complaint related only to the publication and dissemination of RIF Bulletin #3, and that he was not now alleging that Respondent implemented the policy.

In a sworn statement filed after the hearing, upon the agreement of the parties, the President of NTEU stated that it was NTEU's position that it is not required by law to provide representation to any employee who appeals an action to the MSPB; that NTEU may, at its option, provide representation to some employees before the MSPB; and that NTEU may decide whether or not an employee will be represented based upon membership status with NTEU as well as other factors. This statement is set forth fully on page 6 of the Judge's Decision.

III. The Judge's Decision

The Judge found that Respondent NTEU violated section 7116(b)(1) and (8) of the Statute by publishing a statement which continued a policy of considering union membership as a factor in determining whether to furnish an attorney to unit employees in appeals before the MSPB.[1] In this regard the Judge found that NTEU's current policy is the same as that announced by NTEU's former president in September 1979 to the effect that NTEU would continue a policy, in effect before enactment of the Statute, of not furnishing attorneys to represent nonmembers while furnishing attorneys to represent members. The Judge concluded that it did not matter that the statement of policy in RIF Bulletin #3 had not been implemented, since the Authority will find a violation when the statement reflects an established policy of discrimination.

IV. Positions of the Parties

In its exceptions to the Judge's Decision, NTEU argued, essentially, that the statement contained in RIF Bulletin #3 did not constitute a policy statement of the national union; that implementation of a discriminatory policy is necessary before a violation of section 7116(b)(8) of the Statute can occur; and that it had no obligation under section 7114(a)(1) of the Statute to provide attorneys to represent nonmembers in MSPB appeals.

V. Analysis

The Authority finds that the statement in RIF Bulletin #3, in all the circumstances, created the impression that nonmember unit employees seeking NTEU's assistance would not be afforded the same standard of representation as members. Therefore, the statement constituted a violation of section 7116(b)(1) of the Statute because the clear implication that nonmember unit employees would not receive the same level of assistance or standard of representation from the Respondent as members reasonably tended to interfere with the protected right of employees under section 7102 of the Statute to refrain from joining a labor organization.[2/]

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[1] The Judge found that NTEU Chapter 229 had acted only in a ministerial capacity. This is consistent with the position of the General Counsel and the Respondent taken during the hearing, and is not at issue before the Authority. See National Treasury Employees Union and National Treasury Employees Union Chapter 121, 16 FLRA 717, 718 (1984), petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 85-1053 (D.C. Cir., Jan. 25, 1985).

However, contrary to the Judge, the Authority concludes that by posting the above statement the Respondent did not fail to comply with the requirements of section 7114(a)(1) of the Statute to represent the interests of all unit employees without discrimination and without regard to labor organization membership, and thus did not violate section 7116(b)(8) of the Statute.[3/] In this regard, the Authority notes that the General Counsel does not assert--and the record does not establish--that the Respondent implemented a policy of discrimination subsequent to the posting of "RIF Bulletin #3," or that nonmember unit employees were ever denied the assistance of an attorney in connection with MSPB appeals. On the contrary, the Respondent presented unrebutted evidence that any unit employee who requested advice or assistance was provided with such assistance without regard to membership in the Union, although no unit employee subsequently filed an appeal with the MSPB.[4/]

[2/] *American Federation of Government Employees, AFL-CIO, Local 916*, 18 FLRA No. 2 (1985), *petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 916 v. FLRA*, No. 85-2011 (10th Cir., July 10, 1985); *National Treasury Employees Union and National Treasury Employees Union Chapter 121*, 16 FLRA 717 (1984), *supra*; and *National Treasury Employees Union*, 10 FLRA 519 (1982), *aff'd*, 721 F.2d 1402 (D.C. Cir. 1983).

[3/] Section 7114(a)(1) provides, in pertinent part:

> § 7114. *Representation rights and duties*
>
> (a)(1) . . . An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

[4/] *See American Federation of Government Employees, Local 1778, AFL-CIO*, 10 FLRA 346 (1982), in which the Authority *specifically* declined to affirm the Judge's findings that the union Respondent had violated section 7116(b)(8) by failing to comply with section 7114(a)(1) of the Statute since the record failed to establish that there was disparate treatment in the representation of nonmembers by the union.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommendations only to the extent consistent with this decision.

The Authority shall dismiss that portion of the complaint which alleges that the Respondent did not comply with section 7114(a)(1) of the Statute and thereby violated section 7116(b)(8) of the Statute, and shall find only that Respondent's conduct constituted an independent violation of section 7116(b)(1) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Treasury Employees Union shall:

1. Cease and desist from:

(a) Creating the impression that the National Treasury Employees Union will afford differing standards of employee representation with respect to appeals to the Merit Systems Protection Board (MSPB) by employees in units of exclusive recognition on the basis of whether such employees are members of the National Treasury Employees Union.

(b) Interfering with, restraining, or coercing unit employees in the exercise of their right to refrain from joining, freely and without fear of penalty or reprisal, the National Treasury Employees Union or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Provide clear notice to all nonmember unit employees seeking representation by their exclusive representative that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts, including representing them on appeals to the Merit Systems Protection Board, on the same basis as it supplies attorneys to members.

(b) Post at its Chapter 229 local office and at its normal meeting places, and at all places where notices to members and other employees of the Department of Health and Human Services, Office of the Secretary, Headquarters are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the president of the National Treasury Employees Union, or a designee, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the section 7116(b)(8) allegations of the complaint be, and they hereby are, dismissed.

Issued, Washington, D.C., June 24, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 22]

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT create the impression that the National Treasury Employees Union will afford differing standards of employee representation with respect to appeals to the Merit Systems Protection Board (MSPB) by employees in units of exclusive recognition on the basis of whether such employees are members of the National Treasury Employees Union.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their right to refrain from joining, freely and without fear of penalty or reprisal, the National Treasury Employees Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL provide clear notice to all nonmember unit employees seeking representation from their exclusive representative that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts, including representing them on appeals to the Merit Systems Protection Board, on the same basis as it supplies attorneys to members.

____
(Labor Organization)

Dated:________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 - 18th Street, N.W., Room 700 (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[22 FLRA No. 22]

OALJ 85-101

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

NATIONAL TREASURY EMPLOYEES UNION
and NTEU CHAPTER 229,

Respondent

and

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, OFFICE OF THE SECRETARY
HEADQUARTERS,

Charging Party

Case No.: 3-CO-40029

. . . .

Sharyn Danch and
Betty A. Ginsburg,
For the Respondent

Erica F. Cooper
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of an unfair labor practice filed on August 2, 1984, and amended on October 17, the Regional Director of Region III of the Federal Labor Relations Authority (hereinafter, the Authority) investigated the charge and, on November 28, 1984, served the complaint initiating this action.

The complaint alleges that, in or about July 1984, Respondent "promulgated a policy wherein the decision to provide attorneys employed by Respondent to represent employees included in the units [for which Respondent is certified as exclusive, collective-bargaining representative], in appeals before the Merit Systems Protection Board, is based solely upon whether such employees are members of Respondent." See paragraph 6 of G.C. Exh. 1(e).[1] In answer, Respondent replied that it had "insufficient information to admit or deny this allegation at this time." See paragraph 6 to G.C. Exh. 1(f).

The complaint further alleges that, in or about July 1984, Respondent "disseminated to employees included in the unit . . ., at the Agency's Washington, D.C. location a newsletter dated July 1984 and entitled 'RIF Bulletin #3' which stated, inter alia, that attorney assistance from Respondent for bargaining unit employees filing and/or pursuing appeals to the Merit Systems Protection Board would only be provided to members of Respondent." See paragraph 7 of G.C. Exh. 1(e). Respondent admits this allegation. See paragraph 7 to G.C. Exh. 1(g).

Respondent denies that by such alleged acts and conduct it has failed and refused to comply with sections 7102 and 7114(a)(1) of the Statute or thereby violated section 7116(b)(1) and (8) of the Statute, as alleged in the complaint.[2]

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[1] "G.C. Exh." refers to the exhibits of the General Counsel. Other abbreviations to be used herein are as follows. "R. Exh." refers to the exhibits of Respondent and "Jt. Exh." to the joint exhibits. "Tr." refers to the transcript. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondent.

Corrections to the transcript are attached hereto and are made pursuant to 5 C.F.R. 2423.19(r).

[2] These statutory provisions are as follows:

Section 7102 concerns "Employees' rights" and provides, in pertinent part, that:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.

Section 7114(a)(1) provides that:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective

(continued)

A hearing was held on February 5, 1985, in Washington, D.C. The General Counsel and Respondent entered appearances and a Stipulation of Facts (Jt. Exh. 1); introduced documentary evidence; and examined witnesses. At the hearing, it was agreed that Respondent could offer into evidence a statement by its President. This statement has been received and marked as Respondent's Exhibit 4. Briefs were filed by Respondent on March 6 and by the General Counsel on March 7. Based upon the record evidence, my observation of the demeanor of witnesses, and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact

1. It is admitted that, at all times material herein, Respondent has been and is now a labor organization and the Charging Party (also referred to herein as "DHHS") has been and is now an agency, within the meaning of section 7103(a)(4) and (3), respectively, of the Statute.

2. It is also admitted that Respondent has been, since May or June, 1984, and is now certified as the exclusive collective bargaining representative of a unit of the Charging Party's non-professional General Schedule and Wage Grade employees, and a unit of professional employees, all located in the Washington, D.C. metropolitan area, and with certain exceptions not here relevant. These unit employees predominately work in the DHHS North Building, the Hubert S. Humphrey Building, and the Mary Switzer Building.

3. The National Treasury Employees Union ("NTEU") was elected the exclusive representative of approximately 1300-1500 non-professional,

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(continued)

> bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 7116 delineates "Unfair labor practices" and Section 7116(b) provides, in pertinent part, that: "it shall be an unfair labor practice for a labor organization -

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . or
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

bargaining-unit employees at DHHS in June 1983. The incumbent union filed a challenge to the election, thereby delaying NTEU's certification. This challenge ultimately was resolved in favor of NTEU. In October 1983, some 300 professional employees of DHHS elected NTEU as their exclusive representative in a separate, unchallenged election.

4. Patricia Randle, Assistant Counsel for NTEU's National Office, was assigned to work with these DHHS employees, designated Chapter 229, in June 1983. She is supervised by Sharyn Danch, who is National Counsel for NTEU. As an employee of the national office, the duties of Ms. Randle include recruitment, representation, and organizing at the local level. Her responsibilities at DHHS include organizing the employees for collective action, recruiting members, and representing employees and the chapter in bargaining and in administrative proceedings.

5. During the period between the election for the large non-professional unit, in June 1983, and its certification in May or June 1984, NTEU was not the exclusive representative of this unit. NTEU was active on its behalf, however. Ms. Randle found the unit employees to be confused about the role of the two unions. Conversations with unit employees led her to believe that they were upset that the incumbent union had failed to provide an attorney for pending appeals before the Merit Systems Protection Board ("MSPB") during a reduction-in-force ("RIF"), and that many of them had gone out, on their own, and hired an attorney. In addition, the professional unit, which elected NTEU as its representative in October 1983, had never previously been represented; and unit employees were unaware of their rights and the benefits of having an exclusive representative. Since she was not able to represent the non-professional unit in matters relating to collective bargaining, Ms. Randle concentrated her efforts on providing information, such as advising employees of their statutory rights; educating them on relevant rules, regulations and procedures; and keeping them apprised of NTEU's legislative efforts.

5a. During this interim, pre-certification period, DHHS developed a program for "streamlining" the Office of the Secretary which required a RIF affecting bargaining unit employees. See Tr. 14, 29-30. Employees affected by a RIF have appeal rights to the MSPB.

5b. NTEU responded with several actions designed to dissuade the Agency from separating employees, including lobbying efforts in Congress, local petition drives, and talks with DHHS. In order to publicize these efforts, inform the bargaining unit of their progress, and get more employees involved, Chapter 229, with the help and advice of Ms. Randle, issued a series of "Special Bulletins" to all employees. The first one, entitled "Special Bulletin #1," was issued March 26, 1984, and detailed the plan of action. Three more (designated Bulletins, 2, 3, and 4) were issued as the RIF threat continued through April, July, and August 1984. Each of these bulletins provided updates on the progress of the RIF negotiations, explanations of relevant employee rights, directions for aiding the lobbying effort, and other specific information on how employees could prepare for and oppose the impending RIF.

5c. Prior to the issuance of RIF Bulletin #3, in July of 1984, Ms. Randle learned that a member of NTEU did not know that Ms. Randle, an attorney, was available to employees for handling MSPB appeals. The prior union had not provided attorney assistance. Therefore, during her review of RIF Bulletin #3, she added the following paragraph at the end and under a heading, "If A RIF Occurs":

> The attorney assigned to NTEU Chapter 229 will be available to provide legal advice and/or assistance in filing and/or pursuing MSPB appeals to members of NTEU Chapter 229. There is no extra fee for such assistance. Your union dues will cover such legal assistance.

See Jt. Exh. 1(a) emphasis as in the bulletin. The third bulletin was published on NTEU letterhead. The first, second and fourth bulletins were published on the letterhead of the local chapter. RIF Bulletin #3 was observed by management on an employee bulletin board in the North Building, where it normally would remain for about two weeks. This same bulletin was also observed by management in the Humphrey Building.

5d. No unit employee complained to DHHS regarding RIF Bulletin #3.

5e. No unit employee was made subject to a RIF pursuant to the streamlining program.

6. DHHS reached and signed an agreement with NTEU on July 31, 1984. The agreement has 33 sections, one of which (section 20) states that: "This agreement shall not be construed to deny any employee any right of appeal he/she may have to the Merit Systems Protection Board." See G.C. Exh. 2. Another (section 27(B)9) provides that RIF notices must contain information as to "the employee's grievance or appeal rights."

7. Throughout the interim period described in finding 5, above, and since the NTEU certification at DHHS, no MSPB appeals have been filed by Chapter 229 of NTEU. Ms. Randle has given advice, through Chapter 229's Chief Steward, to unit employees and has not questioned whether they were NTEU members. The Chief Steward, who was not identified as an attorney, has helped a lot of unit employees, regardless of NTEU membership. The Chief Steward is still in a "learning process" (Tr. 54). She was told by Ms. Randle that nonmembers of NTEU have the same rights as members, including "representation before MSPB" (Tr. 56).

8. Ms. Randle cannot herself make policy for NTEU. She has been with NTEU since 1981 and knows that a former NTEU president, Vincent Connery, had a policy that attorney assistance would be provided to NTEU members. She has read an Authority decision concerning this matter, 16 FLRA No. 102. She is unaware of any pronouncement by NTEU's national office that NTEU policy has changed, on the issue. The present NTEU President, Robert Tobias, "has not expressly stated what N.T.E.U.'s policy is," to her knowledge (Tr. 42). She has represented nonmembers of NTEU before the MSPB and before the Equal Employment Opportunity Commission.

9. In a sworn statement filed after the hearing, upon the agreement of the parties (Tr. 50), the present President of NTEU states:

> My name is Robert M. Tobias. I am the National President of the National Treasury Employees Union. In this position, I may establish and disseminate NTEU's national policy on various issues including the nature and scope of representation provided to employees within bargaining units for which NTEU is the exclusive representative.
>
> The current representational policy of the National Treasury Employees Union ("NTEU") with regard to appeals to the Merit Systems Protection Board ("MSPB") for employees within such bargaining units may be summarized as follows:
>
> NTEU is not required by law to provide representation to any employee who appeals an action to the MSPB. NTEU may, at its option, provide representation to some employees before the MSPB, and may make its decision on whether or not an employee will be represented on the basis of membership status with NTEU as well as other factors.
>
> I hereby solemnly swear and affirm that the foregoing is true and correct.

Counsel for the General Counsel did not file a motion to reopen the hearing to cross-examine Mr. Tobias, a right which was accorded. See Tr. 50.

10. During the hearing, the position of the General Counsel was clarified, as follows:

> The General Counsel's position on this case, and the allegations contained in the complaint relate only to the publication and posting or dissemination of RIF #3. We do not allege that Respondent has implemented the policy.

See Tr. 35.

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,[3] that Respondent has engaged in unfair labor practices, in violation of 5 U.S.C. § 7116(b)(1) and (8), by publishing a statement, in July 1984, which continued an established policy of considering union membership as a factor in determining whether to furnish an attorney to a unit employee in appeals before the Merit Systems Protection Board.

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[3] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

This conclusion is compelled by Authority decisions in National Treasury Employees Union and National Treasury Employees Union Chapter 121, 16 FLRA 717 (Dec. 4, 1984, hereinafter referred to as "NTEU Chapter 121") petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 85-1053 (D.C. Cir., Jan. 25, 1985); National Treasury Employees Union, 10 FLRA 519 (1982), enforced sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 721 F.2d 1402 (D.C. Cir 1983, hereinafter "NTEU") and American Federation of Government Workers, AFL-CIO, Local 916, 18 FLRA No. 2 (May 14, 1985, hereinafter "AFGE Local 916"). Each of these cases holds, inter alia, that the Statute does not allow a union to distinguish between members and nonmembers in providing assistance of attorneys, including attorneys to prosecute appeals before the Merit Systems Protection Board.

See also the recent case of American Federation of Government Employees, AFL-CIO, 17 FLRA 446 (1985, hereinafter "AFGE"), involving a union charging nonmembers disparate fees to participate in a class action suit under the Back Pay Act, and holding that:

> The duty of fair representation imposed by the Statute is not restricted to those proceedings under the sole control of the exclusive representative as a consequence of its certification. Rather, when an exclusive representative decides to represent unit employees in any matter which affects their conditions of employment, it has the duty under sections 7114 of the Statute to represent unit employees fairly, and may not discriminate with regard to that representation on the basis of union membership.

See 17 FLRA at 447.

See also the recent case in National Treasury Employees Union Chapter 204, 18 FLRA No. 36 (May 24, 1985, hereinafter "NTEU Chapter 204") holding it to be an unfair labor practice for NTEU to establish different schedules for members and nonmembers to telephone the union president to ascertain whether they were on an agency list of employees tentatively eligible to receive cash rewards. The Authority inferred that NTEU obtained the list from the agency by virtue of its status as the employees' exclusive representative and acted in that capacity in disseminating the information.

I am unpersuaded that the NTEU and NTEU Chapter 121 cases an be validly distinguished, as Respondent argues. See R. Br. 15-20. While the July 1984 statement here at issue does not flatly state a "members only" policy, it clearly creates that impression. And, in answering the complaint, Respondent concedes as much. See paragraph 7 of the answer and complaint in G.C. Exh. 1(e) and (g).

While here the July 1984 statement was not implemented, this apparently is not considered significant by the Authority, when the statement reflects an established policy of discrimination. See footnote 4 to page 15 of the decision of Administrative Law William B. Devaney, which the Authority affirmed in AFGE, Local 916, 18 FLRA No. 2. Judge Devaney distinguishes, on this basis, American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA No. 62, 10 FLRA 346 (1982), upon which Respondent here relies. See R. Br. 19-20.

Respondent argues that the July 1984 statement is not an established policy of discrimination, but, rather, "an entirely different policy" that that articulated in NTEU and NTEU Chapter 121. Those cases both involve a September 7, 1979 statement promulgated by NTEU's past National President, Vincent Connery, to the effect that NTEU would continue a policy, in effect before enactment of the Statute, of not furnishing attorneys to represent nonmembers while furnishing attorneys to represent members. See 10 FLRA at 520 and 527 and 16 FLRA at 728. NTEU is currently defending its September 9, 1979 policy before the United States Court of Appeals for the District of Columbia in No. 85-1053. NTEU has apparently never advised its staff that any different policy is in effect. See finding 8, above. And this policy was affirmed by a sworn statement made by the current President for NTEU for this record. See R. Exh. 4, set forth in finding 9 above, which is a statement by President Robert Tobias that NTEU "may, at its option, provide representation to some employees before the MSPB, and may make its decision on whether or not an employee will be represented on the basis of membership status with NTEU as well as other factors." There is no basic difference discernible between this statement of policy and that involved in NTEU and NTEU Chapter 121. See 10 FLRA at 527 and 16 FLRA at 728.

Respondent argues that RIF Bulletin #3, and the statement therein referring to legal representation available to NTEU members, did not constitute a policy statement by NTEU because Ms. Randle wrote it and she could not state with certainty what the national policy was. See R. Br. 5-8. It is undisputed, however, that Ms. Randle is a national officer sent to a pledging chapter to assist it; that she knew that NTEU policy had been to provide legal assistance to members and, from her admitted reading of NTEU Chapter 121, must have known that nonmembers were provided such assistance only on an optional basis. See 16 FLRA at 727. It is also undisputed that RIF Bulletin #3 was posted on NTEU letterhead, in contrast to the other three union bulletins issued on the RIF, which went out on letterhead of Chapter 229. See finding 5c, above. Under these circumstances, Respondent cannot disavow RIF Bulletin #3 as stating national policy.

The fact that NTEU's Assistant Counsel, Ms. Randle, has not questioned the union membership of unit employees seeking her help does not save the day for Respondent. As already explained, the Authority does not require proof of implementation where a statement of an established, discriminatory policy is involved. Obviously, the statement itself tends to serve to screen out nonmembers from soliciting her help. See the testimony given by Ms. Randle's supervisor, NTEU Associate Counsel Sharyn Danch, in NTEU, to the effect that she never questioned union status is rendering assistance to unit employees because she "assume[d] that cases referred to [her were] cases involving a member [of NTEU]" (10 FLRA at 532, finding 4).

Respondent also distinguishes NTEU on the basis of the court's ruling in that case that a union may not provide attorneys only to members where the representation "pertains directly to enforcement of the fruits of collective bargaining." See R. Br. 17, arguing that the policy involved here is "outside" the fruits of collective bargaining. The Authority, however, views the yardstick of fair representation as applicable to any matter "which affects [the unit employees'] conditions of employment." See AFGE, 17 FLRA at 447. Appeal rights pursuant to a RIF would surely be a condition of employment. But, in any event, Respondent did, through collective bargaining, obtain for unit employees the "fruit" of having RIF notices contain information as to employees' appeal rights. See finding 6, above. Appeal rights lead to the MSPB, which leads to the need of representation by an attorney.

The Remedy

The General Counsel takes the position, consistent with the Authority's decision in NTEU Chapter 121, 16 FLRA at 718, that Chapter 229 here involved performed only a ministerial function, and seeks no remedy against it. See G.C. Br. 8. Respondent concurs. See R. Br. 20. On the basis of the record made in this case, so do I.

As to the national union, a broad cease and desist order similar to that entered in NTEU Chapter 121, 16 FLRA at 719-720 is deemed appropriate here and for the same reasons expressed by the Authority in that case.

Ultimate Findings and Recommended Order

Respondent has engaged in unfair labor practices, in violation of section 7116(b)(1) and (8) of the Statute.

Accordingly, and pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Treasury Employees Union shall:

1. Cease and desist from:

(a) Affording differing standards of employee representation to employees in units of exclusive recognition on the basis of whether such employees are members of the National Treasury Employees Union.

(b) Interfering with, restraining, or coercing unit employees in the exercise of their right to refrain from joining, freely and without fear or penalty or reprisal, the National Treasury Employees Union or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) National Treasury Employees Union, by its President, shall forthwith notify all national office officials, including its legal staff, and each Chapter President, in writing, that the National Treasury Employees Union's policy has changed; that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts on the same basis as its supplies attorneys to members to help in representational efforts including representing them on appeals to the Merit Systems Protective Board; and that the prior policy to the contrary is hereby withdrawn and rescinded.

(b) National Treasury Employees Union will represent the interests of all employees in units where it holds exclusive recognition without discrimination and without regard to labor organization membership.

(c) Post at its national headquarters, at the local business office of each of its chapters, and at each agency or activity, including but not limited to Department of the Health and Human Services, Office of the Secretary, Headquarters, for which the National Treasury Employees Union, and/or any chapter of the National Treasury Employees Union holds exclusive recognition, and at all places where notices to members and other employees are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the National Treasury Employees Union and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and other employees are customarily posted. The National Treasury Employees Union shall take reasonable steps to insure that such Notices are not altered, defaced or covered by any other material.

(d) Submit appropriate signed copies of such Notices to the Department of Health and Human Services, Office of the Secretary, Headquarters, Washington, D.C.; and, upon request, to an appropriate officer of each other agency or activity for which the National Treasury Employees Union and/or any chapter of the National Treasury Employees Union holds exclusive recognition, for posting in conspicuous places where the respective unit employees are located, where that shall be maintained for a period of 60 consecutive days from the date of posting.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: June 24, 1985
Washington, DC

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT afford differing standards of employee representation to employees in units of exclusive recognition on the basis of whether such employees are members of the National Treasury Employees Union.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their right to refrain from joining, freely and without fear or penalty or reprisal, the National Treasury Employees Union or any other labor organization.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce unit employees in the exercise of their rights assured Statute.

WE HEREBY NOTIFY all members and all employees in all units in which we hold exclusive recognition that the National Treasury Employees Union's policy has changed; that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts on the same basis as it supplies attorneys to members including representing them on appeals to the Merit Systems Protection Board; and that the previous policy to the contrary is rescinded.

WE WILL represent all employees in units where we hold exclusive recognition without discrimination and without regard to labor organization membership.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, NW., Room 700, P.O. Box 33758, Washington, DC 20033-0758 and whose telephone number is: (202) 653-8452.

[22 FLRA No. 23]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION

Union

and

ANTILLES CONSOLIDATED
SCHOOL SYSTEM

Agency

Case No. O-NG-784

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), concerning the negotiability of one five-part Union proposal.

II. Union Proposal

Article 36. BASE/POST PRIVILEGES

1. All unit employees will be granted the use of the following base/post facilities:

   A. Base/Post Exchanges at the site to which the employee is assigned.

   B. All retail food outlets operated by the Navy Exchange, AAFES, or Coast Guard Exchange at the site to which the employee is assigned, or

   C. Access to the nearest exchange system and its retail food outlets in any case in which an employee is assigned to a site at which the facilities described in subsection A and B are not operated.

D. Base/post/station/fort special services recreation and morale support facilities at the site to which the employee is assigned.

E. Hospital facilities on a paid basis.

A. Position of the Parties

The Agency asserts that the proposal is nonnegotiable for four reasons: (1) it does not concern matters affecting working conditions of bargaining unit employees, within the meaning of section 7103(a)(14) of the Statute; (2) the Agency is without authority to bargain over the proposed benefits; (3) bargaining on the proposal is barred by regulations for which a compelling need exists; (4) negotiation on parts D and E of the proposal is foreclosed by applicable law.

The Union did not provide any arguments in its petition for review supporting the negotiability of the proposal, nor did it file a reply brief.

We will examine the Agency's contentions, in turn.

B. Analysis

1. Conditions of Employment of Bargaining Unit Employees

Under the statutory scheme established by sections 7103(a)(12), 7106, 7114 and 7117 a matter proposed to be bargained which is consistent with Federal law, including the Statute, Government-wide regulations or agency regulations is, nonetheless, outside the duty to bargain unless such matter directly affects the conditions of employment of bargaining unit employees. The term "conditions of employment" is defined in section 7103(a)(14) as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions . . . ."

In deciding whether a proposal involves a condition of employment of bargaining unit employees the Authority considers two basic factors:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

For example, as to the first factor, the question of whether the proposal pertains to bargaining unit employees, a proposal which is principally focused on nonbargaining unit positions or employees does not directly affect the work situation or employment relationship of bargaining unit employees. *See National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida*, 3 FLRA 88 (1980) *aff'd sub nom. National Federation of Federal Employees v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981) (Proposal requiring management to designate a particular number of representatives to negotiations was held to be outside the duty to bargain). But, a proposal which is principally focused on bargaining unit positions or employees and which is otherwise consistent with applicable laws and regulations is not rendered nonnegotiable merely because it also would have some impact on employees outside the bargaining unit. *See Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard*, 14 FLRA 38 (1982) (Union Proposal 1 defining the competitive area for reduction-in-force as coextensive with the bargaining unit was held to be within the duty to bargain even though it had an impact on nonbargaining unit employees).

Part 1 of the Appendix to this decision references other Authority decisions concerning the nature and extent of the affect of a proposal on bargaining unit employees.

As to the second factor, relating to the effect of a proposal on working conditions, the question is whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. For example, a proposal concerning off-duty hour activities of employees was found to be outside the duty to bargain where no such connection was established. *See International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California*, 7 FLRA 123 (1981) (Proposal to permit employees to utilize on-base recreational facilities during off-duty hours found not to concern personnel policies, practices, or matters affecting working conditions of bargaining unit employees).

On the other hand, a proposal concerning off-duty hour activities of employees was held to affect working conditions of bargaining unit employees where the requisite connection was established. National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980) (Proposal to revise the agency's "ration control" policy was found to concern standards of health and decency which were conditions of employment under agency regulations).

Part 2 of the Appendix to this decision references other Authority decisions concerning the nature and effect of a proposal on bargaining unit employees' working conditions.

Applying the first factor to the disputed proposal we find that the proposal expressly pertains only to bargaining unit employees. No claim is made that the proposal has any impact on nonbargaining unit employees. However, we must also assess the nature and effect of the proposal on bargaining unit employees' working conditions under the second factor. Here the Agency argues without contravention that access to the retail, recreational and medical facilities denoted in the proposal would occur primarily during the employees' non-duty hours. Further, the Union has provided no evidence, whatever, and the record does not otherwise establish that access to the facilities in question is in any manner related to the work situation or employment relationship or is otherwise linked to the employees' assignments within the school system in Puerto Rico. As a result we find the disputed proposal is to the same effect as the proposal permitting employees to use on-base recreational facilities during off-duty hours found outside the agency's obligation to bargain in Vandenberg Air Force Base, 7 FLRA 123 (1981). Thus, the disputed proposal also does not directly affect working conditions of bargaining unit employees and is outside the Agency's obligation to bargain.

2. Matters within the Agency's Authority to Bargain

It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion, that is, except as provided otherwise by Federal law including the Statute, or by Government-wide rule or regulation or by an agency regulation for which a compelling need exists. For example, see National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982).

It is also well established that an agency may not foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level within the agency different from the organizational level of recognition. Rather, under section 7114(b)(2) of the Statute, an agency is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the statutorily prescribed scope of negotiations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) (Union Proposal 1). Thus, the Agency's claim that the Superintendent of the Department of Navy Antilles School System is without authority to bargain on access to Navy retail, recreational or medical facilities because such facilities are in separate chains of command within the Department of Navy from the school system cannot be sustained. See American Federation of Government Employees, AFL-CIO, Local 1409 and U.S. Adjutant General Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985). Similarly, the Agency's argument that the Superintendent is without authority to bargain on access to Army facilities which are under the jurisdiction of a separate subdivision of DOD also cannot be sustained. See Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984).

As to Coast Guard facilities, there is nothing in the record in this case which indicates that the Agency lacks the discretion to at least request the Department of Transportation to extend access to such Coast Guard facilities to Antilles School System employees. Thus, the Agency is obligated to bargain on access to Coast Guard facilities to this extent. See American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Union Proposals XI-XVI), enf'd sub nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983).

3. Compelling Need

The Agency has argued that a compelling need exists for certain of its regulations to bar civilian employee access to the retail and recreational facilities in Puerto Rico. We note, however, an apparent inconsistency between this argument and DOD Directive 1400.6 which could be interpreted to permit access to such facilities by the employees in

Puerto Rico. Neither party in this case addressed this specific question or otherwise discussed the effect of DOD Directive 1400.6 on civilian employees in Puerto Rico. Therefore, we consider it inappropriate, based on the record in this case, to pass on the compelling need issue raised by the Agency.

4. Consistency with law of Parts D and E of the Proposal

a. Part D of the Proposal

According to the record this part of the proposal would permit the Antilles School System employees to patronize on-post retail liquor stores. While the Agency's claims that Puerto Rico law precludes the sale of Commonwealth tax-free alcoholic beverages to these civilian employees we find such claim unsupported in the record. That is, the DOD regulations, which were included in the record by the Agency, specifically permit patronage of on-post retail liquor stores by other categories of persons, such as dependents of military personnel, who, like the civilian employees in this case, are not expressly listed as exempt under the Puerto Rico Statute. *See* Puerto Rico Laws Annotated tit. 13 § 6019 (1976). Thus, we do not find that the Agency has established that Part D of the proposal is inconsistent with law.

b. Part E of the Proposal

Part E of the proposal would permit employees to use the local Navy hospital on a paid basis. However, under 24 U.S.C. § 34 Federal employees located outside the continental limits of the United States and in Alaska may receive medical care at a naval hospital only "where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals." Also, under 24 U.S.C. § 35, such employees may be hospitalized in a naval hospital "only for acute medical and surgical conditions . . . ." Since Part E of the proposal contains no limitations on access to the local naval hospital, it is inconsistent with the express statutory provisions governing such access.

C. Conclusion

The Authority finds, for the reasons set forth in the preceding analysis, that the entire proposal in this case concerns matters which are not conditions of employment of bargaining unit employees. Consequently, it is not within the duty to bargain although the Agency could negotiate on the proposal if it chose to do so, except for Part E.

Further, the Authority concludes that as Part E of the proposal is inconsistent with Federal law, it is outside the scope of the duty to bargain pursuant to section 7117(a)(1) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., June 24, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

Part 1

The following cases involve examples of proposals found outside the duty to bargain because of the impact on individuals or positions outside the bargaining unit.

National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., 3 FLRA 290 (1980) (Proposal I establishing the method management will use in filling supervisory and management positions found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980) (Proposal relating to the assessment and training of supervisors found not to affect working conditions of bargaining unit employees).

National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Proposal VI requiring management to notify individuals who telephone the agency for tax information that such calls are subject to monitoring found not to affect working conditions of bargaining unit employees).

National Association of Government Employees, Local R7-23 and Headquarters, 375th Air Base Group, Scott Air Force Base, Illinois, 7 FLRA 710 (1982) (Proposal concerning discipline of management officials and supervisors found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982) (The portion of Proposal 5 which required management to prosecute private citizens who file false reports found not to affect working conditions of bargaining unit employees).

Association of Civilian Technicians, State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Proposal 2 concerning procedures for filling military positions found not to affect the working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 FLRA No. 95 (1985) (Proposal 4 prescribing the content of certain management records relating to employees, the manner in which such records are maintained and restrictions on management access to such records found not to affect working conditions of bargaining unit employees).

Part 2

A. The following cases involve examples of proposals found outside the duty to bargain because of the absence of a direct affect on bargaining unit employees' working conditions.

National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Proposal IV permitting employee allotments from pay for "Political Action Fund" to be used in "political efforts to improve working conditions" found to affect working conditions in only a remote and speculative manner).

National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983) (Proposals 3 and 4 requiring management to utilize recycled paper products and to provide the union with such recycled paper products upon request found not to directly affect bargaining unit employees' working conditions as there was no demonstration in the record of any such effect).

Maritime Metal Trades Council and Panama Canal Commission, 17 FLRA 890 (1985) (Proposals 1 and 2 permitting employees to cash personal checks at the agency's treasury found not to directly affect working conditions of bargaining unit employees).

B. The following cases involve examples of proposals found to directly affect working conditions of bargaining unit employees.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal 1), enf'd as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982) (A proposal to establish a union operated day care facility on agency property was found to directly affect bargaining unit employees by enhancing an individual's ability to accept employment or to continue employment with the agency and to promote workforce stability and prevent tardiness and absenteeism).

National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980) (Union Proposal I establishing criteria for approval of outside employment was found to directly affect working conditions of unit employees because agency regulations which set forth policies governing outside employment were determinative of employee eligibility for certain positions and even prescribed whether employees could continue to be employed).

Planners, Estimators and Progressmen Association, Local No. 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 13 FLRA 455 (1983) (A proposal to permit bargaining unit employees to record their time and attendance manually instead of mechanically through use of a time clock found to directly concern working conditions of such employees).

United States Department of Justice, United States Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 2509, 14 FLRA 578 (1984) (Assignment of Government-owned housing to employees was found to directly affect working conditions of bargaining unit employees in circumstances where there was a lack of adequate housing in the geographic area and the Government-owned housing in question was constructed for the benefit and use of employees stationed at the hardship location).

American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Proposal 4 requiring the agency to provide lockers or other secure areas for employees' personal items during working hours found to directly affect working conditions of unit employees).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
PHILADELPHIA DISTRICT OFFICE

Respondent

and

Case No. 2-CA-50267

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 22

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. The General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions, and recommended Order.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-50267 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C. June 25, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

INTERNAL REVENUE SERVICE
PHILADELPHIA DISTRICT OFFICE

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 22

Charging Party

Case No.: 2-CA-50267

David J. Markman, Esquire
For the Respondent

Barbara S. Liggett, Esquire
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

The hearing in the above-entitled case was held before the undersigned on August 5, 1985 at Philadelphia, Pennsylvania. A Complaint and Notice of Hearing was issued on June 28, 1985 by the Regional Director for the Federal Labor Relations Authority, Region II, New York, N.Y.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, et. seq. (herein called the Statute). It is based on a First Amended Charge filed on June 17, 1985 by National Treasury Employees Union, Chapter 22 (herein called the Union) against Internal Revenue Service, Philadelphia District Office (herein called Respondent).

The Complaint alleged, in substance, that the parties negotiated and reached an agreement regarding alternative work schedules for Respondent's Data Services Staff and its Automatic Collection System Branch; that Respondent refused to execute such agreements, all of which constituted a violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer dated July 19, 1985, denied the aforesaid allegations[1] as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has acted as the representative of the National Treasury Employees Union[2] for the purposes of collective bargaining for Respondent's employees, and Respondent has recognized the Union as the bargaining representative of Respondent's employees.

2. A National Agreement between National Treasury Employees Union and Internal Revenue Service became effective by its terms on January 26, 1981 and remained in effect for four years thereafter.

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[1] The Answer admits that from July 1984 through March 1985 the parties negotiated regarding alternative work schedules for unit employees in the Automated Collection System Branch.

[2] National Treasury Employees Union is the exclusive representative of a consolidated nationwide unit of certain employees of Internal Revenue Service, including professional and non-professional employees who are employed in the District, Region and National Offices. No challenge is made to the appropriateness of the unit.

3. Both NTEU and IRS executed a Memorandum of Understanding in November 1982 which established the framework within which local offices and chapters may negotiate agreements re alternative work schedules.

4. Pursuant to the aforesaid Memorandum the Union herein and Respondent executed an agreement on February 25, 1984 providing for alternative work schedules (hereinafter called AWS) for bargaining unit employees. Provision is made therein for flexitour[3] with credit hours[4] and a 5/4-9[5] schedule of work. The said agreement also provides as follows in Section 7(b) thereof:

> This Agreement does not extend to organizational segments implemented after the effective date of this Agreement.[6] AWS for organization segments established after the effective date of this Agreement will be determined at the time of its establishment. (underscoring supplied).

In addition, the procedures set forth in Article 39, Section 3(B) of the National Agreement will apply re notice to the Union when management proposes changes in employment conditions.

5. Subsequent to the AWS agreement pertaining to the District, two new sections were created by Respondent: the Data Services Staff, herein called DSS, and the Automated Collection Systems Branch, herein called ACS. The DSS section takes care of programming for computer operations. The ACS branch was a new system involving the use of

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[3] Flexitour denotes a flexible schedule which an employee may select but must adhere to until an opportunity for change arises.

[4] Credit hours means any hours worked under the work schedule in excess of an employee's work requirement.

[5] Under this schedule employees may work eight (8) nine and one-half (9-1/2) hour tours and one (1) eight and one-half (8-1/2) hour tour with one (1) non-work day within a pay period of ten (10) days. Starting time is 8:00 a.m.

[6] Effective date of this agreement is April 15, 1983.

computers to contact taxpayers and aid in collecting taxes from smaller payers. About 20 individuals (inclusive of managerial staff) comprised DSS, while about 45 are employed in ACS.

6. In a memorandum dated March 29, 1984 Florence Warner, Respondent's Chief of Personnel, advised William H. Walton, Union president, that the DSS had been established; that while the AWS agreement requires that new segments have AWS schedules negotiated as they are established, Respondent does not believe computer operators should participate in AWS. This latter position was based on the fact that these operators will be working set rotating shifts incompatible with either staggered or credit hours. Further, the use of credit hours would pose a problem since only six employees covered 24 hours most of the week.

7. Walton replied to the aforesaid memo by a letter dated April 16, 1984 wherein it was stated that the Union wished to negotiate the substance, impact and implementation of AWS for DSS computer operators. The Union also requested a briefing in order to draft proposals.

8. Following a briefing between the parties, Respondent sent a memorandum dated May 4, 1984 to Walton requesting that specific proposals of the Union re AWS for DSS be submitted by C.O.B. May 9, 1984.

9. By memo dated May 9, 1984 the Union submitted to Respondent its proposals re AWS for the DSS that (a) Computer operators have a compressed schedule of 10-1/2 hours per day for eight days of the biweekly period to complete the basic work requirement of 80 hours; (b) Computer Operators be allowed to exchange shifts and/or days off.

10. Later in that month, Union President Walton met with John Ferraro, Chief of DSS, Mark Hart, a manager in that section, and Judy Jones, personnel specialist. A briefing was held re AWS for the DSS at which time management expressed concern about the computer operators who worked three shifts, and how their schedules would work out.

11. Several short meetings were held in July 1984 regarding the implementation of AWS for DSS, and these were attended by the same individuals, i.e. Walton, Ferraro, Hart

and Jones. Testimony by Walton[7] reflects that while management continued to express concerns re the adaptability of AWS for computer operators, he finally drafted a written instrument covering these concerns. Walton testified that the agreement he drafted (G.C. 9) was written to "go along with what me and the managers came up with;" that it was his "feeling" that the parties came to an agreement in July with regard to AWS for the data services computer operators. Further, Walton testified Judy Jones was to have the agreement typed up and send him a copy. However, she left the agency around July or August and he never received a typewritten or signed copy.

12. The drafted agreement is entitled "Proposed Agreement Regarding Alternative Work Schedules/Staggered Work Hours for the Data Services Staff." It provides, in substance, that bargaining unit employees will be provided the opportunity to work flexitour with credit hours or a 5/4-9 schedule, except those required to work rotating shifts. Further, that computer operators on rotating shifts will be allowed to work a 10 hour day, 4 day work week if all agree to a set schedule and the number of operators does not go below six. Provision is also made, subject to approval, for exchange of shifts between employees.

13. About a month later Walton asked William Wagner, Chief of Labor-Management Relations, about the agreement since he had not received a typewritten copy. Wagner told the Union official to speak with Sandy Coffman, a labor relations specialist for Respondent. Record facts reflect that Walton met with Coffman and asked her about the agreement; that Coffman stated she was not sure of its status but would check with management and get back to him. Walton testified that he later met with Coffman again who "sort of indicated everything seemed to be okay."[8] Further, that Walton assumed Coffman must have obtained approval from management as to AWS for data services.

7/ Neither Ferraro, Hart, nor Judy Jones testified at the hearing.

8/ Coffman denies meeting with Walton or discussing the agreement with him. I credit Walton with respect to his having met with Coffman and the substance of their conversations.

14. Testimony adduced from Coffman reflects that she reviewed the files re AWS for DSS; that notes therein concerning the meeting in July 1984 indicated management would get proposals along with examples of how the 4-10 schedule would work and then the parties would get back together; that no such schedules were submitted to management, and the proposals were deemed incomplete.[9]

15. Walton's testimony reflects that in several discussions with Wagner the latter stated that management was working on the agreement; that it would be signed and sent to him for signature. Wagner testified that he assigned the Union's proposals to Coffman; that he assumed that everything had been worked out, and, in fact, two bargaining unit people were already under AWS. Record facts also show that in April, 1985 Wagner met with Walton; that the management official stated he thought everyone was happy, and he assumed there was an informal resolution of the problem.

16. In December, 1983 NTEU and IRS negotiated an agreement covering ACS implementation at districts throughout IRS (G.C. Exhibit 10). Section 9(a) thereof provides that bargaining over matters relating to AWS would be conducted at the local level, but any agreements re AWS must be consistent with the AWS agreement negotiated at the national level.[10]

17. By memo dated December 5, 1983 R. K. Burgess, Chief, Personnel Branch of Respondent advised Raymond Wolownik, President of the Union herein, that AWS coverage for ACS employees would be handled under Section 7-B of the locally negotiated AWS agreement.[11]

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[9] The record reflects that some proposed schedules were submitted by both parties; that the computer operators had also given management a schedule for certain shiftwork; that the parties continued to discuss working out schedules for the computer operators regarding AWS in the data services section.

[10] The Agreement for ACS also provided that issues re restrictions on food and drink in work areas, office space and furniture placements, rest/break areas and facilities, would be negotiated locally.

[11] This refers to G.C. Exhibit 4.

18. In a letter dated March 23, 1984 Walton advised Respondent's District Director, Charles E. Roddy, that the Union desired to negotiate the implementation of ACS. Included therein were ten proposals by the Union concerning employment conditions for ACS employees. Proposal No. 6 stated:

> "That the hours of work remain generally as they are currently in the Collective Office Branch."12/

19. Respondent replied to the Union in a memo dated April 13, 1984 in which management set forth eight proposals re ACS negotiations along with Interim ACS Office Rules. Item number 6 proposed that "AWS for ACS will be negotiated beginning as soon as possible in October, 1984 to provide experience under the ACS system."

20. Prior to commencement of negotiations re ACS implementation, Respondent's negotiating teams, consisting of Michael Harkins, Chief of Special Procedures, William Cressman, former Chief of ACS, and Judy Jones, met with Jay West, Chief of Collection Division. Record facts disclose that West told the team that he and the District Director made the final decision re any working rules which may be adopted. Further, that the group's authority was limited to "hammering" out tentative agreements which must then be discussed with the Division Chief.

21. The first negotiation session for ACS13/ was held on May 8, 1984. The Union was represented by Al Jones, Vice-President of the Union, Francis Greene, Secretary of the local and steward for the Union, and Raymond Wolownik. Management requested, and the Union agreed, that the parties hold off on AWS negotiations for 60-90 days. Subsequent to the meeting the Union submitted 24 proposals, although the list did not include items concerning AWS for the employees in ACS.

22. Sessions continued thereafter, and the record reflects that meetings were held on May 15 and 30, 1984, as

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12/ The employees thereat were on automated work schedule (AWS).

13/ ACS became operational in Philadelphia on about May 14, 1984.

well as June 12 and July 19, 1984 and August 29, 1984. Management's representatives Harkins, Cressman and Raymond Pfeiffer[14] testified, and I find, that at each meeting in June and July, 1984 it was stated by either Harkins or another official that the alternative work schedule (AWS) for the ACS unit would be part of the entire package or negotiations for that unit. No discussion or agreement was made that a separate agreement would be executed for the AWS, independent of one for the work rules which would govern ACS.[15] I also find that at various meetings representatives of management mentioned that any agreement reached would not be final and binding until signed and approved by the District Director. While Union agent Greene testified no such limitation was stated by management, I credit Harkins and Cressman that the Union agents were told that any agreement reached had to be approved by the Director.

23. The parties continued negotiations for ACS and had resolved all issues except three by January, 1985. With respect to AWS for the new unit the only material dispute concerned starting time. The Union decided to forego its demand for 7:00 a.m. for the start of work, and the parties

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14/ Although not in attendance on May 8, Pfeiffer was present at the meetings held thereafter in May, as well as June 12 and July 19.

15/ Union witnesses Greene and Al Jones testified, in contradiction, that no mention was made of the "package" deal at the 1984 sessions. Greene insists it was not mentioned until March 20, 1985 when Wagner mentioned that there could be no AWS agreement separate and apart from an agreement for the ACS unit. The undersigned is persuaded that management did previously declare that a total agreement must be negotiated, inclusive of an arrangement for the alternative work schedule. Weight is attached to the fact that both Harkins and Pfeiffer made notes of meetings confirming that the Union was apprised of the connection between AWS and other terms applicable to ACS. Moreover, the record reflects no discussion or consent to consider them separate agreements. Although it is true that later in February, 1985 management submitted a "proposed agreement" for AWS in ACS, it was never signed and no date of implementation was specified. Moreover, the subsequent implementation of a few work rules at ACS is not necessarily supportive of the Union's contention in this regard.

agreed to an 8:15 a.m. starting time. Except for minor items as correct spelling and the like, the parties agreed on the alternative work schedule for ACS. The three issues remaining, and which were unresolved, concerned food and drinks at the work place, an electronic bulletin board for employee notices, and radios for employees. In January, 1985 the parties submitted the unresolved issues to the Federal Services Impasse Panel.[16]

24. Record facts disclose that some items, which were agreed to by the parties concerning the ACS unit, were implemented. Thus, a work rule was implemented excluding permanent employees from being required to sign in and out; it was agreed a cork board would be provided and notices must be placed therein and nothing would be hung or taped on walls: that nobody would turn machines on or off unless authorized.[17]

25. On February 21, 1985 the Union received a proposed agreement for AWS in ACS. In March, Sandra Coffman told Greene that the AWS provisions were agreed to, but no commitment was made as to date of implementation. She agreed to bring the AWS items with her to a meeting scheduled for March 20. The proposed agreement (G.C. Exhibit 17) set forth the alternative work schedule provisions but omitted the date for implementation thereof. It also left blank the date when it would become effective. It was also unsigned and not initialed.

26. On March 20, 1985 Greene and two other Union representatives met with Wagner as scheduled. The latter mentioned the three unresolved issues as to ACS. The Union did not agree to the language concerning those items, and it suggested these issues be tabled and that the parties should sign an agreement re AWS. Wagner stated that there would be no AWS agreement in view of the unresolved ACS issues. The remaining three issues in respect to working rules at ACS were never resolved, and the parties continued to negotiate thereon.

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[16] The parties subsequently agreed to continue negotiations on these issues and the submission to the Impasses Panel was withdrawn.

[17] This was not deemed to be a rule about which the parties had to negotiate or change. The parties understood that no employee should tamper with equipment.

Conclusion

The key issues for determination herein are twofold: (1) Whether Respondent violated Section 7116(a)(1) & (5) of the Statute by failing and refusing to execute an agreement re alternative work schedules (AWS) for the Data Services Staff; (2) Whether Respondent violated Section 7116(a)(1) & (5) of the Statute by failing and refusing to execute an agreement re AWS for the Automated Collection System Branch (ACS).

Under Section 7114(b)(5) of the Statute an obligation is imposed upon an agency to execute an agreement reached with the exclusive representative. Thus, the statutory provision in that regard states as follows:

> "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this Section shall include the obligation-
>
> "(5) if agreement is reached, to execute on the request of any party to the negotiation of a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement."

It becomes clear from the foregoing statutory language that an imposition is placed upon a party to sign a document provided that an agreement is reached after negotiations thereon. The central dispute, which is at the heart of the issues herein, revolves around a determination as to whether the Union and Respondent actually negotiated an agreement concerning alternative work schedules for the Data Services Staff and the Automated Collection System Branch. If such agreements were reached with respect to the units herein, and were deemed to be operative agreements to be executed, the agency may be faulted for not signing same in such instances.18/ See and compare American Federation of

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18/ In the case of the ACS section, the collateral issue is posed as to whether any agreement reached re alternative work schedules, if it be part of the overall package for ACS, should have been executed separately by Respondent.

Government Employees, AFL-CIO, Local 3732 and Department of Transportation, Maritime Administration, U.S. Merchant Marine Academy, Kings Point, N.Y., 16 FLRA No. 50.

(1) General Counsel contends that, with respect to the Data Services Staff, the parties reached an agreement as to the alternative work schedules which was embodied in a written instrument and submitted for typing and execution. It is argued that for the first time, in April, 1985, Respondent raised the point that no agreement seemed necessary and thus none was needed. Further, that no disagreement with the terms of the AWS agreement were raised theretofore by Respondent, and management was only attempting to escape its obligation to execute the instrument.

While no basis may have existed for Wagner's conclusion in April, 1985 that he believed the AWS issue for Data Services had been resolved to Wagner's satisfaction, I am not persuaded that, in fact, a meeting of the minds took place in respect to this work condition. Record facts establish that, at the outset of negotiations in May, 1984, Respondent manifested concern re the applicability of AWS for computer operators. Management continued to express misgivings about the computer operators utilizing the alternative work schedules. Since they worked three shifts, it was questioned whether such schedules were a feasible arrangement for these employees.

It is true that the Union drafted a proposed agreement re AWS for the Data Services Staff which made provision for computer operators on rotating shifts to work a specified number of hours. Moreover, Walton testified it was his "feeling" that the parties came to an agreement in July, 1984 re AWS for this unit. However, I am not convinced that there was an express agreement or understanding in this regard in view of the doubts declared by Respondent as to the coverage of computer operators. At most it appears to the undersigned there was a misunderstanding concerning the sentiment expressed by Coffman that all "seemed to be okay." It may be argued that such declaration signified the parties had reached agreement re AWS for this group. However, record facts disclose that, apart from the fact that the proposed terms were not initialed, the parties had not signified to each other that the dispute regarding the computer operators had been resolved. Thus, I am constrained to conclude that no final agreement had been reached re the alternative work schedules for the Data Services Staff; that Respondent's refusal or failure to sign an agreement embodying such schedules was not violative of Section 7116(a)(1) and (5) of the Statute.

(2) It is asserted by the General Counsel that the parties reached an agreement in March, 1985 concerning AWS for the ACS section; that the failure or refusal by Respondent to execute such agreement constituted an unfair labor practice. The essential terms re the alternative work schedule, as applicable to the ACS unit, were allegedly agreed upon by January, 1985 and no major modifications were necessary. Respondent challenges the contention that it was required to sign the AWS agreement even if it be conceded that the parties agreed to these schedules for the ACS branch.[19] The principal argument advanced by Respondent is that negotiations for the ACS unit were meant to be a complete package; that the alternative work schedules for that unit were a part of the working conditions negotiated for ACS; and that the two were not separable or to be bargained separately.

It is true that by February, 1985 the parties had agreed to the alternative work schedules for ACS employees. While most of the other terms for this unit had been resolved, there were three main issues which had become the "bone of contention" between the Union and management: food and drink at the work place, electronic bulletin boards for employee notices, and radios for employees. These matters, although submitted to the Impasses Panel and then withdrawn, were never resolved. Thus, in March, 1985 Negotiations for the ACS Branch had not been concluded, and a complete agreement was never reached covering all the terms and conditions for that unit. Moreover, management did state at the various bargaining sessions in 1984 that AWS would be part and parcel of an agreement embracing other terms applicable to ACS. There was no mutual understanding or written confirmation upholding the Union's view that an AWS agreement was to be a separate one and independent of other negotiable conditions for these employees. I am satisfied that alternative work schedules were part of negotiations for the entire unit; that management so declared to the union on various occasions during negotiations; and that Respondent indicated to the Union representatives that no separate agreement would be made re alternative work schedules for ACS. Accordingly, I conclude that Respondent did not breach the duty imposed upon it under 7114(b)(5) of the Statute by failing or refusing to sign the agreement embodying alternative work schedules for the Automated Collective System unit. Accordingly, I also conclude Respondent did not violate Section 7116(a)(1) and (5) of the Statute.20/

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[19] Respondent also raises an issue of timeliness in respect to filing the charge concerning the failure to negotiate in good faith and execute the AWS agreement for the ACS Branch. It is urged that, if an unfair labor practice occurred, it took place in March, 1984 and thus the occurrence was more than 6 months before the charge was untimely filed on April 19, 1985. Accordingly, Respondent argues, said charge was untimely filed under Section 7118(a)(4)(A) of the Statute. I do not agree. The significant date for the purpose of calculating the 6 month limitation period, is March 20, 1985. This is the date when it is alleged the unfair labor practice occurred, i.e. the refusal to execute the AWS agreement for ACS. The Complaint is predicated thereon. Since the charge was filed within one month thereafter, I conclude it was timely filed under 7118(a)(4)(A).

Having concluded Respondent did not violate the Statute as far as, it is recommended that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint in Case No. 2-CA-50267 be, and the same hereby is, dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: February 10, 1986
Washington, D.C.

20/ In view of the findings and conclusions reached by the undersigned and his recommendations, it is not deemed necessary to pass upon Respondent's contention that no agreement reached could be binding until approved by its district director.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD

Respondent

and

Case No. 3-CA-40176

NATIONAL LABOR RELATIONS BOARD UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority based on the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations. The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally rejecting provisions of the parties' collective bargaining agreements and Memorandum of Understanding, all of which authorized payment of travel and per diem expenses, and by refusing to negotiate with the Charging Party regarding payment of travel and per diem expenses.

II. Background

The Charging Party is the exclusive representative for two separate professional and nonprofessional units of the Respondent's employees. Separate collective bargaining agreements were negotiated covering the two units. The agreements were executed on August 1, 1980 for three-year terms. On July 8, 1983, the parties agreed to extend the agreements until new agreements were reached or until 30 days after either party notified the other of a desire to terminate.

Each of the agreements contained the following provisions relative to the payment of travel and per diem expenses.

> (a) Official Time - In accordance with existing law, official time has the same meaning as when an employee is otherwise on official duty status and shall include entitlements to payment for such time, travel, per diem and other benefits. In the event the FLRA or a court modifies the existing law, this Article will be reopened upon the request of either party regarding the employees['] entitlement to travel, per diem and other benefits.
>
> (b) Administrative Leave - Administrative leave is leave granted which is not charged to annual, sick, or leave without pay. Employees on such leave shall not be entitled to travel or per diem.

In September 1983, the parties executed a Memorandum of Understanding (MOU) containing ground rules governing the parties' negotiations for new collective bargaining agreements for both units. Section 1 of the MOU provided as follows:

> 1. The NLRBU may have up to five bargaining committee members on official time for scheduled negotiating sessions regardless of the number of management committee members;[1] at its option, the NLRBU may have a sixth committee member present, not on official time, and share the committee's administrative leave among such six members. The foregoing shall not apply where the parties agree to negotiate in subcommittee.
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> ---
>
> [1] Whenever bargaining sessions are held in a field office site as provided in paragraph 3 herein, the NLRBU may have up to four bargaining committee members on official time and one bargaining committee member on administrative leave. A sixth bargaining committee member may be present and share only in administrative leave as noted above.

since September 1983, the parties were engaged in negotiating new collective bargaining agreements. As of the date of the stipulation in this case, no new agreements had been reached.

Payments of travel and per diem expenses were made by the Respondent until January 26, 1984. At that time, the Respondent informed the Charging Party that it would no longer make such payments on the basis that payment of travel and per diem expenses was not in the primary interest of the Government and the Respondent was precluded by law from making such payments. The Respondent then offered to bargain over the impact and implementation of its decision to no longer make payments and apparently rejected the Charging Party's claim that the decision itself was a negotiable matter. The parties met and reached agreement on the Charging Party's impact and implementation proposals. During the bargaining sessions which followed the Respondent's decision to stop paying travel and per diem expenses, the Charging Party reduced its bargaining team from five members to three and also paid the travel and per diem expenses of the employees acting as its negotiators.

III. Positions of the Parties

The Respondent argues basically that payments of travel and per diem expenses are contrary to law and therefore the refusal to make such payments is not a violation of the Statute; that it acted lawfully in refusing to negotiate over whether payment of travel and per diem expenses is in the primary interest of the Government; and that under the collective bargaining agreements, the provisions relating to travel and per diem expenses could be reopened by either party if the Authority or a court modified existing case law on the subject matter as occurred here.

The General Counsel takes the position that the Respondent's agreement to pay travel and per diem expenses is enforceable under the Statute in the absence of any showing that such matter is inconsistent with Federal law or is not a condition of employment. Therefore, the General Counsel asserts that the Respondent's repudiation of its agreement to make such payments and its further declaration that the refusal to make such payments was nonnegotiable constituted a violation of section 7116(a)(1) and (5) of the Statute. To remedy this conduct, the General Counsel requests that the Respondent be ordered to make whole any unit employees who expended funds for their travel and per diem expenses for negotiations after January 26, 1984. The General Counsel also requests a nationwide posting of the remedial notice.

The Charging Party essentially argues that the Respondent unlawfully terminated payment of travel and per diem expenses and requests that an appropriate remedy include retroactive payment of travel and per diem to the Charging Party. As to the language of the provisions in the collective bargaining agreements permitting their reopener upon modification of case precedent, the Charging Party argues that rather than reopening the agreements and allowing negotiations to take place, the Respondent chose to abrogate the provisions and refuse to bargain.

In an *amicus curiae* brief filed by the Office of Personnel Management (OPM), it is argued that an agency's decision to authorize payment of travel expenses and per diem allowances is outside the scope of bargaining under the Statute. Here, OPM argues, the Respondent was correct in abrogating the provisions of the agreements calling for payment of travel and per diem expenses.

IV. Analysis

Turning first to the Respondent's contentions that payment of travel and per diem expenses is contrary to law, and that the Respondent did not unlawfully refuse to bargain over whether such payments are in the primary interest of the Government, the Authority found in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986), *petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. Mar. 27, 1986), that agencies have discretion under the Travel Expense Act, 5 U.S.C. §§ 5701 *et seq*., and implementing regulations to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. Further, the Authority held that the exercise of such discretion is subject to negotiations.[1] The Authority noted, however, that determinations as to the appropriateness of specific travel and per diem expenses which are necessary and proper under law and governing regulations would have to be made on a case-by-case basis.

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[1] *See also American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service*, 21 FLRA No. 21 (1986) and *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 21 FLRA No. 19 (1986), in which proposals authorizing payment of various travel and per diem expenses were found to be within the duty to bargain.

In this case, the parties had negotiated for the payment of travel and per diem expenses and had included such provisions in their collective bargaining agreements, which were extended pending the negotiation of new collective bargaining agreements, and had also included such payments in the MOU covering ground rules for the negotiations. In Department of Defense Dependents Schools System, 21 FLRA No. 125 (1986), the Authority concluded that an agency's conduct in repudiating provisions of a negotiated agreement authorizing the payment of travel and per diem expenses violated section 7116(a)(1) and (5) of the Statute. Similarly, in Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio, 21 FLRA No. 124 (1986), the Authority found that the unilateral termination and repudiation of a memorandum of understanding setting forth ground rules for upcoming negotiations which provided for the payment of travel and per diem expenses of employees serving as the union's negotiators violated section 7116(a)(1) and (5) of the Statute. On the same basis, the Authority finds that the Respondent's repudiation of the agreements and the MOU in this case violated section 7116(a)(1) and (5) of the Statute.

As to the Respondent's contention that it had the right to reopen the provisions of the agreements as a result of the modification of existing law,2/ there is no evidence that the Respondent had in fact reopened the agreements or requested to do so. The language of the "Official Time" provisions of the agreements, as set forth above, specifies

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2/ The modification of existing law referred to by the Respondent is the United States Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), in which the Court found that section 7131(a) of the Statute does not entitle employees on official time to the payment of travel and per diem expenses. Subsequent to that decision, of course, the Authority found the authorization of payment for travel and per diem expenses to be within the duty to bargain. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, supra.

that "[i]n the event the FLRA or a court modifies the existing law, this Article will be reopened upon the request of either party regarding the employees['] entitlement to travel, per diem and other benefits." The stipulated facts here indicate that the parties were engaged in negotiations for new collective bargaining agreements commencing in September 1983 and that payments of travel and per diem expenses were made by the Respondent until January 26, 1984. At that time, the Respondent informed the Charging Party that payments would no longer be made based upon its decision that such payments could not be certified as being in the primary interest of the Government. The Authority does not view such notification to the Charging Party as a request to reopen the agreements. However, even if it could be found that the provisions of the agreements had been reopened, the Respondent's conduct would still be a violation of the Statute. As previously noted, determinations as to whether and under what circumstances travel related to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds is within the duty to bargain. Here, when the Respondent notified the Charging Party of its unilateral decision to no longer make such payments, it also rejected the Charging Party's assertion that the Respondent was obligated to bargain over the decision itself. Instead, the Respondent chose to limit bargaining only to the effects of its decision to discontinue the payment of travel and per diem expenses. Such conduct is contrary to the Respondent's duty to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute.

V. Remedy

The General Counsel has requested that there be a nationwide posting of the remedial unfair labor practice notice and that the Respondent be ordered to make whole any unit employee who expended funds for travel and per diem expenses in connection with negotiations after January 26, 1984. The Charging Party, on the other hand, requests that it be given retroactive payment for the amount spent on travel and per diem expenses which, the parties stipulated, was taken from union membership dues funds.

As noted above, the Respondent paid travel and per diem expenses until January 26, 1984. Thereafter, the Charging Party made such payments to unit employees who served as its negotiators. In our view, it will effectuate the purposes and policies of the Statute to issue an order requiring the Respondent to make whole the Charging Party for those travel and per diem expenses which it incurred by reimbursing the affected employees who should have received such payments directly from the Respondent. A contrary conclusion would result in a windfall to the Respondent for its unlawful conduct. Such an order assumes, of course, that payment of the travel and per diem expenses involved would be consistent with law and regulation, including the Federal Travel Regulations. Further, although it does not appear from the record before us that bargaining unit employees themselves expended funds for their travel and per diem expenses, in the event that there are such employees who either did not receive the payments to which they were entitled or were not compensated fully for such expenses, we shall order the Respondent to reimburse them for the travel and per diem expenses they incurred upon their submission of properly documented claims for such payments. These payments too must be consistent with law and regulation, including the Federal Travel Regulations.

As requested, we shall also order a nationwide posting of the remedial notice. The Charging Party represents two nationwide units of the Respondent's employees, professional and nonprofessional, and therefore the Respondent's conduct in unilaterally repudiating provisions in the agreements covering the employees in those units can be effectively remedied only by an Order which requires the posting of the remedial notices wherever the affected employees in such units are situated.

VI. Conclusion

The Authority concludes that the Respondent's repudiation of the collective bargaining agreements and the MOU and its subsequent refusal to bargain in good faith violated section 7116(a)(1) and (5) of the Statute. The Authority shall therefore issue the following Order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Office of the General Counsel, National Labor Relations Board shall:

1. Cease and desist from:

(a) Repudiating the terms of the 1980 collective bargaining agreements and the September 1983 Memorandum of Understanding negotiated with the National Labor Relations Board Union, the exclusive representative of units of its professional and nonprofessional employees, which authorize payment of travel and per diem expenses to unit employees.

(b) Failing or refusing to bargain with the National Labor Relations Board Union, the exclusive representative of units of its professional and nonprofessional employees, concerning payment for travel and per diem expenses to unit employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the terms of the 1980 collective bargaining agreements and the September 1983 Memorandum of Understanding negotiated with the National Labor Relations Board Union, the exclusive representative of units of its professional and nonprofessional employees, which authorize payment of travel and per diem expenses to unit employees.

(b) Negotiate upon request of the National Labor Relations Board Union concerning payment for travel and per diem expenses to unit employees.

(c) Make the National Labor Relations Board Union whole for the costs it incurred by paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators after January 26, 1984, for which the employees otherwise would have been entitled to reimbursement directly by the Respondent.

(d) Pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments for negotiations which occurred after January 26, 1984, to the extent that such expenses have not been reimbursed by the National Labor Relations Board Union.

(e) Post at all its facilities where bargaining unit employees represented by the National Labor Relations Board Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the General Counsel of the National Labor Relations Board, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., June 25, 1986.

Jerry L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 25]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT repudiate the terms of the 1980 collective bargaining agreements and the September 1983 Memorandum of Understanding negotiated with the National Labor Relations Board Union, the exclusive representative of units of our professional and nonprofessional employees, which authorize payment of travel and per diem expenses to unit employees.

WE WILL NOT fail or refuse to bargain with the National Labor Relations Board Union, the exclusive representative of units of our professional and nonprofessional employees, concerning payment for travel and per diem expenses to unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the terms of the 1980 collective bargaining agreements and the September 1983 Memorandum of Understanding negotiated with the National Labor Relations Board Union, the exclusive representative of units of our professional and nonprofessional employees, which authorize payment of travel and per diem expenses to unit employees.

WE WILL negotiate upon request of the National Labor Relations Board Union concerning payment for travel and per diem expenses.

WE WILL make the National Labor Relations Board Union whole for the costs it incurred by paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators after January 26, 1984, for which the employees otherwise would have been entitled to reimbursement directly by us.

WE WILL pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments for negotiations which occurred after January 26, 1984, to the extent that such expenses have not been reimbursed by the National Labor Relations Board Union.

(Activity)

Dated: ______________ By: ______________________________

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, 1111 18th Street, NW., Room 700 (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

22 FLRA No. 26

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
AND SOCIAL SECURITY ADMINISTRATION

Respondents

and

Case No. 9-CA-40337

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. The Respondents and the General Counsel filed exceptions to the Judge's Decision, and the General Counsel filed an opposition to the Respondents' exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendation that the complaint be dismissed.

In adopting the Judge's conclusion, we note particularly the Judge's findings, with which we agree, that the Respondents here in fact fully complied with the arbitrator's award, and that in light of all the facts and circumstances presented, the Respondents acted promptly enough, and did not engage in any dilatory tactics, in implementing the award. Thus, we do not agree with the General Counsel's assertion that the "standard" applied by the Judge in reaching her conclusion was one of gross negligence or deliberate delay.*/

ORDER

IT IS ORDERED that the complaint in Case No. 9-CA-40337 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 25, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ With respect to the only issue raised by the Respondents' exceptions, that is, that the Authority may not order compliance with an arbitrator's award involving a matter covered under 5 U.S.C. § 4303 in light of section 7121(f) of the Statute, such contention must be rejected. *See*, *United States Army, Adjutant General Publications Center, St. Louis, Missouri*, 22 FLRA No. 20 (1986)(in which the Authority recently found that the Authority has jurisdiction to order compliance with an arbitrator's final award such as the one herein in an unfair labor practice proceeding).

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF HEALTH AND HUMAN
SERVICES AND SOCIAL SECURITY
ADMINISTRATION,

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,

Charging Party

Case No.: 9-CA-40337

Michael Walsh and
Wilson G. Schuerholz,
For the Respondents

Stefanie Arthur,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of an unfair labor practice filed on July 20, 1984, and amended on October 1 and October 5, the Regional Director of Region IX of the Federal Labor Relations Authority (hereinafter, the Authority) investigated the charge and, on October 30, served the complaint initiating this action. The complaint was amended on November 13. Answers were served on November 15 and 29.

The amended complaint alleges, as to the Social Security Administration (SSA) that since on or about February 13, 1984, SSA has failed to comply with an arbitration award by failing to reinstate a grievant with full pay and with reinstitution of all other perquisites in accordance with the arbitration award and/or by complying in a dilatory manner. By such acts and conduct, it is alleged that SSA has failed and is failing to comply with section 7122(b) of the Statute, as modified by section 7121(f), and thereby has engaged in and is engaging in unfair labor practices within the meaning of section 7116(a)(1) and (8) of the Statute.[1]

As to the Department of Health and Human Services (DHHS) it is alleged that DHHS has not processed the documentation necessary to effectuate the arbitration award at issue and/or has processed such documentation in a dilatory manner which has precluded prompt compliance with such award by SSA. By such acts and conduct, it is alleged that DHHS has interfered with SSA's obligation to comply with section 7122(b) of the Statute to implement and effectuate final and binding arbitration awards that result from SSA's collective bargaining agreement with the Charging Party, and thereby has engaged in unfair labor practices within the meaning of sections 7116(a)(1), (5) and (8) of the Statute.[1]

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[1] The pertinent statutory provisions are as follows:

> § 7122. Exceptions to arbitral awards
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).
>
> § 7121. Grievance procedures
>
> (f) In matters covered under sections 4303 [pertaining to actions based on unacceptable performance] and 7512 [pertaining to certain adverse actions such as removals] of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board. . . .
>
> [Section 7703 provides that the Director of OPM may obtain judicial review upon a determination that an error was made in interpreting a civil service law, rule, or regulation and that the error would have a substantial impact.]

(continued)

Respondents admit that there has been an arbitration proceeding under the provisions of a collective bargaining agreement with the Charging Party over a termination, but deny any violations concerning it.

A hearing was held on December 20, 1984, in Seattle, Washington. The parties appeared, entered into a stipulation of facts, examined witnesses, and adduced exhibits. Briefs were filed on February 3, 1985, by the General Counsel and on February 4 by Respondents. Based upon the record made in this case, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact[2]

Background facts

1. At all times material herein, DHHS has been and is an agency and SSA an organizational subcomponent thereof, within the meaning of section 7103(a)(3) of the Statute.

(footnote continued)

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> > . . .
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . or
> >
> > (8) to otherwise fail or refuse to comply with any provision of this chapter.

[2] The following abbreviations will be used herein. "Tr." refers to the transcript of the hearing. "Jt. 1" refers to the stipulation entered into by the parties, with the exhibits thereto indicated by a parenthetical reference as, for example, "Jt. 1(9)(a)." "G.C. Exh." refers to exhibits of the General Counsel and "R. Exh." to those of Respondents. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondents.

The General Counsel's unopposed motion to correct the transcript is granted.

2. At all times material herein, the Charging Party (also referred to herein as the Union) has been and is a labor organization within the meaning of section 7103(a)(4) of the Statute.

3. At all times material herein, the Union has been certified as the exclusive representative of an appropriate nationwide consolidated unit within the meaning of section 7112 of the Statute. The unit includes employees employed in SSA's Seattle and Renton Districts.

4. At all times material herein, SSA and the Union have been parties to a collective bargaining agreement covering employees in the unit. The agreement includes a grievance procedure culminating in final and binding arbitration.

5. On or about April 26 and 29, 1983, in accordance with the collective bargaining agreement of the parties, an arbitration was held before Arbitrator George Schatzki in the matter of the Madge Wolfe termination. Ms. Wolfe is a member of the bargaining unit and has been an employee of SSA since 1970. At the time of her termination she was serving as a Service Representative at SSA's Renton Branch Office. Prior to her termination, Ms. Wolfe was a permanent career employee of SSA. Her termination was effective November 26, 1982, and was grieved by the Union.

6a. On July 13, 1983, the arbitrator issued a preliminary opinion and award directing that Ms. Wolfe be reinstated and that she have a fitness-for-duty examination. He also directed the restoration, retroactive to November 26, 1982, of all the perquisites of her position other than back pay. The arbitrator retained jurisdiction over the case to address any issues not voluntarily resolved following the examination.

b. The opinion stated that the arbitrator was "fully persuaded that at the time Madge Wolfe was discharged, she was not performing her job adequately;" that her supervisors acted in good faith and put in a great deal of effort to help her improve; but that they should have realized that a fitness-for-duty examination was called for pursuant to SSA's Personnel Guides for Supervisors. See pages 4 and 5 of Jt. 1(1).

c. The opinion stated that she should receive pay at her GS-7 rate "during the period between the Monday following management's receiving the Opinion and Award and the time the course of action following the examination [was] implemented." See page 6 of Jt. 1 (1). No other time limits were set by the arbitrator.

7. SSA received the July 13, 1983 opinion and award of the arbitrator on July 15 (a Friday). Pamela Smith, the SSA Branch Chief for the Human Resource Management Branch in the Regional Office for Region 10 had been the management representative at the arbitration and had some responsility for implementing the July 13 award. She was confused by its interim nature, and the fact that Ms. Wolfe was to be reinstated at once with no backpay but all other perquisites. SSA felt that "the most expeditious thing to get her into pay was to do a temporary appointment" (Tr. 124).

Ms. Smith personally took the papers to accomplish this over to the necessary authorizing and implementing officials. Ms. Wolfe was reinstated into a pay status on Monday, July 18.

8. Within the next couple of weeks discussions were held as to where Ms. Wolfe should be placed. It was decided to place her in a less stressful position, in another office. The Union was informed and interposed no objection.

9. During the same time frame, Ms. Smith proceeded to resolve questions about this "very unusual award" (Tr. 126). Advice was sought from SSA's central office, from DHHS, and the Office of Personnel Management (OPM) in Washington, D.C.

10a. The Union raised a question with management officials about the appropriateness of a temporary appointment for Ms. Wolfe in that there is a significant difference in perquisites, the most critical one being, in Ms. Wolfe's case, her ineligibility for group health insurance. As a result of the temporary appointment, she was forced to take insurance with a private plan, Blue Shield, with higher premiums. Also, career employees are covered under and pay into the Civil Service Retirement System (CSRS) whereas temporary employees make so-called FICA payments into and are covered under the Social Security Act. Also, time served in a temporary appointment does not count towards longevity for retirement purposes under the CSRS and does not apply towards tenure for purposes of promotion and within-grade salary increases. Also, temporary employees are not eligible for promotion, reassignment, or transfer as are career employees. Also, as a career employee, Ms. Wolfe had been eligible for and had carried group life insurance (FEGLI) for which she was ineligible as a temporary employee. The Union urged conversion of the appointment to permanent career.

b. SSA found that the temporary appointment was also creating problems for it. Therefore, SSA came to a decision and an agreement with the Union to convert Ms. Wolfe to a career appointment "in order to get all those back benefits paid" (Tr. 127). This decision was reached in late August 1983 by Ms. Smith, after getting approval from the Regional Personnel Office.

c. The necessary papers to effect this conversion were received by DHHS on September 29, 1983. A number of personnel actions had to be processed to effect the conversion. See Jt. 1 (3(a)-(f)) and paragraph 7 to the Stipulation. The computer system was unable to process them; and permission had to be sought to prepare them manually.

d. The Regional Personnel Officer signed the necessary conversion papers on October 4, 5 and 31, 1983. The conversion became effective on October 5. Ms. Wolfe was placed on leave without pay (LWOP) for the period November 26, 1982 to July 18, 1983. Health benefits were first deducted from her paychecks for the pay period ending October 15, 1983.

FICA payments were deducted through the pay period ending October 29, 1983 after which Civil Service Retirement was deducted.

11a. In accordance with applicable procedures of the Federal Personnel Manual, SSA set up the required fitness-for-duty examination and convened a panel, including a Public Health Service physician. The panel had to determine what type of examination was appropriate, whether a clinical or psychiatric one. The panel determined that there was no basis for a psychiatric examination. Accordingly, the employee was given a neurological fitness-for-duty examination. Management asked the neurologist if he thought a psychiatric examination was warranted. He determined that there was no such need and that the employee was fit for duty.

b. On November 23, 1983, SSA informed the arbitrator that two doctors had agreed that Ms. Wolfe was fit for duty.

c. On November 30, 1983, the Union wrote to the arbitrator to complain of the absence of a psychiatric examination. The Union asked the arbitrator to review the records of a psychiatrist whom Ms. Wolfe had consulted.

d. Apparently SSA did not inform the arbitrator, before his supplemental opinion and final award, that it had sought a psychiatry examination and been told that there was no need for one.

12. On December 15, 1983, the arbitrator issued a supplemental opinion and final award. According to the arbitrator, the examining doctors agreed that Ms. Wolfe was presently "neurologically capable of performing duties." See Jt. 1 (4). The arbitrator expressed surprise that a psychiatric examination had not been ordered, since it appeared that her performance problems could have been the product of a mental problem, and the Union had requested one. Expressing the view that SSA, for the second time, had chosen not to give Ms. Wolfe the examination she should have had, the arbitrator declined to order one himself and, instead, ordered that "Ms. Wolfe be reinstated with full back pay and with reinstitution of all other perquisites." See Jt. 1 (4).

13. SSA received the December 15, 1983, award on December 21. Upon receipt, SSA referred the award to DHHS which, in turn, referred it to OPM for determination as to whether to seek review in accordance with provisions of the Statute. OPM received the award on or about January 11, 1984.

14. On or about February 10, 1984, OPM verbally informed DHHS and SSA that it would not seek review of the July 13, 1983 and December 15, 1983 arbitration awards. In a letter to DHHS dated February 24, 1984, OPM stated its reasons for declining to seek review. One was that the OPM regulations relied upon by SSA for agency-ordered medical examinations had become obsolete and replaced by new ones which became final on February 10, 1984.

The beginning of the alleged unfair labor practices

15. By letter dated February 13, 1984, DHHS wrote to the arbitrator to request his reconsideration of his awards. On February 27, 1984, the arbitrator declined the request.

16. In early March 1984, SSA decided to move forward in complying with the final award. This entailed going back and dealing with the retroactive period of Ms. Wolfe's non-pay status, from November 1982 through July 1983; and sorting out what perquisites had and had not been given. Ms. Smith met with the SSA official responsible for handling the necessary personnel actions; discussed the case and some of the time frame problems; and asked that implementation take place "as expeditiously as possible" (Tr. 139).

17a. In handling personnel actions for SSA Region 10 employees, SSA requests them of DHHS's Region 10 Personnel Office which, in turn, processes them and forwards them to DHHS's Central Payroll for effectuation.

b. Actions involving retroactive application create a "different situation in terms of the Automated Personnel Data System" (Tr. 167). They require manual processing at the regional level of DHHS and submission of documents by mail to Central Payroll in order for Central Payroll to access the system.

c. The Wolfe case took a considerable amount of special procedures in Central Payroll, and special permission from Central Payroll to DHHS's Region 10 to cut the action manually.

18a. By requests for personnel action on March 26, 1984, SSA requested effectuation of the arbitration order of December 15, 1983, for back pay. On March 30, 1984, DHHS's Region 10 processed these requests. It normally takes 12 weeks for Central Payroll to process such corrective actions.

b. Although SSA and DHHS management officials had been discussing the award since July 1983, most of the discussions had dealt with the fitness-for-duty process.

19. About March 30, 1984, the Union filed an unfair labor practice charge over failure of management to implement the arbitration award. This was later withdrawn, in May 1984, as "possibly [being] premature" (Tr. 80-81). On at least five occasions between the filing of the charge and its withdrawal, a union official spoke with SSA Management Analyst, Richard Morris, about the Wolfe case and the charge. Mr. Morris pointed out that it takes a long time to process papers. The union official brought up the matter of Ms. Wolfe's having paid out her own money for health benefits and being due a refund. Mr. Morris did not understand the exact personnel problem that was involved, and discussed the matter with somebody in the Regional Personnel Office. Mr. Morris so informed the union official and told him, on April 25, that the Regional Personnel

Office was looking into it and determining what the proper course of action was and if, in fact, the premiums paid by Ms. Wolfe could be refunded.

20a. By letter dated May 31, 1984, the Union complained to Douglas McDonald, the DHHS Region 10 Personnel Officer about the status of Ms. Wolfe's retroactive salary and reinstatement of health benefits.

b. On June 1, 1984, DHHS's payroll liaison person for DHHS's Region 10, Lila Anderson, suggested that she take over for the two timekeepers involved in the matter and write up the necessary Error Notices. Error Notices are used to alert Central Payroll to handle a case as an exception to the automated process or to review a case for corrective action or follow up. One Error Notice was needed to determine how much back pay Ms. Wolfe was owed. Another Error Notice was needed to correct annual and sick leave notices. The preparation of these Error Notices took a lot of time to work out and necessitated calling the timekeepers where Ms. Wolfe had worked to get more information and to clarify points. Ms. Anderson could not determine all the deductions that would have to be made and decided she would have to rely on Central Payroll to do the final audit on the back pay involved.

c. On June 11, 1984, Ms. Anderson mailed to Central Payroll the Error Notices, with a request that they be given "priority" because the employee had already waited six months since a favorable arbitration award. (Jt. 1 (12(b)). Error Notices are forwarded by mail.

d. On June 12, 1984, DHHS replied to the Union's May 31 letter; explained that the necessary paperwork had been sent to Central Payroll during the first week in April and that normal processing time was 12 weeks; and assured the Union that DHHS had followed up with Central Payroll, taken additional steps to expedite the matter, and would continue to monitor it.

e. If there is some "urgent aspect to [a] case" that "deserves special treatment," DHHS follows up on a case before the normal 12-week processing time expires (Tr. 168 and see also Tr. 181).

21. On July 20, 1984, a union official wrote to Mr. McDonald, to complain about the lack of positive action since the Union's May 31 letter, to state that the unfair labor practice charge had been refiled, and to seek his help.

22. On July 26, 1984, Ms. Anderson began calling Central Payroll to check on the matter. On July 27, Ms. Anderson was told that more information was needed, specifically whether Ms. Wolfe had received unemployment compensation. Ms. Anderson replied that she thought she had. Ms. Lewis requested this information so that the State could be notified that Ms. Wolfe had been brought back and given back pay. Ms. Anderson called Ms. Wolfe who brought her a copy of the unemployment compensation papers within a couple of days. Ms. Anderson immediately mailed them off. Ms. Anderson did not know such papers were needed until July 27.

23. In addition to Ms. Anderson's inquiries, Mr. McDonald arranged a meeting with union representatives regarding effectuation of the arbitration award. The meeting was held on August 3, 1984. Present were two union officials and, for DHHS, Mr. McDonald, and the Chief of the Employment Branch for DHHS, Barbara Schmedling. At the meeting, the Union reviewed the history of the case, the delays involved, and the various issues remaining to be settled, such as reimbursement for premiums which Ms. Wolfe had paid Blue Shied. Neither Mr. McDonald nor Ms. Schmedling appeared clear as to what, if anything, would be done concerning Ms. Wolfe's premiums payments. At Mr. McDonald's request, Ms. Schmedling itemized some of the problems which had delayed payment to Ms. Wolfe. This included papers being misplaced and the movement of computers from Washington, D.C. to Rockville, Maryland, or vice versa. The meeting ended with Mr. McDonald agreeing to contact Central Payroll to try to get the matter resolved.

24. On or about August 23, 1984, Ms. Wolfe received a check in the amount of $7,397.59 representing back salary for the period November 1982 to July 1983 ($12,262), less Federal taxes ($1772.40), federal retirement contributions ($1248.55), Medicare ($137.22) and leave reimbursement ($1707.04). The leave reimbursement represents the amount of money Wolfe had received for her accrued annual leave at the time of her termination in November 1982. With the deduction of this money from her back pay, Ms. Wolfe was credited with 206.7 hours of annual leave and 68 hours of sick leave as of the payperiod September 29, 1984. No deduction was made for health benefits premiums. No reimbursement was made for Ms. Wolfe's Social Security (FICA) payments which she had made during the period of her temporary appointment.

25a. On September 10, 1984, the Union wrote to DHHS's Regional Personnel Officer and asked for an explanation of the check. The Union acknowledged, in its letter, that the "case has been difficult" (Jt. 1 (13)).

b. On September 19, 1984, DHHS's Regional Personnel Officer gave a written explanation and an offer to meet with the Union and Ms. Wolfe to clarify the explanation and answer questions. The explanation included a discussion of deductions for health benefits, Medicare, reimbursements for FICA and FEGLI, refund of unemployment benefits, leave deductions and restoration, and options for health benefits.

26. On September 24, 1984, a Labor Relations Specialist for SSA and DHHS arranged a meeting with Ms. Wolfe and a union representative to finish up any unresolved matters in the Wolfe case. Several management representatives attended, including Lila Anderson, Payroll Liaison for DHHS.

a. One unresolved matter concerned Ms. Wolfe's medical benefits. Ms. Anderson explained to Ms. Wolfe what her options were. Prior to her termination, Ms. Wolfe carried medical benefits with Washington Physicians Service (WPS), a group medical insurance plan. Upon her termination, she was informed by DHHS that WPS did not offer individual coverage. Ms. Wolfe then elected to enroll with Blue Shield, which did offer individual coverage. The cost of her health insurance, after November 26, 1982, was to be paid in full by Ms. Wolfe. Her premiums under Blue Shield were $71.05 per month. Under the arbitration award, Ms. Wolfe was entitled to reinstatement with WPS retroactive to November 27, 1982, but had to pay premiums to WPS for this retroactive period. Following the meeting, DHHS wrote a letter, dated September 24, 1984, to Blue Shield asking for assistance in refunding the dues paid by Ms. Wolfe to Blue Shield "as soon as possible," for the period she paid (January through June 1983). See Jt. 1 (16). Blue Shield refunded the dues to Ms. Wolfe on October 22, 1984; and Ms. Wolfe reimbursed DHHS for the retroactive premiums due to WPS on October 29. DHHS had agreed, at the September 24 meeting, to hold off any collection of the retroactive premiums from Ms. Wolfe until she received a refund from Blue Shield. See Tr. 96-97 and 115-117. On or about October 11, 1983, Ms. Wolfe's enrollment in WPS was reinstated.

b. Another unresolved matter was leave. Ms. Anderson explained to Ms. Wolfe that 113 hours of her annual leave could not be put on the pay slip because they would result in an excess of annual leave that can be carried over. Ms. Anderson told Ms. Wolfe that the 113 hours could be placed in a restored leave account, or she might be able to receive cash for the 113 hours. Ms. Wolfe indicated that she would prefer cash.

c. On September 25, 1985, DHHS's Regional Personnel Officer sent a memorandum to the Supervisor Leave Unit approving the restoration of 113 hours of leave to Ms. Wolfe, and another to the Director Pay Systems Divisions seeking assistance in resolving the leave and health benefits problems of the Wolfe case and asking that Ms. Wolfe be paid a lump sum for her 113 hours of leave.

d. As it turned out, regulations prohibited a cash payment for the 113 hours. The 113 hours were placed in a restored leave account, from which Ms. Wolfe would receive payment within 44 or 51 days following her retirement, which apparently took place prior to the hearing. See Tr. 190, DHHS learned that the 113 hours would be placed in a restored leave account on October 11, 1984.

27. On October 10, 1984, the Union wrote to SSA that Ms. Wolfe had received credit for 240 hours of annual leave, but had not received her lump sum payment for her 113 hours or her FICA money refund. The Union explained that Ms. Wolfe had retirement plans which she could not finalize until all her pay problems were adjusted. The Union asked for advice as soon as possible as to when a final resolution could be reached on the payroll processing issues.

28. On November 11, 1984, the Union wrote to Mr. McDonald to complain about the failure to implement the arbitration award as to the FICA and 113 annual leave hours, and to seek his assistance. The Union did not learn that Ms. Wolfe would not get "a cash-out" for her 113 hours of annual leave until the day of the hearing.

29. On December 18, 1984, Ms. Wolfe received reimbursement from SSA for the FICA contribution which had been deducted from her salary while she was in a temporary appointment during the period July to October 1983. See paragraph 21 of Jt. 1, as explained at G.C. Br. 12.

30. There was "just nothing in the books" as to how Respondents had to proceed in this unusual, difficult, and complex case, involving issues not only of retroactive back pay (with which they had dealt before), but also adjustments for health benefits, life insurance, taxes, unemployment benefits and leave (Tr. 141 and see also Tr. 174).

Discussion and Conclusions

The General Counsel has not established, by a preponderance of the evidence,[3] that Respondents engaged in dilatory conduct in complying with an arbitration award, or that they have failed to comply with it.

In reaching this conclusion, the following facts of record have been most persuasive. In the first place, the arbitration award was bifurcated, with the initial award coming some five months before the final award. This presented difficulties for Respondents. In the preliminary award, an employee was found not to have been performing her job adequately at the time of her termination; but she was ordered reinstated with all perquisites but back pay, and directed to have a fitness-for-duty examination. In the final order, five months later and after a finding that she was fit for duty, the arbitrator ordered reinstatement with full back pay and reinstitution of all other perquisites.

Secondly, Respondents promptly complied with the only portion of the arbitration award with a clear time frame -- receiving pay at the grievant's GS-7 rate beginning the Monday following the receipt of the July 13, 1983 preliminary opinion and award. Respondents accomplished this by giving the grievant a temporary appointment, which was the most expeditious method available to comply with the award. The rest of the award concerned the restoration of pay and perquisites, with no indication of a time frame within which Respondents were to act. This serves to distinguish the case relied upon by the General Counsel at page 24 of the brief, SSA, Field Office Operations, New York Region, 2-CA-30127, decided by Judge Chaitovitz on June 8, 1984, wherein the arbitrator ordered backpay made be within 20 days.

Thirdly, having reinstated the grievant with full pay, Respondents had to face resolution of what was indisputably a difficult, complex matter of restoring all perquisites and back pay over a period of several years, some of which involved a temporary appointment and LWOP status. Social Security taxes, life and health insurance, unemployment benefits, and leave accumulation were among the issues to be resolved. These issues were complicated by Respondents' compliance with the preliminary award edict, that they get the employee back on the payroll the Monday following receipt of the award, which they accomplished by giving her a temporary appointment. This decision resulted in the employee paying into the Social Security system rather than the Civil Service one, losing leave and life insurance entitlements, and having to pay for private health benefits rather than less-expensive group health ones. While Respondents made this decision on their own, it was not done to deprive the grievant of any rights but, rather, to get her back on the payroll as expeditiously as possible. Furthermore, personnel actions to effect restoration of all these perquisites and payback could not simply be cut and processed. First, decisions had to be made on how to effectuate them, and involved consultations between various levels of management of SSA and DHHS. A further complication was that the computer system in use had to be accessed manually and normally takes 12 weeks to process corrective actions such as the ones here involved.

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[3] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

The final fact is that nothing in the record suggests any deliberate delay or gross neglect in effectuating the award. To the contrary, Respondents did take some steps to expedite it. And during the entire period, Respondents acted with compassion toward the employee and her job performance problems. The arbitrator found that the grievants' supervisors acted in good faith and put in a great deal of effort to help her improve, before finally reaching the decision to terminate her. On this record it was established that Respondents reinstated her in a job involving a less stressful situation, after consulting with the Union which voiced no objections.

The General Counsel cites, as an example of "unreasonable interference with compliance" with the award, the conduct, on February 13, 1984, of DHHS in soliciting the arbitrator to reconsider his decision. See G.C. Br. 20-21. The General Counsel correctly points out that nothing in the collective bargaining agreement or the Statute gives DHHS a right to seek reconsideration of an arbitrator's award.[4/] However, while this attempt by DHHS to obtain reconsideration may be characterized as a feckless one, it did not unduly delay the SSA decision, made in early March, to move forward in complying with the final award.

The General Counsel notes that the award had been the subject of discussion among Respondents since July 1983, and yet it took SSA until March 26, 1984 to complete the forms necessary to initiate effectuation of the December 13, 1983 final award. See G.C. Br. 21. However, most of the

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[4/] In the case of terminations for performance deficiencies, the Statute gives only OPM appeal rights; and one Federal Court has held that even OPM is not permitted to seek reconsideration of arbitrators' decisions. See 5 U.S.C. 7121(f) and 7703 and Devine v. White, 697 F.2d 421, 112 LRRM 2374, 2379-2383 (C.A.D.C., Jan. 7, 1983).

pre-March 1984 discussions dealt with the fitness-for-duty process, rather than the complications of restoring perquisites and backpay. Even the Union took the position, in discussions with management, to defer arguments regarding retroactivity until receipt of the final award. See Tr. 63.

The General Counsel also makes the point that, until her retirement, the grievant was not paid for 113 hours of excess annual leave placed in her restored leave account, and that the Union, despite two communications on the problem, was not kept advised on this issue. See G.C. Br. 23. Management officials were derelict in not keeping the Union advised on this issue. However, overall, management officials responded promptly to Union communications, which were numerous over the period of time here involved; and I do not find that this particular dereliction, in itself, lifts this case into the status of an unfair labor practice.

Superficially, taking a year to comply with an arbitrator's award would seem to be proof of an unfair labor practice. But the facts here show that Respondents did act promptly enough in starting up the process. While they could have probably moved it along at a faster rate, they were under no specific order to give it special, expedited treatment. The administrative process ground slowly, but surely; and full compliance with the award was eventually accomplished. There is no evidence that the employee suffered unduly from the delay. At most, it may have delayed her retirement plans somewhat.

Other issues have been raised by the parties. However, in view of the conclusions expressed above, that Respondents did not engage in dilatory tactics in complying with the arbitration award and have now fully complied therewith, the resolution of other issues is deemed to be unnecessary.

Ultimate Findings and Recommended Order

Respondents have not engaged in the unfair labor practice alleged in the complaint.

Accordingly, it is hereby ORDERED that the complaint should be and hereby is dismissed.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: July 15, 1985
Washington, DC

9/Case No. 373/errata

Federal Labor Relations Authority

Washington, D.C. 20424

ERRATA July 9, 1986

Report of Case Decisions Number 373 (July 2, 1986) 1/

Pages 219 - 220

1. Remove incorrect pages.
2. Insert attached corrected pages.

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DEPOSITORY 376

Attachment

1/ Paragraph "(c)" is changed to be paragraph "(d)" on page 219. A paragraph, which was previously inadvertently omitted, is included as paragraph "(c)".

Y 3.F31/21-3:

(a) Provide clear notice to all nonmember unit employees seeking representation by their exclusive representative that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts, including representing them on appeals to the Merit Systems Protection Board, on the same basis as it supplies attorneys to members.

(b) Post at its Chapter 229 local office and at its normal meeting places, and at all places where notices to members and other employees of the Department of Health and Human Services, Office of the Secretary, Headquarters are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the president of the National Treasury Employees Union, or a designee, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Office of the Secretary, Headquarters, Department of Health and Human Services for posting in conspicuous places where unit employees represented by the National Treasury Employees Union, Chapter 229 are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the section 7116(b)(8) allegations of the complaint be, and they hereby are, dismissed.

Issued, Washington, D.C., June 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT create the impression that the National Treasury Employees Union will afford differing standards of employee representation with respect to appeals to the Merit Systems Protection Board (MSPB) by employees in units of exclusive recognition on the basis of whether such employees are members of the National Treasury Employees Union.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their right to refrain from joining, freely and without fear of penalty or reprisal, the National Treasury Employees Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Statute.

WE WILL provide clear notice to all nonmember unit employees seeking representation from their exclusive representative that the National Treasury Employees Union will supply attorneys to nonmembers to help in representational efforts, including representing them on appeals to the Merit Systems Protection Board, on the same basis as it supplies attorneys to members.

____
(Labor Organization)

Dated: ______________ By: ______________________________
(Signature) (Title)

9/case no 374

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 374 REPORT OF CASE DECISIONS July 3, 1986

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 28 (June 27, 1986)

Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina and National Treasury Employees Union, Case No. 4-CA-577

22 FLRA No. 31 (June 30, 1986)

Defense Logistics Agency, Alexandria, Virginia and Defense Construction Supply Center, Columbus, Ohio and American Federation of Government Employees, Local 1148, AFL-CIO, Case No. 5-CA-40131

22 FLRA No. 32 (June 30, 1986)

Norfolk Naval Station, Department of the Navy and Local 13, Federal Firefighters Association, Case No. 34-CA-50303

NEGOTIABILITY CASES

22 FLRA No. 27 (June 27, 1986)

International Association of Machinists and Aerospace Workers, District Lodge 74 and Department of the Navy, Case No. 0-NG-1274

22 FLRA No. 29 (June 30, 1986)

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, Case No. 0-NG-638

22 FLRA No. 30 (June 30, 1986)

National Treasury Employees Union, Chapter 26 and Internal Revenue Service, Atlanta District, Case No. 0-NG-237

Y3.F31/21-3.

ARBITRATION CASES

22 FLRA No. 33 (June 30, 1986)

American Federation of Government Employees and U.S. Marine Corps, Camp Lejeune, North Carolina (Singer, Arbitrator), Case No. 0-AR-1166

*Case No. 0-AR-1016 (Order Denying Request for Reconsideration of 21 FLRA No. 86) (June 30, 1986)

Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

June 30, 1986

0-AR-1130   0-AR-1136   0-AR-1139

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

22 FLRA No. 27

IAM, District Lodge 74 and Dep't of the Navy, Case No. 0-NG-1274 (Decided June 27, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

Negotiability
  Procedure
    Timeliness
	7105(a)(2)(E)
	7117(c)(2)

DIGEST NOTES

The Authority dismissed the union's appeal of an agency's allegation of nonnegotiability because under the provisions of § 7117(c)(2) of the Statute and §§ 2424.3, 2429.21 and 2429.22 of the Authority's Rules and Regulations, the petition for review was untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

22 FLRA No. 28

Federal Labor Relations Authority

Dep't of the Treasury, IRS, Columbia District, Columbia, S.C., and NTEU, Case No. 4-CA-577 (Decided June 27, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Unfair labor Practice	7102
Agency Violations	7116(a)(1), (5) & (8)
Interference	7118
Failure to Abide by Ground Rules for Negotiations	7131(a)

Unfair labor Practice
  Agency Violations
    Interference
      Failure to Abide by Ground Rules
        for Negotiations
    Otherwise Refuse to Comply with the Statute
      § 7131(a)
    Refusal to Negotiate
      Travel and Per Diem Ground Rule Rejected
  Collective Bargaining
    Statute Interpretation
      Parties' Interpretation of § 7131(a) at Time of Negotiations
    Travel and Per Diem Ground Rule
  Remedy
    Reimburse Employees and Union for Travel and Per Diem Expenses
Federal Travel Regulations

DIGEST NOTES

At the time that the parties agreed upon ground rules for negotiating a local supplementary agreement, official time under § 7131 had been interpreted by the Authority and was understood by the parties to encompass related travel and per diem expenses. The parties agreed that official time would be granted "in accordance with [section] 7131(a)". Thereafter the activity initially paid the travel and per diem of union negotiators but reversed its position; then refused to pay additional travel and per diem expenses of union negotiators; and sought the return of those expenses which it alleged were erroneously paid. The U.S. Supreme Court and the Authority have subsequently held that under § 7131(a) there is no entitlement to travel expenses and per diem allowances merely by virtue of finding that official time is required. However, such payment is a negotiable matter.

In this case, the Authority held that since there was no requirement to grant travel and per diem under § 7131(a), the activity's refusal to do so did not constitute a § 7116(a)(8) violation. If there had been an allegation of a § 7116(a)(5) violation in the complaint, the Authority stated it would have found a violation. Finally, the activity violated § 7116(a)(1) by its failure and refusal to meet its obligation under an agreement with the exclusive representative to grant to employees representing the union in supplemental negotiations "in accordance with" § 7131(a) as it was understood by the parties at that time which included an agreement to pay travel and per diem expenses. Such actions interfered with the employee's protected rights under § 7102 "to form, join, and assist a labor organization".

Federal Labor Relations Authority

22 FLRA No. 29

AFGE, Local 32 and OPM,
Case No. 0-NG-638 (Decided
June 30, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Compensation
    Unemployment Compensation
      Furlough Provisions
  Management Rights
    Assign Work
      Furlough of Employees
    Budget
      Furlough of Employees
    Layoff
      Furlough of Employees
    Retain
      Furlough of Employees
  Mandatory Subjects of Bargaining
    Appropriate Arrangements
      Furlough of Employees
    Procedures
      Furlough of Employees
Unfair labor Practice
  Collective Bargaining
    Scope
      Where Proposal Violates Management's § 7106 Rights
  Remedy
    Bargaining Order
      Where Proposal Violates Management's § 7106 Rights

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A) and (B)
7106(b)(2) and (3)

DIGEST NOTES

A proposal is a negotiable appropriate arrangement under § 7106(b)(3) that requires the agency, first, to notify employees who are to be furloughed that they would be entitled to unemployment compensation for any furlough of more than five continuous days and, second, to offer those employees the opportunity to take their furlough on continuous days so as to qualify for unemployment compensation. Under the proposal, when an employee chooses to be furloughed on continuous days,

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

management is not able to assign work to that employee during that period, even if management should determine that it is necessary for that employee to work. In this way, the proposal would restrict management's ability to determine when assigned work will be performed.

However, although the proposal directly interferes with management's right under § 7106(a)(2)(B) to assign work, the burden placed by the proposal does not constitute excessive interference with that right so as to render the proposal an "inappropriate" arrangement. The most significant impact on the agency's ability to accomplish its workload comes from management's own decision to furlough employees rather than from any consequences which might flow from implementation of the proposal. Whether employees are furloughed on a continuous or discontinuous basis, the amount of worktime lost due to furlough would be the same. Moreover, the proposal permits management to schedule furloughs so as to enable it to get its work done when that is necessary.

Contrary to the agency's allegations, the proposal would not directly interfere with management's right to furlough employees or determine its budget. Ultimately, Federal agencies must reimburse states for unemployment compensation received by Federal employees. Anything that increases an agency's obligation for unemployment compensation might have a fiscal impact on the agency and force the agency to take corrective action. However, it is not possible to know in advance how many, if any, employees would take advantage of the option afforded by the proposal. Even if employees choose to make their furloughs continuous and the agency thereby incurs some liability for unemployment compensation, it would not necessarily follow that there must be more and longer furloughs to make up for the savings lost. That would only be the result if the agency chooses that alternative from other possible actions it could take to achieve the necessary savings. Thus, contrary to the agency's contention, the proposal would not require management to increase the number of employees furloughed or the duration of their furloughs, or to initiate further RIF actions, even though it might make such a decision more probable. Similarly, the impact on the agency's budget is speculative. Even if the proposal ultimately results in increased agency liability for unemployment compensation, the proposal would not prevent management from achieving the necessary savings to meet the anticipated shortage of funds. (proposal 1)

Both the language and the legislative history of the Statute indicates that § 7106 was intended as a limitation on the scope of bargaining. Thus, contrary to the union's contention, the Authority is precluded from issuing a bargaining order where it is determined that a proposal violates management's rights. (footnote 8)

Federal Labor Relations Authority

22 FLRA No. 30

NTEU, Chapter 26 and IRS, Atlanta District, Case No. 0-NG-237 (Decided June 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Outside Authority Alleged
      - GSA Bulletin FPMR A-40, Supp. 5
  - Management Rights
    - Assign Work
      - To Particular Employees
        - Criteria for Grading Levels of Difficulty of Work
        - Employee Preferences and Seniority
    - Generally - Qualifying Phrases in Proposal
      - "As Far As Possible"
    - Organization
      - Criteria for Grading Levels of Difficulty of Work
  - Procedure - Timeliness
  - Subjects of Bargaining
    - At the Election of the Agency
      - Technology, Methods and Means of Performing Work
        - Mode of Transportation
          - Allocation of Government Cars on the Basis of Hardship
          - Requirement to Provide Government Cars
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangement
      - Criteria for Grading Levels of Difficulty of Work
      - Mode of Transportation
    - Procedures - Allocation of Government Cars [Hardship Basis]

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(B)
7106(b)(1), (2), (3)
7116(a)(1) and (5)
7117(a)(2)

DIGEST NOTES

A proposal is nonnegotiable that would require management to assign work strictly on the basis of criteria specified in a guide to managers. The right to assign work under § 7106(a)(2)(B) includes the discretion to determine the particular employees to whom or positions to which work will be performed. Since the proposal would make it impossible for the agency to deviate from the criteria established in the document in assigning particular employees to perform work, the proposal directly interferes with management's right to assign work and does not constitute a procedure under § 7106(b)(2). Moreover, the proposal is not an appropriate arrangement under § 7106(b)(3) because through the arbitration process management's decision to

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

assign work to a particular employee could be completely negated if such assignments were not strictly in accordance with the criteria. However, contrary to the agency's contention, the proposal does not interfere with its right under § 7106(a)(1) to determine its organization because the proposal does not require the agency to modify its internal structure. (proposal 1)

A proposal is nonnegotiable that would require the agency to request government cars from GSA for the purpose of providing those cars to employees whose work involves travel. The mode of transportation to be used for accomplishing an agency's mission is a decision as to the "means" to be used for its accomplishment. The proposal is not an appropriate arrangement because it would completely negate the agency's § 7106(b)(1) right to decide the means to be used in the accomplishment of its mission, rather than merely ameliorating the adverse affect on employees of the agency's exercise of its rights. (proposal 2)

A proposal that would allocate available Government cars to employees on the basis of hardship is a negotiable procedure under § 7106(b)(2). The proposal contemplates a situation where there would be an insufficient number of cars available for employees' use as a result of the implementation of a temporary agency program. The proposal does not directly concern the technology, methods and means of performing work under § 7106(b)(1). Nor does the proposal appear to be inconsistent with the current GSA regulation [GSA Bulletin FPMR A-40, Supp.5, effective June 19, 1983] governing the assignment of cars to employees on official Government business. Accordingly, the agency did not meet its burden of proof for the compelling need for its regulation barring the proposal which the agency alleged was dictated by GSA regulations. (proposal 3)

A proposal is nonnegotiable that would permit employees to secure GSA cars, or rental cars, under certain conditions for local transportation in the performance of their work. The proposal concerns and excessively interferes with management's right to determine the technology, methods and means of performing work, under § 7106(b)(1). However the agency did not support the compelling need for its regulation barring the proposal since, contrary to the agency, the applicable GSA regulations [GSA Bulletin FPMR A-40, Supp.5, effective June 19, 1983] does not appear to be inconsistent with the proposal. [p. 4]

A proposal is nonnegotiable that applies a preference, hardship and seniority test in determining which employee is to perform what work. The proposal would have the effect of interfering with management's discretion under § 7106(a)(2)(B) to determine the particular employees to whom work will be assigned. Moreover, the phrase "as far as possible" included in the proposal does not guarantee that management would retain its rights. Under the proposal, an arbitrator could overturn a manager's decision to assign work to a particular employee by concluding that the manager had not taken into account the factors specified in the proposal "as far as possible." (p. 5)

22 FLRA No. 31

Federal Labor Relations Authority

Defense Logistics Agency, Alexandria, Va. and Defense Construction Supply Center, Columbus, Ohio and AFGE, Local 1148, Case No. 5-CA-40131 (Decided June 30, 1986)

DIGEST HEADINGS

Unfair labor Practice
  Agency Violations
    Refusal to Negotiate
      Deputizing Attorneys to Prosecute Misdemeanor Cases
  Conditions of Employment
    Increased Possibility of Prosecution for Misdemeanor Offenses Through Deputization of Activity Attorneys as Prosecutors

STATUTE

7101(a)(2) and (6)
7103(a)(14)
7114(b)(2)
7116(a)(1) and (5)
7118(a)(7) and (8)

DIGEST NOTES

The deputization of activity attorneys as Special Assistant U.S. Attorneys in order to prosecute misdemeanor offenses at the activity's supply center, did not change working conditions of unit employees. Bargaining unit employees had always been subject to prosecution by the U.S. Attorney for their unlawful acts committed at the supply center. The implementation of an agreement to deputize center attorneys in order for those attorneys to assist in the prosecution of misdemeanor offenses did not result in the imposition of any new penalties, new investigative procedures or regulations. Absence evidence that the activity's actions constituted a change in personnel policies, practices or matters affecting working conditions, no violation of § 7116(a)(1) and (5) was established.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 32

Federal
Labor Relations
Authority

Norfolk Naval Station, Dep't of the Navy and Local 13, Federal Firefighters Association, Case No. 34-CA-50303 (Decided June 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7101(b)
Agency Violations	7116(a)(1), (2) & (5)
Interference	7118
Directing Union President to Wear Firefighter Uniform to CBA Meeting	7131(c)
Discrimination	
Suspension for Failing to Wear Uniform	
Refusal to Negotiate	
Requiring Uniforms at Bargaining Meetings	
Collective Bargaining	
Requirement to Wear Firefighter Uniforms	
Discipline	
Suspension for Not Wearing Firefighter Uniform in Negotiations	
Health and Safety	
Wearing of Firefighter Uniforms	

DIGEST NOTES

The activity had a legitimate reason for requiring union negotiators at collective bargaining meetings to wear their uniforms when they were on-call as firefighters. Although a firefighter is not in a duty status during negotiations, he is subject to being recalled to full duty status at moment's notice. The response of firefighters must be instantaneous, and full readiness to respond in an appropriate uniform is critical to the efficient accomplishment of essential duties without undue delay. Thus the Authority adopted the Judge's conclusion that the activity did not violate § 7116(a)(1), (2) and (5) when it directed the union president to wear his firefighter uniform to a collective bargaining meeting; suspended him for three days for his refusal to do so; and required all employee/union negotiators who would otherwise be in a duty status to wear the firefighter uniform to collective bargaining meetings as a condition for being allowed official time to participate in such meetings.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 33

Federal Labor Relations Authority

AFGE and Marine Corps, Camp Lejeune, N.C. (Singer, Arbitrator), Case No. 0-AR-1166 (Decided June 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration Procedure Timeliness National Office vs. Regional Office Filing	7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with §§ 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The union misfiled its exceptions with a regional office of the Authority rather than filing the exceptions with the Authority's national office. Although, on the the same day the regional office received the exceptions in the mail, the regional office mailed them to the national office, the Authority did not receive the exceptions at its national office within the applicable time limit.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT LODGE 74

Union

and

Case No. 0-NG-1274

DEPARTMENT OF THE NAVY

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained.

The Agency's allegation of nonnegotiability in this case apparently was served on the Union by mail on April 16, 1986. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, no later than the close of business on May 6, 1986. However, the petition for review was not filed until May 12, 1986, and thus was untimely.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 27, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
COLUMBIA DISTRICT
COLUMBIA, SOUTH CAROLINA

Respondent

and Case No. 4-CA-577

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case arose as a result of the Respondent's refusal to grant certain employees travel expenses and per diem allowances in connection with their representing the Union in negotiations for a local supplemental agreement, during time they otherwise would have been in a duty status. This refusal is alleged to have violated section 7116(a)(1) and (8) of the Statute.[1] The Respondent also sought to reclaim money it had paid to other employees during an earlier round of the negotiations, and this is alleged to be an independent violation of section 7116(a)(1) of the Statute. The issue is whether the employees were entitled to such travel and per diem expenses.

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[1] Section 7116(a)(1) and (8) provides:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter[.]

The Administrative Law Judge found that the Activity had committed the violations as alleged. The case is before the Authority now because the Respondent filed exceptions to the Judge's Decision.

II. Facts

The Internal Revenue Service and the National Treasury Employees Union are parties to a Multi-District Agreement which covers the Columbia, South Carolina District. The undisputed evidence establishes that negotiations between the parties over a local supplemental agreement, as provided for by the Multi-District Agreement, took place during June and July of 1980. Ground rules for the negotiations included an agreement that official time would be granted "in accordance with [section] 7131(a)" of the Statute. Following the negotiations, various members of the Union negotiating team submitted travel vouchers claiming travel and per diem expenses covering the period of the negotiations. The Respondent paid travel and per diem expenses to three of the Union negotiators for the June negotiating sessions and later refused to pay other members of the team for sessions held in July. The Union paid the travel and per diem expenses for two members of its negotiating team for the July sessions that Respondent refused to pay. After paying travel and per diem expenses to the Union negotiators, the Respondent notified them that they had been paid erroneously and that they should return the money. The employees declined. The refusal to reimburse certain employees for travel and per diem expenses, and the attempt to recover money which the Respondent asserts it paid in error to other employees, led to the complaint.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with section 7131(a) of the Statute,[2] in violation of section 7116(a)(1) and (8) of the Statute, by refusing to reimburse travel expenses and per diem allowances to employees representing the Union in negotiations for the local supplemental agreement during the time they otherwise would have been in a duty status. He also found that the

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[2] Section 7131(a) of the Statute provides:

§ 7131. Official time

(Continued)

Respondent's attempt to reclaim travel and per diem expenses paid to certain employees entitled to them constituted a violation of section 7116(a)(1) of the Statute.

IV. Exceptions to the Judge's Decision

The Respondent excepted to the Judge's reliance on decisions of the Authority which it contends are without support in the Civil Service Reform Act or its legislative history. The Respondent also contends that it is without legal authority to expend appropriated funds for travel and per diem expenses and also noted that two members of the Union negotiating team paid by the Union for the July negotiating sessions would receive double reimbursement if paid by the Respondent. On that basis, Respondent argues that since no expenses were incurred by these two members no 7ravel and per diem expenses were due. Finally, the Respondent takes the position that official time does not include travel and per diem expenses and can only be negotiated for during mid-term bargaining under section 7131(d) of the Statute.

V. Analysis

The questions to be answered here are (A) Does the official time requirement of section 7131 include travel expenses and per diem allowances alleged to have been improperly denied in this case; and (B) if not, what is the effect of the parties' agreement to grant official time "in accordance with [section] 7131(a)" which, at the time of that agreement and at the time of the denial of travel and per diem expenses, included travel and per diem according to existing case law?

After the Judge issued his Decision in this case, the United States Court of Appeals for the District of

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(Continued)

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

Columbia Circuit ruled that the official time provisions of section 7131(a) of the Statute encompass the negotiation of local agreements supplementing master agreements where such local negotiations are authorized by the parties at the level of exclusive recognition. *American Federation of Government Employees, AFL-CIO v. FLRA*, 750 F.2d 143 (D.C. Cir., 1984).3/ The Authority has found itself constrained to follow the court's legal interpretation of the language of section 7131(a) of the Statute, for the reasons set forth in the court's opinion, *Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 19 FLRA No. 17 (1985), and continues to follow that interpretation in cases such as this one. Thus, the employees negotiating on behalf of the Union were entitled to official time for the negotiations which occurred while they otherwise would be in a duty status.

(A) Prior to the United States Supreme Court's decision in *Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA*, 464 U.S. 89 (1983), the Authority had interpreted "official time" under section 7131(a) of the Statute as encompassing travel expenses and per diem allowances. *See*, *for example*, *Interpretation and Guidance*, 2 FLRA 264 (1979). However, in *BATF*, the Supreme Court concluded that the section 7131(a) obligation to provide official time does not encompass travel expenses and per diem allowances. Therefore, as they are not included within official time under section 7131, there is no entitlement to travel and per diem merely by virtue of a finding that official time is required because of negotiations for certain kinds of agreements. Thus, since there is no requirement to grant travel and per diem under section 7131(a), the refusal to do so cannot be a failure to comply with that section of the Statute. Therefore, the section 7116(a)(8) allegation of the complaint must be dismissed. However, in *BATF* the Court stated, "unions may presumably negotiate for such payments [of travel expenses and per diem allowances] in collective bargaining as they do in the private sector." 464 U.S. at 107, n. 17. The Authority has since determined that a union's proposal requiring the Agency to pay travel expenses incurred by employees using official time was not inconsistent with law or Government-wide regulation and therefore was within the duty to bargain. *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986).

3/ This decision reversed the Authority's position as set forth in *Interpretation and Guidance*, 7 FLRA 682 (1982).

petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986). Thus, the remaining question is the effect of the parties' agreement to pay official time "in accordance with [section] 7131(a)."

(B) The parties agreed that employees representing the exclusive representative in negotiations for a local supplemental agreement would be granted official time "in accordance with [section] 7131(a)" of the Statute. At the time that the parties entered into this agreement, official time under section 7131 had been interpreted by the Authority and was understood by the parties to encompass related travel and per diem expenses. Moreover, the Respondent initially acted on that understanding when it paid some travel expenses in accordance with the parties' agreement. Therefore, the Authority finds that, in effect, the agreement encompassed payment of travel and per diem expenses.

There is no allegation in the complaint that the Respondent's refusal to pay travel and per diem to some employees, and its attempt to reclaim payments to others it determined had been "erroneously" paid, was a refusal to honor the negotiated agreement in violation of section 7116(a)(5) of the Statute. If there had been such an allegation, the Authority, noting particularly Respondent's statements that no payment for travel and per diem would be forthcoming, could have found that the Respondent's actions were contrary to the clearly understood meaning of the parties' agreement, and constituted a repudiation of the agreement amounting to a section 7116(a)(5) violation. See Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982), American Federation of Government Employees, Local 1923, AFL-CIO, 20 FLRA No. 88 (1985). Nevertheless, the Authority does find that the Respondent's actions amount to a violation of section 7116(a)(1) of the Statute, as alleged, because the Respondent's failure and refusal to meet its obligation under an agreement with the exclusive representative of its employees to grant official time to employees representing the Union in supplemental negotiations "in accordance with" section 7131(a) of the Statute as it was understood by the parties at that time, which, as noted above, we find to include agreement to pay travel and per diem expenses, interfered with the employees' protected rights under section 7102 of the Statute "to form, join, and assist a labor organization" and to receive the benefit of those provisions of an agreement negotiated on their behalf by the exclusive representative. Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio, 21 FLRA No. 124 (1986); Department of Defense, Dependents Schools System, 21 FLRA No. 125 (1986); Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986).

VI. Remedy

The Respondent paid travel and per diem expenses of Union representatives for the June 1980 negotiating sessions. Thereafter, the Charging Party made such payments to unit employees who served as its negotiators when the Respondent refused to do so. In our view, it will effectuate the purposes and policies of the Statute to issue an order requiring the Respondent to make whole the Charging Party for those travel and per diem expenses which it incurred by reimbursing the affected employees who should have received such payments directly from the Respondent. Further, in the event that there are bargaining unit employees who either did not receive the payments to which they were entitled or were not compensated fully for such expenses, we shall order the Respondent to reimburse them for the travel and per diem expenses they incurred upon their submission of properly documented claims for such payments. See Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986).

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings made by the Judge at the hearing, finds that no prejudicial error was committed, and thus affirms the rulings. The Authority has considered the Judge's Decision and the entire record, including the parties' contentions, and adopts the Judge's findings, conclusions and recommended Order only to the extent consistent with this decision.

In view of the above, the Authority concludes that the Respondent's refusal to pay travel expenses and per diem allowances to certain employees, and its attempt to reclaim such payments it had made to other employees, was not a failure or refusal to comply with the provisions of section 7131(a) of the Statute in violation of section 7116(a)(8). That allegation shall be dismissed. Such actions by the Respondent are found to have violated section 7116(a)(1) of the Statute, however, and an appropriate remedy shall be ordered.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in the Statute, by refusing to comply with and repudiating an agreement with the National Treasury Employees Union, the exclusive representative of its employees, to pay travel expenses and per diem allowances to Lavon Hair and Willmeta Dobbs, or attempting to reclaim such payments to Hair, Benjamin Smith, and John Thompson, or any other bargaining unit employees entitled to such payments when engaged in negotiations for a local supplemental agreement as contemplated by the parties' Multi-District Agreement during June and July, 1980.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Make the National Treasury Employees Union whole for the costs it incurred by paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators in July 1980, for which the employees otherwise would have been entitled to reimbursement directly by the Respondent.

(b) Pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments for negotiations which occurred in July 1980, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.[4]

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[4] In finding travel expenses and per diem allowances negotiable, the Authority indicated that the travel itself would

(Continued)

(c) Post at its various offices in the Columbia District in which unit employees are located, copies of the attached Notice to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with this Order.

IT IS FURTHER ORDERED that the portion of the complaint alleging a violation of section 7116(a)(8) of the Statute be, and it hereby is, dismissed.

Issued, Washington, D.C. June 27, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

have to meet the requirements of law and regulation, including Federal Travel Regulations. National Treasury Employees Union and Department of the Treasury, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986). There is no contention, nor does the record disclose evidence, that the travel and per diem expense claims would be inconsistent with Federal law or regulation.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in the Statute, by refusing to comply with and repudiating an agreement with the National Treasury Employees Union, the exclusive representative of our employees, to pay travel expenses and per diem allowances to Lavon Hair and Willmeta Dobbs, or attempting to reclaim such payments to Lavon Hair, Benjamim Smith, and John Thompson, or any other bargaining unit employees entitled to such payments when engaged in negotiations for a local supplemental agreement as contemplated by the parties' Multi-District Agreement during June and July, 1980.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL make the National Treasury Employees Union whole for the costs it incurred by paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators in July 1980, for which the employees otherwise would have been entitled to reimbursement directly by us.

WE WILL pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments for negotiations which occurred in July 1980, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.

(Activity)

Dated: ____________ By: ____________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street NE, Suite 736, Atlanta, Georgia 30367, and whose telephone number is: (404) 347-2324.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET, NW
WASHINGTON, D.C. 20036

. . . .

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
COLUMBIA DISTRICT
COLUMBIA, SOUTH CAROLINA

Respondent

and

Case No.: 4-CA-577

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

. . . .

Harry Mason, Esq.
For Respondent

William Harness, Esq.
For Charging Party

Mathilde L. Genovese, Esq.
For General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. 7101, et. seq., (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. Chapter XIV, §2410 et seq.

Pursuant to a charge filed September 30, 1980 by the National Treasury Employees Union (hereinafter called the Union and NTEU) against Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina (hereinafter called IRS and Respondent) the General Counsel of the Federal Labor Relations Authority by the Regional Director for Region 4 issued a Complaint and Notice of Hearing on October 21, 1980 which was thereafter amended on October 27, 1980. The Amended Complaint alleges that Respondent violated Section 7116(a)(1) and (8) of the Statute when it refused to reimburse employees who were representing the Union in negotiations for a Local Supplemental Agreement, for travel and per diem expenses incurred during during the course of the negotiations which were held during the time the employees otherwise would be in a duty status. The Amended Complaint further alleges that Respondent violated Section 7116(a)(1) of the Statute by seeking to reclaim employees' travel and/or per diem expenses incurred during negotiations for the local supplemental agreement. Respondent filed an answer denying that if violated the Statute.

A hearing in this matter was conducted before the undersigned in Columbia, South Carolina. All parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. The parties were given an opportunity to file briefs, which have been fully considered.

Based on the entire record herein, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

The Internal Revenue Service and the National Treasury Employees Union are parties to a collective bargaining agreement covering the period from January 31, 1977 through January 31, 1981. The collective bargaining agreement is a Multi-District Agreement which includes Respondent's Columbia, South Carolina District.

The uncontroverted evidence establishes that on June 25, 26, 27, 30 and July 1, 2 and 3, 1980, the Union and Respondent met in Columbia, South Carolina for the purpose of negotiating a Local Supplemental Agreement to the Multi-District Agreement (herein MDA).1/ Representing IRS at

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1/ The Local Supplemental Agreement concerned five articles of the MDA: equal employment opportunity, the labor management relations committee, bulletin boards, details into taxpayer service and rotational assignments into specialty groups.

negotiation meetings were Stephen Giroux, Chief of Personnel, Leo Chaussie, Chief of Taxpayer Service, Hugh Wagner, Group Manager and Joe Orzichowski, Chief Negotiator. All the management negotiators, except for Group Manager Wagner, worked in the Columbia, South Carolina office of Respondent. Wagner worked in the Greenville, South Carolina office and travelled to Columbia, South Carolina for the negotiations. Wagner received reimbursement from Respondent for his travel and per diem expenses incurred while engaged in these negotiations. The Union negotiating team was composed, at various times, of Wayne Golden, Lavon Hair, John Thompson, Ben Smith, Donzetta Lindsay, Loreta Pinion and Willmeta Dobbs. Hair worked in Respondent's Aiken, South Carolina office, Thompson worked in Respondent's Anderson, South Carolina office, Smith worked in Respondent's Charleston, South Carolina office and Dobbs worked in Respondent's Greenville, South Carolina office. Hair, Thompson, Smith and Dobbs travelled from their respective home cities to Columbia, South Carolina to negotiate the Local Supplemental Agreement. At each meeting NTEU and IRS had an equal number of negotiators.

Negotiations for the Local Supplemental Agreement commenced at approximately 10:00 a.m. on June 25, 1980. A ground rules agreement was reached by the parties at this initial negotiation session and all five articles were discussed. Negotiations continued through July 3, 1980, when a Local Supplemental Agreement was executed.[2]

Lavon Hair, NTEU Chapter 55 President and Chief Negotiator for the Union attended all the Local Supplemental Agreement negotiating sessions. Hair travelled by privately owned vehicle from Aiken, South Carolina to Columbia, South Carolina on June 25, 1980. Hair left Aiken, South Carolina at approximately 8:00 a.m. and arrived in Columbia, South Carolina at approximately 9:35 a.m., travelling some 59 miles. Hair remained in Columbia, South Carolina and engaged in negotiations on June 25, 26, 27, 1980. On June 27, 1980, Hair departed Columbia, South

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[2] The Negotiations were held on the following dates for the specified periods:

6/25/80	10:00 a.m. - 4:45 p.m.
6/26/80	8:00 a.m. - 4:45 p.m.
6/27/80	8:00 a.m. - 3:30 p.m.
6/30/80	10:00 a.m. - 4:45 p.m.
7/01/80	10:00 a.m. - 4:45 p.m.
7/02/80	8:00 a.m. - 4:45 p.m.
7/03/80	8:00 a.m. - 2:15 p.m.

Carolina at approximately 3:40 p.m. and arrived in Aiken, South Carolina at approximately 5:15 p.m. Thus, from June 25, 1980 through June 27, 1980, Hair incurred both travel and per diem expenses in connection with the above-mentioned negotiations. Hair again travelled to Columbia, South Carolina by privately owned vehicle on June 30, 1980. He left Aiken, South Carolina at approximately 8:00 a.m. and arrived in Columbia, South Carolina at 9:35 a.m. Hair engaged in the negotiations through the execution of the Local Supplemental Agreement on July 3, 1980. At the conclusion of the negotiations, Hair left Columbia, South Carolina at approximately 3:40 p.m. and arrived in Aiken, South Carolina at approximately 5:40 p.m. Hair again incurred travel and per diem expenses for the period of June 30, 1980 to July 3, 1980 while he was engaged in negotiations in Columbia, South Carolina or travelling to engage in such negotiations.

Hair recorded the expenses he incurred while engaged in negotiations on his June 1980 and July 1980 travel vouchers. On or about July 15th or 16th, 1980, Hair received a travel check for his June travel expenses including the expenses incurred as a result of participating in the negotiations in Columbia, South Carolina. Hair did not receive reimbursement for the negotiating expenses incurred on July 1-3, 1980. On or about August 6, 1980, Hair received a memo from his Group Manager, D. F. Ramage advising that a disallowance of $104.55 was made from Hair's July, 1980 travel voucher due to the fact that Hair claimed mileage and per diem for District negotiations to which he was not entitled. Hair later received a Travel Voucher Action Notice, covering the period of July 1 through July 31, 1980, advising that his July travel voucher was approved in the amount of $146.80 and that $104.55 was disallowed, per a memo submited by Hair's Group Manager. Hair also received a letter from Stephen D. Giroux, Chief, Personnel Branch, which stated, in part, the following:

> "We regret that your June travel voucher was submitted and approved claiming travel and per diem for the June negotiations. Efforts are being made to correct your June travel voucher and reclaim the expense erroneously paid. No future vouchers, including the July voucher, will be approved with these expenses claimed. Your July voucher is being processed without the travel and per diem related to the negotiations in an effort to expedite the payment of the allowable items."

Hair received a second Travel Voucher Action Notice covering the period of June 1 through June 30, 1980 advising him that $149.15 should be forwarded to Respondent as that amount was overpaid to him and that amount was not allowable inasmuch as the expenses claimed were for the Union negotiations. Hair did not reimburse Respondent for the June negotiation expenses.

Benjamin Smith, NTEU Chapter 55 Treasurer attended the Local Supplemental Agreement negotiation sessions of June 25, 26 and 27, 1980. Smith travelled from Mount Pleasant, South Carolina to Columbia, South Carolina on June 24, 1980. Smith departed Mt. Pleasant, South Carolina at approximately 5:00 p.m. and arrived in Columbia, South Carolina at approximately 7:30 p.m. ITR 35) Smith participated in the negotiation sessions which began at approximately 10:00 a.m. on June 25, 1981. Smith remained in Columbia, South Carolina and engaged in negotiations held on June 26 and 27, 1980. At the conclusion of the negotiation session on June 27, 1980, at approximately 3:00 p.m., Smith left Columbia, South Carolina for his residence. Smith arrived home shortly after 6:00 p.m. While engaged in the negotiation sessions, Smith incurred travel and per diem expenses. Smith recorded these expenses on his June 1980 travel voucher.[3] Smith submitted his June, 1980 travel voucher and received reimbursement sometime in the middle of July, 1980. During mid-August, 1980, Smith's Group Manager, John Stribling, told Smith that his June travel expenses had been paid in error. Stribling gave Smith a letter from Giroux, Chief of Personnel, which informed him that "efforts are being made to correct your June travel voucher and reclaim the expenses claimed." In early September, 1980 Smith received a Travel Voucher Action Notice for the period of June 1, 1980 through June 30, 1980, advising that a post audit of his voucher had resulted in an overpayment of $135.90 which consisted of expenses incurred during the Local Supplemental Agreement negotiations. Respondent requested Smith to reimburse the amount overpaid. Smith has not repaid the amount requested.

John Thompson, NTEU National Vice President for the first district, participated in the negotiation session on June 30, 1980. Thompson departed Taylor, South Carolina on June 30, 1980 at 7:00 and arrived in Columbia, South Carolina sometime after 9:00 a.m. Thompson participated in the June 30, 1980 negotiation session until the close of the negotiations at about 4:45 p.m. Thompson departed Columbia, South Carolina sometime after 5:00 p.m. and the average driving time from Columbia, South Carolina to Thompson's home was 2 hours. As a result of engaging in negotiations, Thompson incurred travel expenses, which he reported on his June, 1980 travel voucher. Thompson received payment for his June travel expenses sometime around the 15th of July, 1980. In approximately mid-August, 1980, Thompson received a letter from Giroux, Chief, Personnel Branch, advising that the June negotiation expenses were erroneously paid and efforts were being made to reclaim the expenses. In the beginning of September, 1980, Thompson received a Travel Voucher Action Notice covering the period June 1, 1980 through June 30, 1980 advising that $39.40 was claimed for Union negotiations which was not allowable. The Travel Voucher Action Notice requested that Thompson forward the stated amount to Respondent. The Travel Voucher Action Notice was attached to a memo signed by Donald L. Breihan, District Director, Columbia District stating that normal procedures should be followed in reclaiming travel and per diem expenses from John Thompson. Thompson has not paid the amount requested.

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[3] Smith did not claim per diem expenses for June 24, 1980, as he travelled for his personal convenience.

Willmeta Dobbs, Executive Vice President of NTEU Chapter 55, attended the negotiation sessions of July 1 - July 3, 1980. Dobbs departed Taylor, South Carolina at approximately 7:15 a.m. and arrived in Columbia, South Carolina at approximately 9:45 a.m. Dobbs remained in Columbia, South Carolina, engaged in negotiations, until July 3, 1980 when she departed Columbia, South Carolina at approximately 2:00 p.m. and arrived home at approximately 4:30 p.m. While engaged in negotiations in columbia, South Carolina, Dobbs incurred travel and per diem expenses which she recorded on her July, 1980 travel voucher. Dobb's July travel voucher was not processed because Dobb's Group Manager, Al Howard, informed her that the negotiation expenses were not covered. Howard asked Dobbs to submit another travel voucher, deleting the negotiation expenses. This second travel voucher was prepared, submitted and paid by Respondent.

All the Union negotiators participated in the negotiations and provided input on the articles under discussion.

At all times material herein, the regular working hours of Respondent's employees, including the above-mentioned employees engaged in negotiations, were 8:00 a.m. to 4:45 p.m. Both Dobbs and Hair were reimbursed by NTEU for the expenses they incurred in connection with the July negotiating sessions.

Discussion and Conclusions

Section 7131(a) of the Statute provides:

> "(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes..."

The Federal Labor Relations Authority (FLRA) has held that Section 7131(a) requires agencies to reimburse union negotiators for their travel and per diem expenses incurred due to their participation in negotiations. Interpretation and Guidance, 2 FLRA No. 31 (1979). FLRA held further that Section 7131(a) provides that such a union negotiator is entitled to travel and per diem expenses when engaged in mid-term negotiations and that failure to pay it violates Section 7116(a)(1) and (8) of the Statute. Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, 4 FLRA No. 40 (1980). IRS's contention that FLRA was without authority to issue its decision in Interpretations and Guidance, supra is rejected as is the argument that IRS can not be required to expend appropriated funds for the payment of travel and per diem expenses of Union negotiators. Bureau of Alcohol Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, supra.

Further IRS's contention that because the Union negotiators were reimbursed for their travel and per diem expenses IRS is not obliged to comply with §7131 of the Statute is rejected. Such an interpretation of the Statute would permit IRS to benefit because it violated the Statute and NTEU attempted to mitigate the harm to the employees.

Accordingly it is concluded that IRS violated Sections 7116(a)(1) and (8) of the Statute by its failure to reimburse employees Hair and Dobbs for their travel and per diem expenses incurred while they were engaged as members of NTEU's bargaining team in Columbia, South Carolina.

Further it is concluded that IRS' attempts, though unsuccessful, to reclaim the travel and per diem expenses that were paid to Union negotiator-employees Hair, Smith and Thompson for time spent representing NTEU at negotiations, interferres with, restrains and coerces these employees in their rights as set forth in Section 7102 of the Statute and therefore violates Section 7116(a)(1) of the Statute.

Having found and concluded that IRS violated Sections 7116(a)(1) and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the Department of Treasury, Internal Revenue Service, Columbia District,Columbia, South Carolina shall:

1. Cease and desist from:

(a) Failing and refusing to provide and pay necessary travel and per diem expenses to Lavon Hair, Willmeta Dobbs, or any Agency employee, for the time said employees engaged in representing the National Treasury Employees Union, the employees' exclusive representative, during Union - Agency negotiations of a collective bargaining agreement.

(b) Attempting to reclaim or recover travel and per diem expenses paid to Lavon Hair, Benjamin Smith, John Thompson or any Agency employee, for the time said employees engaged in representing the National Treasury Employees Union, the employees' exclusive representative, during Union - Agency negotiations of a collective bargaining agreement.

(c) In any like or related matter, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide Union representatives Lavon Hair and Willmeta Dobbs ordinary travel and per diem expenses for July 1 through July 3, 1980.

(b) Post at its various offices in the Columbia District wherein unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 4, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Samuel A Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: June 10, 1981
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide and pay travel and per diem expenses to Lavon Hair, Willmeta Dobbs, or any Agency employee, for the time said employees engaged in representing the National Treasury Employees Union, the employees' exclusive representative, during Union - Agency negotiations.

WE WILL NOT attempt to reclaim or recover travel and per diem expenses paid to Lavon Hair, Benjamin Smith, John Thompson or any Agency employee, for the time said employees engaged in representing the National Treasury Employees Union, the employees' exclusive representative, during Union - Agency negotiations of a collective bargaining agreement.

WE WILL NOT in any like or related matter, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide Union representatives Lavon Hair and Willmeta Dobbs their ordinary travel and per diem expenses for July 1 through July 3, 1980.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region 4, Federal Labor Relations Authority, whose address is: 1776 Peachtree Street, N.W., Suite 501 - North Wing, Atlanta, Georgia 30309 and whose telephone number is: (404) 881-2324.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 32, AFL-CIO

Union

and

Case No. 0-NG-638

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the underlined portions of the following Union proposal:

> 1. In the event OPM uses a limited furlough as a result of the December 15 budget reductions, 30 calendar days or less, such furloughs will be continuous or discontinuous, at the employee's option. The employees to be furloughed will be only the employees for which the union was given notice.
>
> 2. Employees will be allowed to request a specific schedule for the furlough time. An employee's request will be honored unless management determines that mission and workload requires otherwise, in which case management will make every reasonable attempt to work out a schedule which is suitable to the employee's needs. Should an employee request be denied, the employee will be provided written reasons for the denial.

3. OPM will have a liberal LWOP policy during the period of the furloughs but will not coerce any employee into using LWOP. The agency will inform employees that they can get unemployment benefits for any continuous furlough of more than 5 days, but not for LWOP of any length of time.

II. Positions of the Parties

The Agency contends that the Union's proposal directly interferes with management's right to determine its budget under section 7106(a)(1) and its right to layoff and retain employees under section 7106(a)(2)(A). The Union contends that the proposal is a negotiable procedure under section 7106(b)(2) or, in the alternative, constitutes an appropriate arrangement within the meaning of section 7106(b)(3). The Union also contends generally that, depending on the circumstances of the case, section 7106 does not prevent the Authority from issuing a bargaining order, even if the proposal is inconsistent with management's rights.

III. Analysis and Conclusions

The Union's proposal was made in response to the Agency's decision to furlough employees in order to compensate for a shortage of appropriated funds. The proposal requires the Agency, first, to notify employees who are to be furloughed that they would be entitled to unemployment compensation for any furlough of more than five continuous days and, second, to offer those employees the opportunity to take their furlough on continuous days so as to qualify for unemployment compensation. While the proposal permits employees to request a particular schedule for their furloughs, it reserves to management the right to deny those requests for reasons related to the Agency's workload. Employees would also have the option under the proposal to take leave without pay (LWOP) in lieu of a furlough. In short, the proposal does not prevent management from furloughing employees; it does not require management to make all furloughs continuous, only those where employees choose that option; and it does not dictate when furloughs must be scheduled. The proposal does, however, have consequences which directly affect the exercise of management's rights.

A. Whether The Proposal Violates Management's Rights

Under the proposal, when an employee chooses to be furloughed on continuous days, management is not able to assign work to that employee during that period, even if management should determine that it is necessary for the employee to work. In this way, the proposal is like those requiring management to grant employee requests for leave which the Authority has held directly interfere with management's right to assign work under section 7106(a)(2)(B). See American Federation Government Employees, AFL-CIO, Local 2263 and Department of the Air Force, Headquarters, 160th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA 580, 583 (1984) (Union Proposal 4); National Federation of Federal Employees, Local 15 and U.S. Army Armament Munitions and Chemical Command, Rock Island Arsenal, Illinois, 19 FLRA No. 6 (1985) (Union Proposal 1). As with the proposals in those cases the proposal in this case similarly would restrict management's ability to determine when assigned work will be performed.

Our conclusion that the proposal violates management's right to assign work is based on considerations other than those argued by the Agency. The Agency contends that the proposal directly interferes with management's rights to determine its budget and to layoff employees. For the following reasons we do not find those Agency contentions persuasive.

The Agency's position is based on its assessment of the potential consequences of the proposal. In particular, the effect of the proposal is to give employees who are being furloughed the opportunity to qualify for unemployment compensation.1/ Payments to Agency employees who have been laid off are ultimately funded by the Agency. That is, when Federal employees qualify for unemployment compensation under

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1/ The bargaining unit in this case consists of employees in the headquarters of the Office of Personnel Management which is located in the District of Columbia. Entitlement to unemployment compensation is determined by the law of the jurisdiction in which a person is employed. The Agency states, without contradiction, that under D.C. law, D.C. Code, §§ 46-101 and 110, any continuous furlough of as few as five workdays would establish entitlement to unemployment compensation. Agency Statement of Position at 3. The planned furloughs were intended to take up no more than 10 workdays but could involve as many as 22 work days. Agency Statement of Position at 2 and Attachment A to the Agency's Statement of Position.

the laws of the state in which they are employed -- or in this case, the laws of the District of Columbia -- the state makes the payment to those employees and applies to the U.S. Department of Labor for reimbursement. The Department of Labor reimburses the state and, in turn, bills the Federal agency which had employed those individuals for that amount.[2] The Agency claims that by creating the possibility of such an entitlement the proposal would result in a decrease in the savings which it would realize from the planned furloughs.[3] In order to comply with the proposal and still achieve the savings necessary to make up for the shortage of appropriated funds, the Agency claims that it would be required to lengthen the duration of the furloughs, furlough more employees and/or conduct further reductions in force.[4]

The effects which the Agency contends would result from implementation of the Union's proposal do not amount to a direct interference with management's rights. At most, the effect of the proposal on those rights is indirect and secondary. That is, the consequences which the Agency foresees are not an inevitable result of the proposal but are dependent on factors outside the proposal. In the first place, it is not possible to know in advance how many, if any, employees subject to furlough would take advantage of the option afforded by the proposal. In this respect, the Agency's claims about the impact of the proposal are speculative. Secondly, and more importantly, the consequences which are alleged to flow from the proposal are wholly within the control of management. Thus, even if employees choose to make their furloughs continuous and the Agency thereby incurs some liability for unemployment compensation, it would not necessarily follow that there must be more and longer furloughs to make up for the savings lost. That would only be the result if the Agency chooses that alternative from other possible actions it could take to achieve the necessary savings. Contrary to the Agency, therefore, the proposal would not require management to increase the number of employees furloughed or the duration of their furloughs, or to initiate further RIF actions, even though it might make such a decision more probable.

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[2] *See* 5 U.S.C. § 8509. *See also* 20 C.F.R. Part 609, Subpart C; Federal Personnel Manual, Chapter 850, Subchapter 2.

[3] Agency Statement of Position at 3.

[4] Agency Statement of Position at 4-5.

The Agency also has not shown that implementation of the proposal would directly interfere with management's right to determine its budget under the test set forth in American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 995 (1982). The Agency concedes that the proposal does not on its face prescribe a particular program or operation which must be included in the Agency's budget or an amount to be allocated for such a program or operation.5/ Nor does the proposal result in an increase of costs. Rather, implementation of the proposal could possibly involve the reallocation of a portion of the funds intended for employee salaries to cover the Agency's liability, if any, for unemployment compensation. The effect of the proposal, therefore, is potentially to reduce the amount of savings to be achieved by the proposed furloughs. It is a speculative result at best, because it is impossible to determine at this point whether, or how many, employees will choose to make their furloughs continuous so as to qualify for unemployment compensation. Even if the proposal ultimately results in an Agency liability for unemployment compensation the proposal would not prevent management from achieving the necessary savings to meet the anticipated shortage of funds. The Agency has not shown that it has no other options by which to make up the necessary amount.6/

B. "Appropriate Arrangements"

Because the proposal directly interferes with the exercise of management's right to assign work, it is not, contrary to the Union's claim, a negotiable procedure. We turn then to the Union's additional claim that it constitutes a negotiable appropriate arrangement for employees adversely affected by the exercise of management's

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5/ Agency Statement of Position at 3.

6/ The record indicates that the Agency had determined that it could make up the entire budgetary shortfall through a combination of actions: attrition, i.e., not filling positions which become vacant, ($11.5 million), reduction in force ($1.2 million), reimbursable details ($2.0 million), miscellaneous expenses (including travel) ($3.0 million), a pay raise supplemental ($3.3 million), and the planned furloughs ($3.3 million). Agency Statement of Position at 2.

rights within the meaning of section 7106(b)(3). There can be little question but that the proposal is intended as an "arrangement" for employees adversely affected by management's decision to furlough. The literal language of the proposal indicates that it is intended to mitigate against the loss of wages due to the furlough by providing employees a basis for claiming unemployment compensation. The basic issue is whether the burden placed by the proposal upon the exercise of management's right to assign work constitutes excessive interference with that right so as to render the proposal an "inappropriate" arrangement. See National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

Management's right to assign work is reserved in the Statute in order to protect management's ability, among other things, to manage its workload. Compare American Federation of Government Employees, AFL-CIO, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 613 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 995 (1982) (right to assign employees to positions under section 7106(a)(2)(A) protects management discretion to determine qualifications necessary to perform the work of a position). The effect of the Union's proposal on that important interest is insubstantial. In the first place, the most significant impact on the Agency's ability to accomplish its workload comes from management's own decision to furlough employees rather than from any consequences which might flow from implementation of the proposal. That is, the Agency's decision to furlough employees results in the loss of a certain amount of employee worktime. The proposal would do nothing to change that amount. Whether employees are furloughed on a continuous or discontinuous basis, the amount of worktime lost due to furlough would be the same.[7] Moreover, the proposal permits management to schedule furloughs so as to enable it to get its work done when that is necessary. In short, the proposal protects the Agency's ability to manage its workload with a reduced workforce. For this reason, and because the proposal would not preclude the Agency from making the necessary savings, we conclude that it would not have a detrimental impact on the achievement of effective and efficient government operations. Indeed, even if implementation of the proposal makes it more difficult to accomplish those savings, it would not necessarily mean the proposal is inconsistent with that objective. See American Federation of Government

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[7] See note 1, supra.

Employees, AFL-CIO v. Federal Labor Relations Authority, 785 F.2d 333, 337-38 (D.C. Cir. 1986). Compared to the adverse effect on employees of management's decision to furlough and the benefit conferred by the proposal of an opportunity to qualify for unemployment compensation so as to potentially offset the loss of pay, the minimal burden imposed on management's right to assign work does not rise to the level of excessive interference. The proposal, therefore, constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.8/

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain on the Union's proposal.9/

Issued, Washington, D.C. June 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

8/ We note the Union's general contention that section 7106 does not preclude the issuance of a bargaining order even where it is determined that a proposal violates management's rights. Essentially the same arguments were made to the Authority in American Federation of Government Employees, AFL-CIO, National Council of CSA Locals and Community Services Administration, 5 FLRA 748, 752-53 (1981) and the Authority rejected them, finding that both the language and the legislative history of the Statute indicated that section 7106 was intended as a limitation on the scope of bargaining. Nothing the Union has argued here has persuaded us that we reached the wrong conclusion in that case.

9/ In deciding that the Union's proposal is within the Agency's duty to bargain, we make no judgment as to the merits of the proposal.

22 FLRA No. 30

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 26

Union

and

Case No. O-NG-237

INTERNAL REVENUE SERVICE,
ATLANTA DISTRICT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of five Union proposals[1] dealing with impact and implementation bargaining on changes in working conditions of certain unit employees caused by the institution of a temporary program in one of the Agency's divisions.

II. Preliminary Issues

A. Motion to Dismiss

The Agency filed a motion to dismiss the petition for review in this case. The Agency based its motion on the grounds that the petition was untimely filed and did not contain necessary attachments. However, the record establishes that the petition for review was filed within the time limits required under sections 2424.3, 2429.21, and 2429.22 of the Authority's Rules and Regulations. Moreover, the Union submitted the necessary attachments within the time limits normally afforded parties by the Authority to correct procedural deficiencies. Accordingly, the Agency's motion to dismiss must be denied.

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[1] The Union's petition for review requested negotiability determinations on six proposals. In its response to the Agency's statement of position, the Union withdrew its second proposal. Accordingly, it will not be considered further by the Authority here.

B. More Than "De Minimis" Impact

The Agency contends that it is under no obligation to negotiate any of the Union's proposals because the temporary program it instituted caused no significant changes in the working conditions of affected employees. For the following reason the Authority disagrees.

In conjunction with the petition for review of the negotiability of its proposals, the Union also filed an unfair labor practice charge against the Agency. The charge alleged a failure to give the Union adequate prior notice of the implementation of its program and a refusal to bargain at the Union's request concerning procedures to be utilized in implementing the change and appropriate arrangements for the affected employees. The Union elected to have the unfair labor practice charge resolved prior to any determination being made on the negotiability issues. As a result, in Internal Revenue Service, 16 FLRA 845 (1984), the Authority adopted an Administrative Law Judge's finding that the Agency violated section 7116(a)(1) and (5) of the Statute, as alleged by the Union. The Authority found that the impact of the Agency's program on unit employees was more than de minimis. Therefore, in terms of this case, the Authority concludes that the Agency's contention that its program caused no significant impact in the working conditions of affected employees is without merit, and must be denied.

III. Union Proposal 1

> Management agrees that in grading cases it will follow IRM MT 7500-23 (1-12-79)

A. Positions of the Parties

IRM MT 7500-23 refers to Internal Revenue Manual, Manual Transmittal 7500-23, a document used by the Agency for the purpose of assigning work to its employees. The Agency contends that the proposal would affect its determinations as to the content of the work performed by employees and, therefore, interferes with the Agency's right to determine its organization under section 7106(a)(1) and its right to assign work under section 7106(a)(2)(B) of the Statute. The Agency also contends that the document referred to in the proposal is an internal guide to managers never intended to be mandatory and that it already uses the guidelines whenever possible, so that bargaining over the proposal would serve no useful purpose.

The Union contends that the document referred to in the proposal is binding on management officials. The proposal would merely insure that whatever work is assigned is properly graded and that where an employee believes work is misgraded, a contractual remedy would exist. The Union further states in its petition for review that all of its proposals, including Union Proposal 1, "fall within the ambit" of section 7106(b)(2) and section 7106(b)(3) of the Statute.

B. Analysis

In previous decisions, the Authority has indicated that an agency's right to determine its organization refers primarily to its right to determine the internal structure of the organization. See, for example, American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 17 FLRA 790 (1985). The proposal in this case would not require the Agency to modify its internal structure, and, therefore, does not interfere with the Agency's right to determine its organization under section 7106(a)(1).

As to the Agency's argument concerning assignment of work, the document referred to in the proposal contains criteria used by management officials in grading the level of difficulty of the work to be performed by their employees. Presumably, by correlating the level of difficulty with a specific GS level, the more difficult the work, the higher the GS level of the employee assigned to perform the work. The proposal would require management to assign work to its employees strictly on the basis of the criteria specified in the document and would prevent management from deviating from those criteria. In National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769, 775 (1980), aff'd sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), the Authority established that the right to assign work under section 7106(a)(2)(B) includes the discretion to determine "the particular employees to whom or positions to which [work] will be assigned." Since the proposal would make it impossible for the Agency to deviate from the criteria established in the document in assigning particular employees to perform work, the proposal directly interferes with management's right to assign work and does not constitute a procedure under section 7106(b)(2) of the Statute.

Subsequent to the filings in this case, the Authority issued National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). There the Authority stated that henceforth we will determine whether a proposal constitutes a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute by determining whether the proposal "excessively interferes" with the exercise of management's rights. In making such a determination, the Authority will first examine the record in each case to ascertain as a threshold question whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of it rights. If the Authority concludes that a proposal is in fact intended as an arrangement, we will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes.

The record fails to clearly indicate how this proposal is intended to operate as an appropriate arrangement. However, it would seem, and we assume for purposes of this decision, that the Union intends the proposal to be an arrangement for employees adversely affected by management's right to assign work under section 7106(a)(2)(B) of the Statute. That is, the proposal would be intended to ameliorate the adverse affects on employees as a result of management's right to assign work by binding management to the criteria for grading and assigning work in the document as a matter of contract. However, the Authority finds that the proposed amelioration could totally preclude the Agency from exercising its right to assign work to a particular employee if such assignment were not strictly in accordance with the criteria. Through the arbitration process management's decision to assign work to a particular employee could be completely negated. Such a proposed amelioration which totally abrogates the exercise of a management right clearly does not constitute an appropriate arrangement within the meaning of section 7106(b)(3). See American Federation of Government Employees, Local 2782 v. FLRA, 702 F.2d 1183, 1188 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

C. Conclusion

The Authority concludes, therefore, based on the reasons and cases cited above, that Union Proposal 1 does not interfere with management's right to determine its organization, under section 7106(a)(1). The proposal does directly interfere with management's right to assign work, under section 7106(a)(2)(B) of the Statute and does not constitute a procedure within the meaning of section 7106(b)(2). In addition, the proposal does not constitute an appropriate arrangement for employees adversely affected by management's right to assign work under section 7106(b)(3) of the Statute, because it excessively interferes with that right. Accordingly, the proposal is outside the duty to bargain.[2]

IV. Union Proposal 2

> The Agency agrees to request from GSA, a sufficient number of government cars for qualified EP employees who are involved in the TCMP program and request it.

A. Positions of the Parties

TCMP refers to the Agency's Taxpayer Compliance Measurement Program, the Agency's temporary program in this case. EP refers to the Agency's Exempt Plan agents, the particular employees affected by the Agency's temporary program. The Agency contends that the proposal involves a subject which is negotiable only at its election, under section 7106(b)(1) of the Statute, and it elects not to negotiate the matter. The Union, on the other hand, argues that the Agency has already determined the technology, methods and means by which the work is to be performed. The proposal, therefore, properly concerns the impact and implementation of management's prior decision upon the conditions of employment of unit employees and is negotiable.

B. Analysis

The proposal would require the Agency to request cars from GSA for the purpose of providing those cars to employees involved in the Agency's temporary TCMP. Based on the record in this case it is clear that travel is a necessary aspect of the Agency's temporary program. The Authority has previously determined that the choice of the mode of transportation to be used for accomplishing an agency's mission is a decision as to the "means" to be used for its accomplishment, that is, the instrumentalities or agents, tools, or devices used to accomplish the agency's work. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA No. 104 (1986) (Union Proposal 10). In requiring management to negotiate on this proposal, therefore, the Union is requiring management to bargain over a particular "means" of performing the work assignments associated with its temporary program. See also National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 254 (1979).

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[2] In making this negotiability determination, the Authority finds irrelevant whether, as asserted by the Agency, the document referred to in the proposal was ever intended to be mandatory or whether bargaining over the proposal would serve a "useful purpose."

The Union has indicated that its proposal concerns the impact and implementation of the Agency's prior decision to use cars for the performance of work associated with its temporary program. The proposal therefore concerns how the cars shall be provided. The record fails to clearly indicate how this proposal is intended to operate as a procedure, under section 7106(b)(2), or as an appropriate arrangement, under section 7106(b)(3) of the Statute. In any event, having determined that the proposal directly interferes with management's substantive rights under section 7106(b)(1), we find further that it cannot constitute a negotiable procedure. Moreover, assuming the proposal is intended as an appropriate arrangement for employees adversely affected by the Agency's right to implement its temporary program, that is, its right to assign work under section 7106(a)(2)(B), we find the proposal would be inappropriate because it would excessively interfere with management's right under section 7106(b)(1) to determine the technology, methods and means of performing work. It would be inappropriate because it would completely negate the Agency's section 7106(b)(1) right to decide the means to be used in the accomplishment of its mission, rather than merely ameliorating the adverse affect on employees of the Agency's exercise of its rights. See analysis of Proposal 1 above.

C. Conclusion

Union Proposal 2 concerns a matter negotiable only at the election of management under section 7106(b)(1) of the Statute, as alleged by the Agency. Moreover, the proposal does not constitute a procedure nor is it an appropriate arrangement, under section 7106(b)(3), because it would completely negate the exercise of management's rights. Therefore, the Agency is under no obligation to bargain over the proposal.

V. Union Proposal 3

> If GSA refuses or is unable to provide sufficient number of cars for employees in the TCMP program, then those which are provided will be assigned on a hardship basis. Indications of hardship will include:
>
> 1. Only one car in the family.
>
> 2. Ownership of a car whose age and condition is such that it is suitable only for local travel.

Union Proposal 4

> Those employees working TCMP whose assignments are more than 150 miles from their POD [Post of Duty] who choose to fly will be permitted to secure GSA cars when available or rental cars from authorized GSA supplier for local transportation.

A. Positions of the Parties

The Agency contends that the proposals conflict with agency-wide regulation IRM 1(14)47.1, "Motor Vehicle Management Handbook." It further claims that its regulation is "dictated" by the GSA regulations which govern the matters at issue. The Agency asserts, therefore, that in the absence of a finding by the Authority that no compelling need exists for this regulation, under section 7117(a)(2) of the Statute, the Agency has no obligation to bargain over these proposals. The Agency also contends that the proposals concern the technology, methods and means of performing work under section 7106(b)(1), matters which are negotiable only at the election of the Agency. Finally, with respect to Union Proposal 4, the Agency states that because it is already voluntarily complying with the substance of the proposal, any negotiations would be meaningless.

The Union contends that the burden of proof is on the Agency to demonstrate a compelling need for its regulations, and that the Agency has failed to meet that burden. As to the Agency's view that the proposals concern matters negotiable only at its election, the Union asserts that Union Proposal 3 is a procedure for determining how a previous management decision is to be implemented, and, therefore, concerns a mandatory subject of bargaining. The Union also contends that the Agency has merely asserted, without any rationale, that Union Proposal 4 involves a permissive subject of bargaining, and that mere assertion is insufficient to demonstrate that the proposal is outside the duty to bargain.

B. Analysis

1. Compelling Need Under Section 7117(a)(2)

The Authority has consistently held that when an agency alleges the nonnegotiability of a proposal because it conflicts with one of its regulations under section 7117(a)(2), the agency bears the burden of demonstrating that a compelling need exists for that particular regulation. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 450 (1980). In agreement with the Union, the Agency in this case has failed to demonstrate that there is a compelling need for its regulation.

The Agency's compelling need argument is based on its contention that its regulation implements a mandate under GSA regulations. See section 2424.11(c) of the Authority's rules. The Agency does not specifically contend that the proposals are inconsistent with GSA regulations governing the assignment of cars to employees on official Government business. However, the Agency variously states that its own regulations "incorporate," are "dictated by," and are "based on" the GSA regulations. An examination of the current GSA regulations governing the matters covered by the proposals, as stated in GSA Bulletin FPMR A-40, Supp. 5, effective June 19, 1983, fails to reveal any inconsistency between the proposals and GSA's current guidelines. Specifically, it does not appear that current GSA guidelines include a mileage test, which the Agency claims to have incorporated into its regulations, and which it further claims is inconsistent with Union Proposal 3. Therefore, the Agency has not supported its suggestion that its regulations somehow are mandated by the GSA regulations.

2. Management Rights Under Section 7106(b)(1) and Procedures and Appropriate Arrangements

Union Proposal 3 contemplates a situation where an insufficient number of cars will be available for employees' use as a result of the implementation of the Agency's temporary program. It provides that in such a circumstance, cars will be allocated to employees on the basis of hardship. Therefore, contrary to the Agency's position, the Authority finds that Union Proposal 3 concerns a procedure for implementing management's previous decision to use cars in performing the Agency's mission during the existence of its temporary program, and does not directly concern the technology, methods and means of performing work, under section 7106(b)(1).

As to Proposal 4, the Union contends that the mere assertion by the Agency that it involves permissive subjects of bargaining is not sufficient to establish the assertion. The Authority agrees. However, the Authority is required to find nonnegotiable proposals which appear to conflict with law or Government-wide regulations. In the case of Union Proposal 4, despite a lack of articulated rationale on the part of the Agency in support of its assertion, the proposal does nonetheless conflict with section 7106(b)(1) on its face. It would permit affected employees to secure GSA cars, or rental cars, under the conditions specified in the proposal, for local transportation in the performance of their work. See discussion of Union Proposal 2 above. For this reason, the proposal directly concerns the technology, methods and means of performing work, under section 7106(b)(1).

As with the other proposals, the record does not clearly indicate how Union Proposals 3 and 4 are intended to operate as procedures, under section 7106(b)(2), or as appropriate arrangements, under section 7106(b)(3) of the Statute. Inasmuch as we have determined that Union Proposal 3 constitutes a negotiable procedure under section 7106(b)(2) of the Statute which does not directly interfere with any substantive management rights, the ambiguousness of the record in this regard is irrelevant. Concerning Union Proposal 4, the Authority has determined above that it would directly interfere with management's right, under section

7106(b)(1), to determine the technology, methods and means of performing work. Therefore, regardless of whether the proposal is intended as a procedure, it would be outside the duty to bargain. On the other hand, assuming that the proposal is intended as an appropriate arrangement for employees adversely affected by the Agency's right to assign work, under section 7106(a)(2)(B), in connection with the implementation of its temporary program, the Authority finds as follows. The proposal would be inappropriate because it would completely negate the Agency's section 7106(b)(1) right to decide the means to be used in the accomplishment of its mission, rather than merely ameliorating the adverse affect on employees of the Agency's exercise of its right to assign work, under section 7106(a)(2)(B). See analysis of Proposal 2 above.

C. Conclusion

The Agency has failed to demonstrate either that Union Proposals 3 and 4 are inconsistent with an agency-wide regulation for which there is a compelling need, or that they violate applicable GSA Government-wide regulations. Union Proposal 3 constitutes a procedure which management will observe in exercising its rights, under section 7106(b)(2) of the Statute, and does not concern matters negotiable only at the election of the Agency. Union Proposal 4 concerns the technology, methods and means of performing work, under section 7106(b)(1). Because the proposal directly interferes with the Agency's rights under section 7106(b)(1) of the Statute, it does not constitute a procedure within the meaning of section 7106(b)(2). Moreover, it excessively interferes with the Agency's rights under section 7106(b)(1) and is not an appropriate arrangement under section 7106(b)(3). Therefore, for the reasons and cases cited in the foregoing analysis, Union Proposal 3 is within the duty to bargain and Union Proposal 4 is outside the duty to bargain.3/

3/ Further, the Agency's contention that negotiations on Union Proposal 4 would be "meaningless" because the Agency is already voluntarily complying with the substance of the proposal, is, of course, concerned with the merits rather than the legality of the proposal and is therefore irrelevant in determining whether the proposal is outside the duty to bargain.

VI. Union Proposal 5

As far as possible case assignments will be made in the following manner:

1. Employees will be canvassed to determine their area of work preference.
2. Management will take into account the preference and any hardship reasons which dictate that preference.
3. In the case of 2 or more employees with the same preference and no overriding hardship reasons for that preference, the employee with the earliest service computation date shall be accommodated.

A. Positions of the Parties

The Agency contends that the proposal conflicts with management's right to assign work under section 7106(a)(2)(B) by substituting a "preference, hardship, and seniority test" for the discretion and judgment of management officials in determining which employee is to perform what work.

The Union contends that the Agency has misinterpreted the proposal.

B. Analysis

According to the Union, the phrase "area of work" in the proposal refers to the geographical locations of the work to be performed and not to the actual work assignment. Therefore, the Union interprets the proposal as constituting a procedure for the just and equitable assignment of geographical locations to employees. Moreover, the Union argues that the phrase "as far as possible" guarantees that management retains the right to assign cases and would not prevent management from acting at all in the exercise of its right.

The Authority finds no merit in the Union's contention that by interpreting the phrase "area of work" to mean the geographical locations of the work, the effect of the proposal is altered. On the contrary, the proposal would have the effect of interfering with management's discretion, under section 7106(a)(2)(B), to determine the particular employees to whom work will be assigned. The record indicates that the geographical locations of the work to be performed are determinative of the particular job assignments. Therefore, if an employee has the right to choose the geographical location of the work to be done, management is precluded from assigning the employee to perform a particular job in a different geographical location. See National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982). Moreover, under the proposal, an arbitrator could overturn a manager's decision to assign work to a particular employee by concluding that the manager had not taken into account the factors specified in the proposal "as far as possible." Such a result would have the effect of directly interfering with management's right to assign work. See, for example, American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 19 FLRA No. 9 (1985) (Union Proposals 1, 2, and 3).

For this reason, Union Proposal 5 is distinguishable from cases involving proposals which are negotiable because they concern the selection of individual employees to temporarily perform assigned work in different locations. In such cases, the decision as to where the work of a given position is to be performed is not, as it is here, determinative of the particular work to be assigned. Compare American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83, 86 (1981) (criteria for selecting which employee will temporarily perform previously assigned duties at a different location are within the duty to bargain).

As with Union Proposals 1, 2, 3 and 4, the record fails to clearly indicate how this proposal is intended to operate as a procedure or an appropriate arrangement. The proposal is not a procedure because it directly interferes with the Agency's right to assign work. If the proposal is intended as an appropriate arrangement for employees adversely affected by the Agency's right to assign a particular employee to perform a particular job, the Authority finds that it could have the effect of completely abrogating that right. Therefore, it excessively interferes with management's right to assign work so as to be inappropriate as an arrangement within the meaning of section 7106(b)(3) of the Statute. See analysis in connection with Union Proposal 1 above.

C. Conclusion

The Authority concludes, for the reasons and cases cited in the foregoing analysis, that Union Proposal 5 directly interferes with management's right to assign work, under section 7106(a)(2)(B) of the Statute, and, therefore, does not constitute a procedure under section 7106(b)(2). The Authority also concludes that if the Union intends the proposal as an appropriate arrangement, it would excessively interfere with management's right to assign work, so as to be nonnegotiable under section 7106(b)(3). Therefore, Union Proposal 5 is outside the duty to bargain.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 3.[4] Furthermore, IT IS ORDERED that the Union's petition for review as to Union Proposals 1, 2, 4 and 5 be, and it hereby is, dismissed.

Issued, Washington, D.C. June 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In finding Union Proposal 3 to be within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY,
ALEXANDRIA, VIRGINIA AND DEFENSE
CONSTRUCTION SUPPLY CENTER,
COLUMBUS, OHIO

Respondent

and

Case No. 5-CA-40131

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1148, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions and a supporting brief to the Judge's Decision and Respondent filed a brief in opposition to such exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order to the extent consistent herewith.

In agreement with the Judge, the Authority concludes that, under the circumstances in this case, the General Counsel failed to establish that the Respondent implemented a change in the working conditions of unit employees. Thus, as found by the Judge, the Respondent, Defense Construction Supply Center (the Center), executed an agreement with the U.S. Attorney to have three of the Respondent's attorneys appointed as Special Assistant U.S. Attorneys under the supervision and direction of the local U.S. Attorney. The three were needed to prosecute misdemeanor offenses arising on the Center's facilities because the U.S. Attorney had a large backlog of cases and was short-staffed, although he had jurisdiction to prosecute such misdemeanor cases and had done so in the past.

The Authority notes, in agreement with the Judge, that bargaining unit employees have always been subject to prosecution by the U.S. Attorney for their unlawful acts committed at the Center, and that the implementation of the agreement with the U.S. Attorney did not result in the imposition of any new penalties, new investigative procedures or regulations. Given the Authority's finding that there was no change, the Authority concludes that the complaint should be dismissed. See, for example, Social Security Administration, Baltimore, Maryland, 19 FLRA No. 79 (1985), where the Authority determined that in the absence of evidence that Respondent's actions constituted a change in personnel policies, practices or matters affecting working conditions, no violation of section 7116(a)(1) and (5) of the Statute had been established.*/

ORDER

The complaint in Case No. 5-CA-40131 is dismissed in its entirety.

Issued, Washington, D.C., June 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ With regard to the Judge's conclusion that the matter in this case did not involve conditions of employment of unit employees, Chairman Calhoun agrees with the Judge's conclusion; Member Frazier finds it unnecessary to pass upon this conclusion of the Judge, in light of the Authority's finding that no change was involved.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEFENSE LOGISTICS AGENCY,
ALEXANDER, VIRGINIA AND
DEFENSE CONSTRUCTION SUPPLY
CENTER, COLUMBIA, OHIO

Respondent

and

Case No. 5-CA-40131

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1148, AFL-CIO

Charging Party

. . . .

H. Lowell Ralph and
Fred L. Harris,
For the Respondent

Judith H. Ramey,
For the General Counsel
Federal Labor Relations Authority

Carmelita Burge Riley,
For the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

On February 17, 1984, the Charging Party filed with the Federal Labor Relations Authority (the Authority) a charge that Respondent had committed an unfair labor practice. Amended charges were filed on February 27 and March 16. The charges were investigated by the Authority's Region V Office and, on April 20, the complaint initiating this action was filed by the Acting Regional Director of that Office.

The complaint alleges that, Respondent has failed and refused to bargain in good faith with the Union, in violation of 5 U.S.C. 7116(a)(1) and (5),[1] by the following acts and conduct:

> Commencing in or about the month of January, 1984, the exact date being unknown to the Regional Director, and continuing to date, at the Center, Respondent unilaterally changed established personnel policies, practices or terms and conditions of employment of bargaining unit employees, by implementing a system whereby minor criminal offenses that occur on the premises of the Center are processed through the U.S. Magistrate System and prosecuted by the Center's Office of Counsel, as representatives of the United States Attorney. Said action was taken by Respondent without Respondent's having given advance notice to the Union of said change and without having afforded an opportunity to the Union to bargain with Respondent concerning the impact and implementation of said change.

See G.C. 1(d), paragraph V.[2] Respondent denies that it has committed any acts violative of the Statute.

A hearing was held on June 5, 1984, in Columbus, Ohio. The parties appeared, adduced evidence, and examined witnesses. Briefs were filed by Respondent and the General Counsel on July 23, pursuant to an order extending the briefing time until that date, as requested by Respondent. Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend entry of the following order.

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[1] 5 U.S.C. 7116(a)(1) and (5) provide as follows:

> (a) For the purposes of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .

[2] "G.C." refers to the exhibits of the General Counsel. Other abbreviations to be used herein are as follows. "Jt." refers to the joint exhibits, including the stipulated facts. "G.C. Br." refers to the brief of the General Counsel, and "R. Br." to that of Respondent. "R." refers to the exhibit of Respondent. "Tr." refers to the transcript.

Findings of Fact

1. It is admitted that, at all times material herein, the Defense Logistics Agency (DLA) has operated and supervised a facility in Alexander, Virginia, known as the Defense Logistics Center (DLC) and, through DLC, has operated and supervised a facility in Columbus, Ohio, known as the Defense Construction Supply Center (DCSC or Center).

2. It is also admitted that, at all times material herein, the DLA Council of American Federation of Government Employees, AFL-CIO, Locals (AFGE) has been the exclusive representative of a consolidated bargaining unit of employees, including, inter alia, Respondent's non-supervisory employees at the Center, with certain exclusions not material to this case, and that Local 1148 (Union) is the agent of AFGE with respect to employees at the Center in Columbus. Carmelita Burge Riley is the President of Local 1148 and the union official to whom management at the Center provides notice of proposed changes in working conditions.

3. In the latter part of 1982 and during 1983, Ms. Riley was engaged periodically in negotiations with management concerning a new Magistrate System for the supervision of traffic violations at the Center. At no time before or during these negotiations, which began in about October 1982 and ended with the implementation of the new system in January 1984, did management advise Ms. Riley that it was, during the same period, implementing some new procedures for the prosecution of minor criminal offenses (misdemeanors) at the Center. Ms. Riley became aware of this when she read an article about it in the November 1983 issue of the Center's newsletter, The Supply Line. She then took the initiative to question management about the matter, on two occasions early in January, at a monthly personnel meeting and at a staff meeting. On these occasions, she attempted to determine what exactly it was to which The Supply Line article had referred, but obtained little information. Meanwhile, on December 19, 1983, a memorandum concerning the "Federal Magistrate System" was issued to all employees. It informed them that moving traffic violations, as well as minor criminal offenses that occur on the Center's premises, will "be processed through the Federal Courts." It stated that Ohio traffic laws will be so enforced, as well as "minor offenses such as assault, theft or trespassing," which are governed by Federal statutes.

4. Still having little information about the misdemeanor procedures, Ms. Riley wrote a memorandum to Fred Harris, the Center's Labor Relations Officer, on January 31, 1984. She asked, inter alia, why the employer had not consulted/negotiated with the Union concerning the matter.

5. On February 6, 1984, Mr. Harris responded to Mr. Riley. He stated, inter alia, that: "There was no negotiation on this system because we cannot negotiate laws" (G.C. 8).

6. In a subsequent telephone conversation with Mr. Harris, Ms. Riley brought up the subject again, stating that she believed that the Union had the right to negotiate the impact and implementation of the matter.

7. Shortly thereafter, Ms. Riley filed the unfair labor practice charge. At the time, she was still not entirely sure of what the new misdemeanor procedures were or when they had been implemented. Because of the above circumstances, Local 1148 has not yet submitted any proposals to Respondent.

The alleged violative acts and conduct

8. Certain Department of Defense (DOD) directives have, since 1978, directed that the Department's investigation agency (now called the Defense Criminal Investigative Service or DCIS), provide criminal investigative support to DOD components, including the Center. When investigations have produced evidence of crimes, including misdemeanors, they have been referred to the local U.S. Attorney for possible prosecution. The U.S. Attorney "frequently declined" prosecution of misdemeanor cases so referred "because of a heavy case load and limited manpower" (Jt. 1, para. 9 at page 3). This problem at the U.S. Attorney's office was having "some impact" at the Center, in that it was decreasing the number of prosecutions of employees at the Center, and hindering and slowing down those which were brought (Tr. 81).

9. A number of events occurred prior to January 1984 that considerably increased the likelihood that a person committing a minor criminal offense on the Center would be prosecuted. These included the issuance of a complete revision of DLA Regulation 5705.2, Criminal Investigative Support to the Defense Logistics Agency, on January 23, 1979, and a revision of DLA Regulation 5700.5, Command Security Program, on January 15, 1979. The latter regulation established a new Command Security Program and required the appointment of a Command Security Office at each primary level field activity, such as the Center. Also, fraud, waste, and abuse is now given "high priorty in the Department of Justice" (Tr. 82).

10. Another important event that significantly increased the likelihood of criminal prosecution of minor criminal offenses at the Center was the hiring of two detectives in February 1982, particularly since one of them, George Lutz, was experienced, highly motiviated, and very determined in investigating offenses, and very effective in presenting cases for prosecution. The work of Mr. Lutz was a major factor in the increased likelihood of prosecution of misdemeanor offenses occurring on the Center.

11. The DCIS office providing support to the Center is located in Dayton, Ohio. It was not shown to be bound by any agreements between Respondent and Local 1148. The Center's Office of Counsel provides legal services to the Dayton DCIS offices. In June 1983, DCIS officials talked

with Walter R. Pierce, an Attorney in the Center's Office of Counsel, about difficulties they were having persuading the U.S. Attorney to prosecute criminal offenses because of his heavy case load. At Mr. Pierce's suggestion, he and one of the DCIS officials met with an Assistant U.S. Attorney, James Rattan, on June 17, to discuss the possibility of having attorneys at the Center appointed as Special Assistant U.S. Attorneys to prosecute minor misdemeanors committed on the Center. They discussed the fact that such an arrangement already existed between Counsel's Office at the Defense Electronic Supply Center (DESC), Dayton, Ohio, and the U.S. Attorney.

12. On June 29, 1983, the Dayton DCIS office provided information about the DESC Counsel-U.S. Attorney agreement and encouraged Mr. Newton, head of the Center's Office of Counsel, to seek a similar agreement.

13. On July 12, 1983, the Center's Command Security Officer wrote a memorandum to the Office of Counsel, stressing the importance of filing criminal charges, where warranted, and requested that a procedure be established for presenting all criminal investigations to the U.S. Attorney's Office for prosecution. The memorandum cited the delegation of additional investigative responsibilities to the Office of Command Security by the Office of Assistant Inspector General for Investigations, an activity under DOD, and the increase in cases warranting criminal prosecution because of the activities of the Detective Section.

14. On July 13, 1983, Mr. Pierce followed up on the meeting of June 17, by submitting to the U.S. Attorney a proposed Memorandum of Understanding and a request that he and two other attorneys, Daniel A. Bellman and Philip L. Brady, be appointed as Special Assistants to he U.S. Attorney.

15. On September 2, 1983, the U.S. Attorney signed the Memorandum of Understanding, returned it to Mr. Pierce, and sent a letter to the U.S. Department of Justice, requesting the appointment of Messrs. Pierce, Bellman and Brady as Special Assistants to the U.S. Attorney.

16. On September 9, 1983, the Department of Justice appointed Messrs. Pierce, Bellman and Brady as Special Assistants to the U.S. Attorney. On November 1, 1983, Mr. Newton authorized the three attorneys to perform their duties under these appointments. The appointments were valid through September 30, 1984.

17. On December 23, 1983, the three judges of the local U.S. District Court issued an order directing that misdemeanor complaints and information offenses occurring within the jurisdiction of any agency scheduled pursuant to the Court's rule 6.2.3 be referred to the U.S. Magistrate. This included offenses occurring at the Center.

18. Prior to the court order of December 23, 1983, misdemeanor cases were tried before the U.S. Magistrate, but were initially filed with the Clerk of the U.S. District Court and then referred to a District Court Judge, who would decide whether to refer it to the U.S. Magistrate. The court order by the U.S. District Court Judges was issued "[b]ecause they were advised that DCSC . . . is referring additional cases . . . into the U.S. Attorney's office, and the U.S. Attorney's office has decided to prosecute those" (Tr. 87). Respondent concedes that the appointment of three Center attorneys as Special Assistants to prosecute misdemeanors from the Center before the U.S. Magistrate was a factor in the court order of December 23. However, the change was not made because of "any particular desire or any overt action taken by DCSC officials" (Tr. 52).

19. At the present time, both DCIS and the Center's Command Security Office submit reports of suspected misdemeanor offenses to Mr. Pierce. In his capacity as a Special Assistant to the U.S. Attorney, he reviews the reports and forwards to the U.S. Attorney's office the cases that he believes warrant criminal prosecution. The U.S. Attorney makes the final decision on the cases that should be prosecuted, signs the necessary criminal informations or complaints, and files them in the U.S. District Court. The Clerk of the Court sends the cases to the Magistrate. The U.S. Attorney's Office advises Mr. Pierce of the filing of criminal informations and complaints and he, Mr. Bellman, and Mr. Brady are assigned to represent the U.S. Attorney in prosecuting the cases before the Magistrate.

20. Between June 17, 1983 and May 31, 1984, 11 investigations of suspected misdemeanor offenses at the Center have been referred to Mr. Pierce for possible prosecution. Three of these cases were investigated by DCIS and the remainder by the Center's security personnel. Acting in his capacity as Special Assistant U.S. Attorney, Mr. Pierce determined that six of these should be prosecuted. Of these six cases, the U.S. Attorney declined prosecution in one case. The remaining five cases resulted in convictions or guilty pleas. One of the five persons convicted was a supervisor and a second person was not in the bargaining unit. There are 4,000 to 4,200 bargaining unit employees at the Center.

21. It was not established just how many, if any, misdemeanors committed by bargaining unit employees at the Center were prosecuted before the three Center attorneys were deputized as Special Assistants to the U.S. Attorney. Ms. Riley, who has been an employee at the Center since 1965, and the President of Local 1148 since December 1981, knew of none. Mr. Pierce, the only witness for Respondent, had no knowledge of any either. He has been employed at the Center since 1974. He explained that, prior to his deputization, misdemeanor cases "weren't referred through [him]" (Tr. 83). Paragraph 8 of the Stipulation of Facts (Jt. 1, page 3) states that the U.S. Attorney "frequently" declined to prosecute misdemeanors committed at the Center and referred to him, prior to June 1983. There is an inference from this stipulation that at least some may have been prosecuted.

22. Employees who are prosecuted under these procedures are and have always been also subject to administrative disciplinary action.

23. No new agency regulations or procedures were established, or old ones changed, when the three Center Attorneys were deputized to assist the U.S. Attorney in prosecuting misdemeanors occurring at the Center.

Retroactive relief

24. In response to the fact that the General Counsel is seeking an order that would "[a]pply retroactively to January 1984, as appropriate, any agreements reached as a result of bargaining done" pursuant to any bargaining order that may issue (G.C. 3, page 2), Respondent's counsel questioned Mr. Pierce as to what impact such an order would have on Respondent. See Tr. 73-79. Mr. Pierce opined that "[g]enerally, it could have a devastating affect, depending on how it is framed" (Tr. 73). Mr. Pierce was unable to be specific, since no union proposals have ever been made.

Discussion and Conclusions

The General Counsel has not established, by a preponderance of the evidence,[3] that Respondent has failed to bargain in good faith with the Charging Party, and, thereby, interfered with its bargaining rights, as alleged in the complaint.

As the General Counsel recognizes, proof of the alleged failure to bargain hinges upon proof that the failure concerned "conditions of employment." See G.C. Br. 9 and Sections 7114(b)(2) of the Statute, declaring that the duty to negotiate includes the obligation "to discuss and negotiate on any conditions of employment," and Section 7103(a)(14) of the Statute, defining the term "conditions of employment" as meaning "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ."

The General Counsel rests his case on the failure to bargain over the assignment of attorneys in its Office of Counsel to serve "as supplemental staff to the U.S. Attorney, so that employees are now being prosecuted before the U.S. Magistrate for misdemeanors committed at the workplace" (G.C. Br. 16). It was stipulated that before this change, the U.S. Attorney "frequently declined" prosecution of misdemeanor cases occurring on the premises of the Center "because of a heavy case load and limited manpower." See finding 8, above. It was also stipulated that between November 1, 1983, when three attorneys in the Office of Counsel were deputized as Special Assistant U.S. Attorneys, and May 11, 1984, three bargaining unit employees were prosecuted for misdemeanors. See finding 20. It is not clear how many misdemeanor prosecutions took place prior to this deputization.

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[3] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (d).

The General Counsel acknowledges the holdings of the Authority that "conditions of employment" are only those which "directly relate" to personal policies, practices, and matters affecting working conditions. See G.C. Br. 12, citing National Treasury Employees Union and Internal Revenue Service, 3 FLRA No. 112, 3 FLRA 692, 695 (1980) holding negotiable a union proposal which would set criteria for approving applications for outside employment, where the agency had a written policy concerning outside employment that was determinative of whether employees would be eligible for certain positions within the agency or could continue to be employed by the agency, and American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77, 2 FLRA 604, 605 (1980), holding negotiable a union proposal that the agency provide space and facilities for a day care center, after noting that the availability of such facilities could be determinative of whether an individual would be able to accept a job with the agency and of whether the employee could continue employment, and could affect employee morale, tardiness and absenteeism, thus having an affect on use of leave and productivity. Two other Authority cases cited by the General Counsel each involve a finding of a failure to bargain over changes in agency policy and regulations concerning traffic and parking violations, which resulted in an additional penalty being imposed, namely a monetary penalty. See G.C. Br. 14, citing Department of the Air Force, Malmstrom Air Force Base, Montana and American Federation of Government Employees, Local 2609, AFL-CIO, 2 FLRA No. 2, 2 FLRA 12, 18-19 (1979) and Philadelphia Naval Shipyard, Department of the Navy and International Federation of Professional and Technical Engineers, Local 3 and Philadelphia Naval Shipyard, Department of the Navy and Philadelphia Metal Trades Council, 15 FLRA No. 7, 15 FLRA 26, 35 (1984). The last case relied upon by the General Counsel involved a holding of negotiability as to a union proposal that an agency try to keep cafeteria prices down. See G.C. Br. 14, citing American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 FLRA No. 87, 8 FLRA 409 (1982).

Each of the above-cited cases bears a marked difference to the one here involved. Day-care centers and cafeteria prices have a clearly seen, immediate, and continuing impact on the work situation. In contrast, the increased possibility of prosecution for violation of Federal criminal statutes has a remote, nebulous impact on the work situation and the employment relationship, particularly since the possibility of prosecution has always been present anyway.

The cases involving traffic and parking violations have a somewhat closer nexus to this case. However, in those cases employees were presumably invited to bring their cars onto the agency's premises and to park them there and may not have had any other reasonable mode of transportation to their jobs. Here, the agency certainly does not invite employees onto its premises to commit assaults, engage in acts of thievery, or engage in other misdemeanors. Indeed, such unlawful acts are the antithesis of a bona fide employment relationship and disrupt the work situation.

A case which I find more persuasive is International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenburg Air Force Base, California, 7 FLRA No. 18, 7 FLRA 123 and 127 (1981), in which the Authority found nonnegotiable a union proposal to allow employees and their dependents to hunt and fish on the premises of the base. While the hunting and fishing activities would take place on the agency's premises, and be engaged in by employees, they nevertheless involved personal, recreational acts and not ones directly related to the employment relationship. So here, the increased possibility of prosecution concerns actions which are taken by employees on the agency's premises, but involve actions which are personal, not employment related.

In addition, in this case, bargaining-unit employees at the Center have always been subject to prosecution for their unlawful actions; no new penalties have been imposed; no new investigative procedures have been implemented; and no new regulations have been promulgated. Furthermore,, and in agreement with Respondent, I conclude that nothing in the Statute "clearly gives federal employees any type of right to protection against an increase in the possibility of criminal prosecution, nor does it contain any provisions, implying such a congressional interest" (R. Br. 10). Rather, "Congress stated unequivocally that the public interest demands the highest standards of employee performance" and that '[t]he provisions of the [Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient Government'" (R. Br. 10, citing 5 U.S.C. 7101(a)(2) and (6). It would not promote such a Government to hold that an agency must spend time in bargaining, and perhaps endure a prolonged period of impasse procedures, before it can take steps to protect itself against wayward employees who happen to violate Federal criminal statutes while on its premises.[4]

Because of the above conclusion, other issues raised by the parties need not be resolved.

Ultimate Findings and Recommended Order

Respondent has not engaged in unfair labor practices, in violation of 5 U.S.C. 7116(a)(1) and (5), as alleged in the complaint.

Accordingly, it is hereby ORDERED that the complaint in this case should be, and hereby is, dismissed.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judges

Dated: November 1, 1984
Washington, D.C.

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[4] Perhaps in recognition of this problem, the General Counsel has not sought a return to the status quo ante. See G.C. Br. 17-18.

22 FLRA No. 32

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NORFOLK NAVAL STATION
DEPARTMENT OF THE NAVY

Respondent

and

Case No. 34-CA-50303

LOCAL 13, FEDERAL FIREFIGHTERS
ASSOCIATION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached decision of the Administrative Law Judge. The complaint alleged that the Respondent: (1) violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by directing the Union's President, Jeffrey Allen, to wear his firefighter dress uniform to a collective bargaining meeting; (2) violated section 7116(a)(1) and (2) by suspending him for three days for his refusal to do so; and (3) violated section 7116(a)(1) and (5) by requiring, at all times since that incident, all employee/union negotiators who would otherwise be in a duty status to wear the firefighter dress uniform to collective bargaining meetings, as a condition for being allowed official time to participate in such meetings.

II. Background Facts

Department of the Navy Regulations make the wearing of a prescribed or standard blue uniform (without a tie) mandatory during the normal work period. The addition of a tie makes the uniform a "dress" uniform. The standard firefighter's uniform must ordinarily be worn when they are on official business outside the station that brings them into contact with base officials or the public. Building N-26 is specified as one in which the dress uniform must always be worn. The matter at issue (that is, whether uniforms should be required at collective bargaining meetings) is not specifically addressed in the Regulations.

Allen was scheduled to go to a collective bargaining meeting in Building N-26. He was directed by his supervisor, District Chief Washburn, to attend the meeting in his dress uniform and to ride with Washburn to the meeting in a government vehicle. Allen replied that he was attending the meeting as a representative of a labor organization, not as a firefighter, and felt it improper to be so directed. Washburn also told Allen that if he disobeyed the order, he would be leaving the station unauthorized. Allen left in civilian clothes and refused the transportation. Upon arriving at the meeting place, Allen was told that he was on unauthorized absence and out of uniform and should return to his duty station. He did not return directly, but took time to discuss the incident with the Director of the Respondent's Labor and Employee Relations Department. Subsequently, Allen was suspended for three days for disobeying a direct order of the District Chief. Since the day of the incident, firefighters have been required to wear their dress uniforms to collective bargaining meetings.

III. Positions of the Parties

The General Counsel contends that the Respondent has no right to dictate the manner in which employee/Union negotiators must be dressed, and therefore disciplining Allen for refusing to wear the proper uniform must also be unlawful. The General Counsel also argues that the requirement for such negotiators to wear the dress uniform to negotiations clearly has a negative psychological impact on the employees, particularly in view of the significantly more impressive uniforms denoting higher rank worn by some of management's negotiators.

The Respondent pointed out in its brief to the Administrative Law Judge, which is part of the record in this case, that, although excused from duty in order to negotiate, Allen here was on call, and if he had to respond to an alarm he must be in uniform for purposes of being identified by the public and other civic firefighters for safety and other purposes. The Respondent also pointed out that the Union's other negotiator in this case, who was also an employee/firefighter but on his own time, was allowed to wear civilian clothes to the negotiations. Finally, the Respondent argued that the uniform-wearing requirement was strictly for internal security/safety reasons, and had nothing to do with union activity.

IV. The Judge's Findings

The Judge recommended that the complaint be dismissed in its entirety. He found that the Respondent had a legitimate and substantial justification for its requirement and that the requirement at worst had only a slight psychological impact on the protected rights of employees. Further, he found that the discipline against Allen was strictly because of his refusal to follow direct orders, and was not in retaliation for union activity.

V. Analysis

The Authority agrees with the Judge in all respects. Thus, we find that the Respondent here had a legitimate reason for its requirement, and note particularly that this requirement only pertained to employee/negotiators who were on call during negotiations. We cannot conclude in the circumstances of this case that the uniform-wearing requirement for on-call firefighters was for reasons other than management's expressed concern for safety. For the same reason, we do not find a violation of the Statute in the Respondent's continuing imposition of the requirement. Additionally, noting that Allen had been specifically and clearly informed of the consequences of his intended action, we find that the suspension action was not in retaliation for his union activity as alleged, but rather for his refusal to obey a direct order.

The General Counsel questions the fact that the Judge did not cite to and follow his recommended decision in a prior case in which the Judge had found a violation. The case referred to by the General Counsel has since been issued by the Authority. See 162nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona, 21 FLRA No. 90 (1986), in which we found a violation of the Statute because the National Guard required an employee, subpenaed by the Authority, to wear the military uniform while appearing as a witness for the Authority in order to be granted official time. We find these cases distinguishable. In 162nd Tactical Fighter Group, the employee involved was obeying an order of the Authority's General Counsel, which carried with it entitlements under section 7131(c) of the Statute; the employee was not on call; and there was no reason shown for the agency to require the uniform to be worn. In this case, by contrast, the employee involved was not under subpena by the Authority; the employee was in an on-call status; and the Respondent had a legitimate reason for its uniform-wearing requirement.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order. We therefore conclude that the Respondent did not violate section 7116(a)(1), (2) or (5) of the Statute as alleged in the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 34-CA-50303 be, and it hereby is, dismissed.

Issued, Washington, D.C., June 30, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 32]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

NORFOLK NAVAL STATION,
DEPARTMENT OF THE NAVY

Respondent

and

LOCAL 13, FEDERAL FIREFIGHTERS
ASSOCIATION

Charging Party

Case No.: 34-CA-50303

. . . .

Ms. Delores T. Griffin
For the Respondent

Mr. Jeffrey W. Allen
For the Charging Party

Ira Sandron, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region III, Federal Labor Relations Authority, Washington, D.C. against the Norfolk Naval Station, Department of the Navy (Respondent), based on charges filed by Local 13, Federal Firefighters Association (Charging Party or Union). The complaint alleged, in substance, that Respondent violated section 7116(a)(1), (2), and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq*. (the Statute), by directing the Union's president, Jeffrey W. Allen, to wear his firefighter uniform to a collective bargaining session on

November 20, 1984; suspending him for three days for his refusal to do so; and, at all times material since then, by requiring all employee-Union negotiators to wear firefighter uniforms to collective bargaining meetings, as a condition for such meetings, during the time employee-Union negotiators otherwise would be in a duty status.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied all other allegations.

A hearing was held in Norfolk, Virginia. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. Department of the Navy (DON) regulations set forth in CPI 594-B and Naval Station (NAVSTA) Norfolk Instruction 12272.1 prescribe the uniform to be worn by Navy firefighters and set forth the circumstances, variations and exceptions to the wearing of it. Firefighters are paid an initial uniform allowance of $125.00 with quarterly replacement of $31.25. Receipt of the uniform allowance carries with it a concomitant obligation to obtain and wear the uniform as prescribed. The prescribed standard firefighter uniform consists of navy blue long or short-sleeved shirts, and trousers, tie, cap and belt. Firefighters also wear silver colored devices or patches. The uniform is intended for both work and dress, the distinction being that the tie is not required for work. Wearing of the prescribed uniform is mandatory during the normal work period with one or two exceptions in the NAVSTA Instruction. Specifically, navy blue coveralls and navy blue T-shirts with the Naval Base emblem may be worn in lieu of the standard uniform when working within or around the fire station or on the fire-servicing station grounds and while testing or servicing fire hydrants and sprinkler systems. Firefighters are also permitted to wear clothes other than their dress uniform outside the fire station when they are engaged in physical fitness programs.

However, when responding to an alarm, they must wear turn-out gear, or protective firefighting gear, consisting of pants, coat, boots and helmet when they leave the station, except for drivers who for safety do not put on pants and boots until the truck arrives at the scene. Firefighters are responsible for assuring that this gear is always readily accessible, either on the truck located inside or immediately outside the fire station or in the station living quarters. They must even take the gear with them to the shower. It makes no difference what, if anything, is on underneath. The protective gear can be worn over athletic clothing, the standard uniform, coveralls, civilian attire, if the alarm sounds shortly before the end of the shift, or put on straight from the shower at the moment the alarm sounds. This gear not only protects the firefighter, but readily identifies him as a firefighter.

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[1] The General Counsel's unopposed motion to correct the transcript is granted; the transcript is hereby corrected as set forth therein.

Other than the above exceptions, the standard firefighter uniform must be worn by firefighters when they are outside the fire station. The dress mode, i.e., with tie, is always required when fire department personnel are on official business outside the station that brings them into contact with base or public officials or with the general public. The dress uniform is always worn when going to Building N-26. There are no exceptions to the uniform requirement, either by regulation or local policy, for the purpose of negotiations. The matter has not been specifically addressed in the regulations.

2. On November 20, 1984 a collective bargaining session was scheduled for 10:30 a.m. between the Fire Chief, Naval Station, Alvah L. Cuthriell, and Jeffrey W. Allen, President, Local 13, Federal Firefighters Association to negotiate proposed ground rules for a collective bargaining agreement and to discuss other matters. The meeting was scheduled for the Fire Chief's office in Building N-26, which is the Headquarters of the Commander, Naval Base.

3. Jeffrey W. Allen is a Lieutenant assigned to the ladder rescue truck in Fire Station No. 1. He reported at 7:00 a.m. on November 20, 1984 for a 24-hour shift. As the driver/operator of the ladder truck, he is subject to responding to all emergency alarms coming to any of the four stations on the base at any time during his 24-hour shift.

4. Prior to departing the station for the collective bargaining session, Allen was ordered by District Chief Robert Washburn to attend the meeting in the standard dress uniform and to go with Washburn in a government vehicle. Allen replied that he was attending the session as a representative of a labor organization and not as a firefighter, and he did not feel it was proper to wear a uniform at such a meeting. Allen told Washburn that he intended to be on official time, to wear his normal civilian attire, and to go with Union vice president Overby in a private vehicle. Washburn informed Allen that if he disobeyed, he would be leaving the station unauthorized. Allen left the station in civilian attire in Overby's private vehicle.

5. Upon arriving at Building N-26 out of uniform, Allen was informed by Assistant Chief B.R. Grimes that the Chief would not meet with him because he was on unauthorized absence and out of uniform. He was ordered to return to his duty station and told that another meeting would be set

up. Allen did not return to the station immediately. Instead, he went to the Personnel Office to see Fletcher F. Bell, Director of the Labor and Employer Relations Department.[2]

6. Following a notice of proposed suspension and Mr. Allen's reply thereto, Fire Chief Cuthriell made the determination on January 23, 1985 to suspend Allen without pay for three days for his refusal to obey the direct order of Chief Washburn to wear the prescribed uniform to the meeting. Allen was suspended from duty without pay on January 25, 27 and 29, 1985.

7. Since November 20, 1984, Respondent has required all firefighters to wear their dress uniforms to negotiations during the time the employees otherwise would be in a duty status and has required them to do so as a condition to engaging in negotiations. In contrast to the firefighters' dress uniform worn by unit employees, the normal dress uniforms of Chief Cuthriell and Deputy Chief Butler worn to these sessions includes black pants, white shirt, gold badge, gold collar devices, name plate, and gold sleeve patches or stripes. A third management negotiator, Lynda Holder, has worn civilian attire. She is not a firefighter.

8. Firefighters representing the Union in negotiations are subject to responding to a fire or emergency alarm that may occur during negotiation sessions falling within their 24-hour duty shift. In case of a second alarm or a serious enough first alarm, the Fire Chief, Deputy Fire Chief, and all hands would be required to respond. In effect, negotiations would be recessed until the emergency is resolved.

9. While other employees would be substituting for Allen and other negotiators in their primary duties (such as serving on the ladder truck), in an emergency serious enough to interrupt negotiations, Allen and other firefighters would be directed to respond to perform other legitimate firefighter duties. A firefighter could be assigned to such matters as

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[2] Allen testified that, during the visit of Union vice president Jack Overby and himself to Bell's office, they were discussing the fact that Allen had been required to come in his dress uniform, and "Mr. Bell stated that the Union, as far as he was concerned, would never be an equal party to these negotiations." Overby testified that "Mr. Bell told him (Allen) that as far as he was concerned, as long as he worked there, the Union would never be on the same footing with management." Bell testified that in discussing the mode of dress, he did not state the Union and management would never be equal at the bargaining table, but did "tell Mr. Allen that it didn't make any difference what he wore or what the Chief wore, the fact still remains that the Fire Chief is the Fire Chief and Mr. Allen and Mr. Overby were firefighters." Based on the entire record, I credit Bell's version.

working at the command post, filling and carrying cascade bottles to the fire scene, serving as a guide to the base for cooperating City of Norfolk firemen, and assisting in medical emergencies.

10. The uniform serves to readily identify the individual as a trained firefighter. Otherwise, Navy dispensary personnel or Norfolk City emergency personnel, who respond on a reciprocal basis, would have no way of knowing whether an individual giving first aid in civilian clothing is a well-meaning, but possibly incompetent, bystander, or a firefighter trained in emergency case. The uniform also instills confidence in an accident or heart attack patient that he is in the hands of a qualified, competent professional. The uniform also enables firefighters to have access to security areas. In addition, it provides a symbol of authority to the public in the event cars or persons have to be controlled or moved out of the way. The Fire Chief and other supervisory personnel have their own responsibilities at a fire or emergency scene. To require that they identify or accompany firefighters in civilian clothes as the occasion would require would not be effective or efficient.[3/]

11. None of the negotiation sessions conducted since November 20, 1984 has been interrupted by any kind of emergency.

12. Respondent has previously disciplined employees for insubordination and refusal to comply with uniform requirements. The employees were not involved in any protected activity at the time.

Discussion, Conclusions, and Recommendations

There is no dispute that Respondent's requirement that firemen wear the uniform while "on duty" constitutes management's choice of a "method and means of performing work" within the meaning of section 7106(b)(1) of the Statute. The dispute centers around whether firefighter Union negotiators bargaining on official time during their 24-hour duty shift are "on duty" so as to be subject to the requirement.

The duty status of employees representing an exclusive representative in negotiations has been addressed by the Statute in relation to their entitlement to official time. Section 7131(a) of the Statute provides, in part, as follows:

[3/] In making Findings 8-10 I have credited the explanation of Respondent's witnesses in this regard after considering and rejecting the General Counsel's arguments, including that as to the speculative and conjectural nature of the potential problems and the credibility of Respondent's witnesses.

> "(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status."

The qualifying language "during the time the employee otherwise would be in a duty status" strongly suggests that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement during the time he would otherwise be scheduled to work is not considered in a duty status. Nor is the conclusion warranted that an employee so serving is acting in his "official capacity," "on the job," or on "official business" of the government. See Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439 (1983).

Counsel for the General Counsel contends that Respondent's requirement that Union negotiators wear their firefighters dress uniforms to negotiations when they otherwise would be in a duty status clearly has a negative psychological impact on such negotiators, particularly in view of the different uniforms denoting higher rank worn by two of the management negotiators and the civilian attire worn by the third management negotiator. He contends that this is a clear signal that management is in control, and it has an intimidating effect on Union negotiators and seriously undermines the collective-bargaining process in violation of section 7116(a)(1) and (5) of the Statute.

Although a firefighter is not in a duty status during negotiations, he is subject to being recalled to full duty status at a moment's notice. As noted, firefighter-negotiators are subject to responding to emergency alarms at any time during their 24-hour shift in which case negotiations would be postponed or interrupted. The response of firefighters must be instantaneous, and full readiness to respond in an appropriate uniform is critical to the efficient accomplishment of essential duties without undue delay. The General Counsel argues that the easiest and most obvious solution would be for Allen and other firefighters to take their protective gear with them to the negotiations. In this event, they could wear civilian clothing while negotiating, and, if an emergency arose, could don their protective gear over their civilian clothing and be prepared for the full range of firefighting duties. While this may be a less intrusive alternative, the choice of clothing in these circumstances is within management's discretion. Based on the record, there is a rational basis for requiring the dress uniform. The dress uniform would facilitate the performance of some essential emergency duties should the need arise. It is also consistent with existing practice and regulation pursuant to which the dress uniform is always worn by firefighters when leaving the fire station during a duty period for purposes other than dirty work, athletics, or fire suppression activities.

The General Counsel and the Charging Party would have Union negotiators wear civilian clothing to negotiations in order to demonstrate the equal status of the parties and a clear division between a firefighter's responsibilities when representing an exclusive representative in the negotiation of a collective bargaining agreement and that called for by his regular responsibilities, duties, and deference to his employer during normal duty hours. However, that clear division is simply not possible in matters of dress because of the unique status of firemen as compared to other Federal employees. Section 7101(b) requires that the provisions of the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." Respondent has a legitimate and substantial justification for its action, and its action has only a comparatively slight "psychological" impact on protected rights. No demonstrable impact was shown.

In view of the foregoing, it is concluded that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged, by directing the Union's president, Jeffrey W. Allen, to wear his dress firefighter uniform to a collective bargaining session on November 20, 1984, or by requiring all employee-Union negotiators to wear their dress firefighter uniforms to collective bargaining meetings during the time the employee-Union negotiators otherwise would be in a duty status.

It is also concluded that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1) and (2) of the Statute, as alleged, by suspending Allen for three days for his refusal to wear his dress firefighter uniform to the collective bargaining session. The discipline of Allen was not motivated by the Union activity in which he was scheduled to participate. Rather, it was taken because he deliberately violated the requirement that all firefighters must be in dress uniform when they leave the fire station premises during a duty period. The disciplinary action was entirely consistent with the discipline given other employees for similar offenses.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 34-CA-50303 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 26, 1985
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

and

Case No. 0-AR-1166

U. S. MARINE CORPS,
CAMP LEJEUNE, NORTH CAROLINA

Activity

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator David A. Singer, Jr. filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award was dated on or about April 23, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended, 1/ and section 2425.1 of the Authority's Rules and Regulations, as amended, 2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on May 27, 1986. However, the exceptions were not filed with the Authority at its national office until June 6, 1986. In this regard, the record established that the Union mailed the exceptions to the Authority's Atlanta Regional Office at its former address on May 22, 1986. The Atlanta Regional Office received them on June 2, 1986, and exercised due diligence in forwarding the exceptions that same day. However, they were not received by the Authority's national office until June 6, 1986. Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, and apart from other considerations, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 30, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 86]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF HEARINGS AND APPEALS,
REGION II

Activity

and

Case No. 0-AR-1016
(21 FLRA No. 86)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Union seeking reconsideration of the Authority's decision of May 9, 1986, modifying the Arbitrator's award in the case.

In his opinion accompanying the award, the Arbitrator determined that management had failed to comply with agreement provisions concerning performance standards and that but for the erroneous applications of the dictates of the collective bargaining agreement, the recommended promotion of the grievant would originally have been approved. As his award, the Arbitrator ordered the grievant retroactively promoted with backpay. In its exceptions to the award, the Agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. § 5596, and section 7106(a) of the Statute. The Authority agreed and held that the Arbitrator's determinations did not constitute the findings required to support an award of retroactive promotion and backpay. In its request for reconsideration, the Union essentially argues that the Authority misinterpreted the Arbitrator's award.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Union has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Union in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Union's request for reconsideration is denied.

Issued, Washington, D.C., June 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL EMPLOYEES METAL TRADES COUNCIL

Union

and

Case No. 0-AR-1130

CHARLESTON NAVAL SHIPYARD

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Arthur T. Van Wart filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., June 30, 1986.

Jerry L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR

Agency

and Case No. 0-AR-1136

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AFGE, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jonas H. Katz filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., June 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GREAT LAKES PROGRAM SERVICE CENTER,
SOCIAL SECURITY ADMINISTRATION

Activity

and

Case No. 0-AR-1139

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1395

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Stanley E. Kravit filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., June 30, 1986

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 375

Federal Labor Relations Authority

Washington, D.C. 20424

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NUMBER 375 REPORT OF CASE DECISIONS July 8, 1986

UNFAIR LABOR PRACTICE CASE

22 FLRA No. 40 (July 9, 1986)

Veterans Administration, Outpatient Clinic, Los Angeles, California and American Federation of Government Employees, Local 2297, AFL-CIO, Case No. 8-CA-50180

NEGOTIABILITY CASES

22 FLRA No. 34 (July 7, 1986)

Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, Case No. 0-NG-850

22 FLRA No. 37 (July 7, 1986)

American Federation of Government Employees, AFL-CIO, Local 2298 and Department of the Navy, Navy Exchange, Charleston, South Carolina, Case No. 0-NG-1214

22 FLRA No. 38 (July 7, 1986)

American Federation of Government Employees, Council of Meat Grading Locals, AFL-CIO and Department of Agriculture, Agricultural Marketing Service, Meat Grading and Certification Branch, Case No. 0-NG-1000

22 FLRA No. 39 (July 9, 1986)

Association of Civilian Technicians and The Adjutant General of Massachusetts, Case No. 0-NG-1169

ARBITRATION CASES

22 FLRA No. 35 (July 7, 1986)

United States Army Aviation Systems Command and National Federation of Federal Employees, Local 405 (Fitzsimmons, Arbitrator), Case No. 0-AR-1088

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22 FLRA No. 36 (July 7, 1986)

U.S. Naval Ordnance Station, Louisville, Kentucky and International Association of Machinists and Aerospace Workers, Local Lodge 830 (Martin, Arbitrator), Case No. 0-AR-1039

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

July 7, 1986

0-AR-1141 0-AR-1143 0-AR-1145

Federal Labor Relations Authority

22 FLRA No. 34

Overseas Education Association, Inc. and DOD, Office of Dependents Schools, Case No. 0-NG-850
(Decided July 2, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Procedure
    - Independent Portions of Proposals Severed for Ruling
  - Conditions for Review
    - Inconsistent with Federal Law
      - The Privacy Act
      - 5 U.S.C. § 8347
      - 5 U.S.C. § 8706(a) and (d)
      - 5 U.S.C. § 8906(e)
    - Inconsistent with Government-Wide Rule or Regulation
      - 5 CFR § 294.106(d)
      - 5 CFR § 831.201
      - 5 CFR §§ 831.1201-1206
      - 41 CFR, Part 101-37
      - 41 CFR § 201-1.103(c)(3)
      - 41 CFR § 201-38.007
      - Department of State Standardized Regulations (DSSRs)
      - FPM, Chapter 870, Subchap. 1, 1-4
      - FPM Supp 870-1, Subchap. S2, S2-7
      - FPM, Chapter 890, Subchap. 3, 3-3
      - FPM Supp 890-1, Subchap. S8, S8-4
    - Inconsistent with The FSLMR Statute
      - § 7115
        - Dues Withholding
      - § 7116(a)(3)
        - Question Concerning Representation (QCR)
          - Equivalent Status
            - Agency Mail System
- Conditions of Employment
  - Control over Conditions of Employment
    - Dues Withholding
  - Information: Disclosure of Records
  - Non-Employees
  - Right to Seek Union Assistance
  - Selectees to Bargaining Unit Positions
  - Telephones

STATUTE

- 7105(a)(2)(D) and (E)
- 7106(a)(2)(A) and (B)
- 7106(b)(1)
- 7111(f)(3)
- 7115
- 7116(a)(3)
- 7117

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

- Management Rights
  - Assign work
    - Right to Seek Union Assistance
  - Direct Employees
    - Right to Seek Union Assistance
- Subjects of Bargaining
  - At Election of Agency [§ 7106(b)(1)]
    - Methods and Means of Performing Work
      - Agency Mail System
    - Technology of Performing Work
      - Agency Mail System
      - Telephones

Comp Gen B-158880, April 28, 1966 (unpub)
Comp Gen B-158880, October 27, 1966 (unpub)
Defense Department Overseas Teachers Pay and Personnel Practices Act, 73 Stat.213 (1959)
Executive Order 10903, as amended
Executive Order 12228
Foreign Service Act of 1980
Overseas Differentials and Allowances Act, 74 Stat. 792 (1960)
Travel Expense Act of 1949, as amended (5 U.S.C. §§ 5701 *et seq.*)

DIGEST NOTES

In response to a union request concerning procedure, the Authority ruled on those portions of proposals able to stand independently of the rest of the proposal, and specifically addressed by the parties in their submissions to the Authority.

A proposal is negotiable that would provide the union an opportunity to include appropriate orientation information in the orientation mailing sent to new employees in the bargaining unit. The proposal does not conflict with the agency's rights under § 7106(b)(1) to determine the methods, means and technology of performing its work because, contrary to the agency's argument, neither the proposal's literal language nor its intended meaning would require new mailings. The proposal concerns "conditions of employment" in the bargaining unit because it relates to matters concerning bargaining unit positions even though it would be effective at a time before the selectees have been appointed. (proposal 1)

A proposal is inconsistent with a Government-wide regulation and outside the duty to bargain that would require the continuation of living quarters allowance (LQA) and post allowances for unspecified periods during which employees are representing the union while in a nonpay status. The proposal conflicts with provisions of Department of State Standardized Regulations (DSSRs) that contain explicit restrictions on payment of the allowances contained in the proposal. The DSSRs were found to be Government-wide regulations as they cover not only bargaining unit employees but civilian Federal employees generally with respect to certain allowances and differentials provided in connection with overseas assignment and travel. However, the proposal's language regarding entitlements to health benefits and life insurance is within the duty to bargain as it does not conflict with the Federal Personnel Manual (FPM). Because limitations imposed by law are expressly incorporated by the language of the proposal, they encompass the relevant FPM provisions, which are derivative and only reiterate specific limitations contained in Federal law. (proposal 2)

A proposal is negotiable because it allows that the performance of agency duties will take precedence over any rights to seek union assistance. Thus, the proposal would not interfere with agency rights under § 7106(a)(2)(A) and (B) to direct employees and to assign work. (proposal 3)

A proposal is nonnegotiable because it makes no allowance for instances where disclosure of records would be inconsistent with law and Government-wide rule or regulation; such as, divulging medical information contrary to the regulations of the Office of Personnel Management (OPM), or requiring that an employee be given access to the records of other employees in violation of the Privacy Act. (proposal 4)

A proposal is nonnegotiable as it would prevent the agency from requiring its employees to follow directives by military personnel in the context of the employee's use of facilities and services under the control of the military departments. The proposal conflicts with the agency's right under § 7106(a)(2)(A) to direct its employees. However, where a union holds exclusive recognition in a component of an agency, that component is obligated to bargain over conditions of employment despite the fact that control over a particular condition of employment rests with a different organizational component. In that circumstance, the only limits on an agency's obligation to bargain over conditions of employment are those placed on its discretion by provisions of law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. (proposal 5)

A proposal is negotiable that requires the agency to ensure that dues withholding monies be forwarded within 14 calendar days of each pay period to the appropriate official designated by the union. The agency's contention that the proposal is not within its duty to bargain because its payroll function is administered by the military departments is rejected. Even if the the military departments were acting under their own delegated authority rather than, as here, under a servicing agreement, the proposal would be negotiable. (proposal 6)

A proposal is negotiable as it is not contrary to § 7115, which merely establishes a mechanism for the payment of dues by bargaining unit employees as opposed to prescribing a permissible dues structure for labor organizations. Nothing in the section

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prohibits dues collection based on a particular "flat fee" dues structure. (proposal 7)

A proposal is outside the duty to bargain because it conflicts with § 7116(a)(3) as the union would have exclusive use of the agency mail system for the distribution of, among other matter, union campaign literature even when a competing union had "equivalent status." (proposal 8)

A proposal is nonnegotiable that solely concerns individuals who are neither employees of the agency nor in the bargaining unit. (proposals 9, 11, and 12)

A proposal is negotiable that seeks to negotiate over matters covered by Joint Travel Regulations (JTRs). The proposal neither conflicts directly with agency cited decisions of the Comptroller General -- Comp Gen B-158880, April 28, 1966 (unpub), and Comp Gen B-158880, October 27, 1966 (unpub)-- (without deciding under what circumstances decisions of the Comptroller General might constitute Government-wide rules and regulations), nor does it conflict with any requirements the decisions may place on the manner in which the JTRs are administered. Additionally, nothing in the cited Comptroller General decisions would require any provisions negotiated to be applied to nonunit employees. (proposal 10)

A proposal is negotiable that concerns the allocation of telephone resources to the union. Where a union holds exclusive recognition in a component of an agency, that component is obligated to bargain over conditions of employment despite the fact that control over a particular condition of employment rests with a different organizational component. (proposal 13)

As written, the proposal is an elective subject on which the agency has chosen not to bargain. Because the proposal would require that telephones, or access to them, be provided employees for the purpose of conducting the business of the agency, it concerns the technology of performing work within the meaning of § 7106(b)(1). (proposal 14)

Federal Labor Relations Authority

22 FLRA No. 35

U.S. Army Aviation Systems Command and NFFE Local 405 (Fitzsimmons, Arbitrator), Case No. 0-AR-1088 (Decided July 7, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Arbitration Award Modified Award of Attorney Fees Contrary to Back Pay Act [5 U.S.C. § 5596] Attorney fees Standards Governing Award Exceptions Asserted in Appeal Award Contrary to 5 U.S.C. § 5596 (Back Pay Act) Remedy Attorney Fees 5 U.S.C. § 7701(g)	7122(a)

DIGEST NOTES

The arbitrator determined that there were substantial errors in the selection action for a supervisory professional engineer position, for which the grievant failed to be selected. The arbitrator ordered that the selection and recruitment process for the position be rerun in accordance with applicable laws, rules, and regulations and that the selected employee be retained in the position pending the corrective action. In addition, the arbitrator ordered that the attorney for the grievant be compensated by the agency.

In its exception, the agency contended that the arbitrator's award of attorney fees to the grievant is contrary to the Back Pay Act, 5 U.S.C. § 5596. Contrary to the position of the union in its opposition, the Authority found that an arbitrator is not authorized to award attorney fees solely under the terms of 5 U.S.C. § 7701(g), independent of the terms of the Back Pay Act, even in cases of prohibited personnel practices. In this case, the Authority concluded that the arbitrator's award of attorney fees is deficient as contrary to an express requirement of the Back Pay Act. Although the arbitrator determined that the grievant had been affected by the improper selection action, he did not determine that this resulted in a withdrawal of reduction of the grievant's pay, allowances, or differentials, and consequently he awarded no backpay to the grievant. Thus, the arbitrator's award of attorney fees was not in conjunction with an award of backpay on correction of the improper selection action. Accordingly, the Authority modified the award by striking the paragraph setting forth the award of attorney fees.

22 FLRA No. 36

Federal Labor Relations Authority

U.S. Naval Ordnance Station, Louisville, Ky. and IAM & AW, Local Lodge 830 (Martin, Arbitrator), Case No. 0-AR-1039 (Decided July 7, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

Arbitration
  Award Modified
    Award Contrary to $ 7106(a)(2)(C) and FPM Chapter 335
  Exceptions Asserted in Appeal
    Award Contrary to $ 7106(a)(2)(C) and FPM Chapter 335
  Promotion
    Retroactive Permanent Promotion
      Standards Governing Award
	7122(a)

DIGEST NOTES

The arbitrator found that the grievant "should have been . . . promoted" to the position of planner and estimator, WD-8 as a result of improper oral inducements and the improper use of a temporary promotion. The arbitrator ordered that the grievant be promoted on a permanent basis to the position effective on a date certain.

In one of its exceptions, the agency contended that the award interferes with management's right to select in violation of $ 7106(a)(2)(C) and FPM chapter 335, subchapter 1-4, Requirement 4. The Authority concluded that arbitrator's finding that the grievant should have been promoted does not support the award of a permanent promotion as the finding does not constitute the necessary finding that but for the unwarranted action, the responsible selecting official would have selected the grievant for the position on a permanent basis on a date certain. Accordingly, the Authority modified the award by striking the order that the grievant be promoted on a permanent basis to the position on a date certain. In view of this decision, it was not necessary to address the agency's other exceptions.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 37

Federal Labor Relations Authority

AFGE Local 2298 and Department of the Navy, Navy Exchange, Charleston, S.C.,
Case No. 0-NG-1214
(Decided July 7, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Management Rights	7106(a)(2)(C)
Fill Positions	
Union Observer on Rating and Ranking Panel	

DIGEST NOTES

A proposal is nonnegotiable that would require the opportunity for a union observer on rating and ranking panels for unit positions because even if the union observer contemplated by the proposal were to play only a passive role in attending deliberations of the panel, such presence would interfere with management's right to select under § 7106(a)(2)(C).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

22 FLRA No. 38

AFGE, Council of Meat Grading Locals and Dept of Agriculture, Agricultural Marketing Service, Meat Grading and Certification Branch, Case No. 0-NG-1000
(Decided July 7, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
  Conditions for Review
    Inconsistent with Agency Regulation
    for which a Compelling Need Exists
      Agency Bears Burden of Showing that Proposal
      Conflicts with Regulation
      Dept. of Agriculture Personnel Letter No. 711-10
    Inconsistent with Federal Law
      Travel Expense Act [5 U.S.C. §§ 5701 et seq.]
    Inconsistent with Government-wide Rule or Regulation
      Federal Travel Regulations [41 CFR, Part 101-7]
  Compelling Need
    Agency Regulation Mandated by Outside Authority
      Travel Expense Act [5 U.S.C. §§ 5701 et seq.]
      Federal Travel Regulations [41 CFR, Part 101-7]
      46 Comp. Gen. 21 (1966)
  Reduction-In-Force

STATUTE

7103(a)(14)
7105(a)(2)(D)
7114(c)
7131(a) and (d)

DIGEST NOTES

Six travel and per diem proposals are negotiable. The agency's argument that the proposals do not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1192 (D.C. Cir. Mar. 27, 1986). The Authority also found that neither 46 Comp. Gen. 21 (1966) nor the authorities to which it applies -- Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations, 41 CFR, Part 101-7 -- require a determination to be made unilaterally and only on a case by case basis that travel in the context of a particular activity is sufficiently within the interest of the Government so as to constitute official business. Accordingly, the Authority concluded that the proposals are not inconsistent with law and

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Government-wide regulations. Therefore, as the Authority found no support for the agency's assertion that its Personnel Letter No. 711-10 implements in an essentially nondiscretionary manner a mandate to it by an outside authority, the Authority concluded that no compelling need exists for the agency's regulation. (proposals 1 - 6)

Two RIF proposals are negotiable. The Authority concluded that the agency failed to carry its burden of establishing that the proposals are inconsistent with its regulations for which it claims a compelling need exists. (proposals 7 - 8)

22 FLRA No. 39

Federal Labor Relations Authority

Association of Civilian Technicians and The Adjutant General of Mass., Case No. 0-NG-1169 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	**STATUTE**
Negotiability	
Management Rights	7105(a)(2)(E)
Assign Work	7106(a)(2)(B)
Military Duty to Civilian Technicians	
Procedure	
Proposal Withdrawn and Not Considered	

DIGEST NOTES

A proposal is nonnegotiable that would prohibt the agency from assigning ICT (integrated combat turn) duties to civilian technicians. The proposal interferes with the agency's right to assign work under § 7106(a)(2)(B).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 40

Federal Labor Relations Authority

VA Outpatient Clinic, Los Angeles, Cal. and AFGE Local 2297, Case No. 8-CA-50180 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Conditions of Employment
        - Allegation of No Adverse Impact on Employees
          - Bargaining Obligation Irrelevant: Bargaining Occurred
      - Failure to Negotiate in Good Faith
        - Unilateral Abrogation of Agreement
      - Lunch-Break Area for Employees
      - Meetings Constituted Bargaining
        - No Prescribed Procedure for Negotiations under Statute
  - Procedure
    - Credibility Resolutions
  - Remedy
    - Implement Agreement

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The Authority adopted the Judge's decision that the agency violated § 7106(a)(1) and (5) when it unilaterally failed and refused to implement an agreement with the union to establish an employee lunch-break area. Concluding that the Statute does not require that negotiations must follow any prescribed procedure, the Judge found, contrary to the agency's contention, that the parties' meetings constituted bargaining on the matter. Further, the Authority specifically noted its agreement with the Judge that it is unnecessary to address arguments going to the agency's initial bargaining obligation when in fact the agency bargained and agreed to the lunch-break area. As a remedy, the agency was ordered to implement the parties' agreement to establish a lunch-break area for employees.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 34

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OVERSEAS EDUCATION ASSOCIATION, INC.

Union

and

Case No. O-NG-850

DEPARTMENT OF DEFENSE
OFFICE OF DEPENDENTS SCHOOLS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of 14 Union proposals. The Union has requested that the Authority sever "any parts, subparts, sentences, phrases or words" of proposals which are found to be nonnegotiable and "declare negotiable so much of the proposals which are negotiable." The Authority grants the Union's request to the limited extent that we will rule upon those portions of the proposals which we view, as submitted, as being able to stand independently of the rest of the proposal and which have been specifically addressed by the parties in their submissions to the Authority.[1]

II. Union Proposal 1

ARTICLE 2 - CONDITIONS OF THE AGREEMENT

Section 1-B:

The Employer and/or its designee at the appropriate level shall provide the

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[1] By its Order dated June 30, 1986, the Authority denied the Agency's motion to consolidate Case Nos. O-NG-840, O-NG-850, O-NG-950, O-NG-1115 and O-NG-1227.

> Association with the opportunity to include appropriate orientation information in the orientation mailing sent to new employees in the bargaining unit. The Association shall also be provided an opportunity to present appropriate orientation material at any orientation sessions.

A. Positions of the Parties

Because the underlined portion of the proposal applies to a point in time before the newly selected teachers have actually been appointed to their positions, that is, during the summer before the school year has begun, the Agency (DoDDS) argues that it does not relate to "employees." Additionally, it asserts that newly selected teachers may be destined for a bargaining unit other than that represented by the Union (OEA). Consequently, it contends that the proposal does not concern conditions of employment of employees in the OEA bargaining unit. Secondly, DoDDS states that because not all schools do orientation mailings, the proposal would require it to institute mailings where none currently exist. Thus, it argues that the proposal conflicts with its right under section 7106(b)(1) to determine the methods, means and technology of performing its work.

The Union states that the proposal is intended to apply only to those new employees who are being assigned to schools in its bargaining unit and only to existing orientation mailings.

B. Analysis and Conclusions

As to requiring new mailings, neither the literal language nor the intended meaning of the proposal would require that. Therefore, DoDDS' argument that the proposal conflicts with section 7106(b)(1) of the Statute is rejected.

As to the "conditions of employment" argument, we note that the proposal, by intent and language, is limited to new employees assigned to schools in the OEA bargaining unit. Moreover, DoDDS does not dispute that the provision of "appropriate orientation information" is a matter affecting working conditions and hence a condition of employment. The only issue, then, is with the timing of the mailing. In our view, the material which would be provided relates solely to the selectees' status as individuals designated for employment in bargaining unit positions and has relevance specifically to employment in those positions. Thus, even though the proposal would be effective at a time before the selectees have been appointed, it relates to matters concerning bargaining unit positions and, consequently, concerns conditions of employment in the bargaining unit. Union Proposal 1 is within the duty to bargain. See, for example, National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275 (1981) (Union Proposals 2-4) where the Authority held negotiable proposals which prescribed procedures for filling vacancies in the bargaining unit even though the procedures would apply to candidates who were currently outside the unit.

III. Union Proposal 2

Section 2-E

> Employees who are released from duty without pay to represent the Association shall retain entitlement to all allowances and benefits (including, but not limited to: step increase, insurance, health benefits, LQA, post allowances, transportation agreement, teaching position, eligibility for transfer program, retirement credit) for the period of representation unless prohibited by law.

A. Positions of the Parties

DoDDS contends that Union Proposal 2 conflicts with Government-wide regulations, specifically asserting that:

(1) the provision relating to insurance conflicts with Federal Personnel Manual Supplement 870-1;

(2) the provision relating to health benefits conflicts with Federal Personnel Manual Supplement 890-1;

(3) the provision relating to living quarters allowance (LQA) and post differential conflicts with the Department of State Standardized Regulations (DSSRs).

OEA, in its reply brief, states that the phrase "unless prohibited by law" is intended to mean that the entitlements sought are to be granted only to the extent permitted by law and Government-wide regulations. It claims that the proposal, being so limited, cannot possibly conflict with those regulations. It concedes that the Federal Personnel Manual provisions involved are Government-wide regulations, however, it contends that the DSSRs are not.

B. Analysis and Conclusions

1. Conflict with the DSSRs

The Authority has construed the term "Government-wide regulation" to include regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply. The Authority emphasized that a requirement that a regulation apply, literally, to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision virtually meaningless, since it appeared that few, if any, regulations affect every civilian employee of the Federal Government. The Authority found from the legislative history of the Statute that Congress understood "Government-wide regulations" to constitute a significant limitation on the scope of bargaining and intended the term to include more than the inconsequential number of regulations that might fall within a literal definition. Thus, the Authority concluded that a regulation is a Government-wide regulation under section 7117 if it is generally applicable throughout the Federal Government as opposed to applying to every Federal employee. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747 (1980).

Various laws providing for certain allowances and differentials for civilian employee travel and assignment overseas authorize the President of the United States to issue implementing regulations.[2] By Executive Orders,[3] this authority is delegated to the Secretary of State who has exercised it by issuing the DSSRs. The DSSRs govern allowances, differentials, and defraying of official residence expenses in foreign areas.[4] As to those subjects, they apply to Federal civilian employees generally[5] and are binding on the heads of agencies.[6]

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[2] For example, Defense Department Overseas Teachers Pay and Personnel Practices Act, 73 Stat. 213 (1959); the Overseas Differentials and Allowances Act, 74 Stat. 792 (1960); and the Travel Expense Act of 1949, as amended (5 U.S.C. §§ 5701 et seq.).

[3] E.O. 10903, as amended, and E.O. 12228.

OEA argues that because Chapter 700 of the DSSRs applies only to Department of Defense teachers and that, but for Chapter 700, the DSSRs would not apply to the teachers, the DSSRs are not Government-wide rules or regulations. In the Authority's view, Chapter 700 merely sets forth modifications to the overall provisions of the DSSRs to accommodate the special circumstances of teacher employment -- most notably the fact that their employment is oriented around the school year.[7] The Authority concludes that the DSSRs, in general, apply to teachers. See also note 4 above.

We reach this conclusion notwithstanding two apparently contrary statements in, respectively, the legislative history of the Statute and of the Foreign Service Act of 1980. First, the legislative history of the Statute contains remarks made by Rep. William D. Ford, regarding the "Udall substitute" which became the final House version of the bill which was enacted, which seem to suggest that the DSSRs are not to be treated as Government-wide regulations within the meaning of the Statute.[8] We think this misconstrues the DSSRs and is inconsistent with the overall intent of the Congress. As noted above, authority to issue regulations governing the subjects which the DSSRs address was delegated from the Congress through the President to the Department of State. Further, the DSSRs cover not only teachers but civilian Federal employees generally with respect to certain allowances and differentials provided in connection with overseas assignment and travel.

Second, a statement in the conference report preceeding enactment of the Foreign Service Act of 1980 (legislation which, among other things, established a labor-management relations program in the Foreign Service, modeled on the Statute), characterizes the DSSRs as not being "Government-wide" within the meaning of the Statute.[9] The legislative history of the Foreign Service Act is not dispositive in interpreting the Statute. See Department of Defense v. FLRA, 659 F.2d 1140, 1157 n.94 (D.C. Cir. 1981) in which the court stated that it considered the legislative history of the Foreign Service Act to be relevant but not dispositive evidence or even an "especially important factor" in interpreting the Statute. In any event, as explained earlier, the Authority does not interpret the term "Government-wide rule or regulation" literally because we believe the result would be inconsistent with Congressional intent.

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[4] Section 012 of the DSSRs. For the text of this provision, see the Appendix to this decision.

[5] See section 040 of the DSSRs. For relevant portions of the text see Appendix.

[6] See section 013 of the DSSRs. For text see Appendix.

[7] For relevant portion of the text of Chapter 700 of the DSSRs, see Appendix.

[8] For text of these remarks, see Appendix.

Hence, based on the Authority's previous decisions, we conclude that the DSSRs are Government-wide regulations.

Union Proposal 2 would require the continuation of LQA and post allowances for unspecified periods during which employees are representing OEA while in a nonpay status. We find that this conflicts with DSSR provisions which contain explicit restrictions on payment of those allowances.[10] Although OEA has stated that its proposal should be read as incorporating any limitations imposed by Government-wide rules and regulations as well as law, the language of the proposal does not reflect this intent. Consequently, we find the proposal as written concerning LQA and post allowances is inconsistent with a Government-wide regulation and outside the duty to bargain.

2. Conflict with the Federal Personnel Manual

DoDDS has also argued that insofar as the proposal would allow an unlimited and unconditional continuation of life insurance and health insurance benefits, it conflicts with provisions in the Federal Personnel Manual (FPM). The FPM limits the extent to which employees in nonpay status may retain life insurance coverage[11] and continue enrollment in a health benefits plan.[12] However, the FPM also allows an employee granted leave without pay to serve in an employee organization to elect the option of continuing health benefits and life insurance coverage indefinitely if the employee pays both the Government and employee contributions to cover premium costs. These FPM provisions are derivative and only reiterate specific limitations contained in Federal law. See 5 U.S.C. § 8706(a) and (d) [life insurance] and 5 U.S.C. § 8906(e) [health benefits]. Because limitations imposed by law are expressly incorporated by the language of the proposal, so by extension are the derivative provisions of the FPM. Therefore, we find the proposed entitlements to health benefits and life insurance do not exceed those permitted by Federal law and the FPM. DoDDS' contention that the proposal conflicts with the FPM is rejected as a basis for finding that aspect of the proposal nonnegotiable.

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[9] For text of this statement, see Appendix.

[10] For text of relevant provision of the DSSRs, see Appendix.

[11] FPM, Chapter 870, Subchap. 1, 1-4 and FPM Supplement 870-1, Subchap. S2, S2-7.

IV. Union Proposal 3

Section 3-D

> Each employee has the right to seek assistance from an Association Representative at any time as long as such assistance does not interfere with the carrying out of instructional duties.

A. Positions of the Parties

DoDDS asserts that the proposal would interfere with its rights under section 7106(a)(2)(A) and (B) to direct employees and to assign work. In support of this contention, it argues that the proposal, as written, would prevent it from assigning duties to an employee who decides to seek assistance from a Union representative during the preparation period, lunch period or between classes.

The OEA states that Union Proposal 3 is intended to allow teachers to visit Association representatives only when no specific duties are assigned and that it is not intended to prohibit the Agency from assigning duties to teachers during periods of free time.

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[12] FPM, Chapter 890, Subchap. 3, 3-3 and FPM Supplement 890-1, Subchap. S8, S8-4.

B. Analysis and Conclusions

The Union's statement of intent is compatible with the language of the proposal which specifically allows that performance of duties will take precedence over any rights to seek union assistance. In view of this meaning, the Agency's argument that the proposal would interfere with its rights to direct employees and to assign work is unpersuasive. Union Proposal 3 is within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 3511 and Veterans Administration Hospital, San Antonio, Texas, 12 FLRA 76 (1983) (Union Proposal 29) in which the Authority found negotiable a proposal which would neither prevent management from assigning duties to employees during their meal periods nor relieve employees of the responsibility to perform any work scheduled during that time.

V. Union Proposal 4

> Section 3-E(7):
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> Any records to which the employee has not been granted access shall not be used to adversely affect said employee.

A. Positions of the Parties

OEA states that under the proposal, when an employee is denied access to material, "those records or documents and the information contained in them may not be used against the employee in any way which may adversely affect the employee in the course of his/her employment." [Emphasis supplied.] DoDDS asserts that, as written, the proposal could require it to disclose information even though under law and regulation it might be improper to do so. Alternatively, the proposal could prevent it from taking actions relating to an employee because of legal prohibitions on the release of relevant information. Because of this, the proposal is inconsistent with law and Government-wide rule or regulation and interferes with its management rights under section 7106(a) of the Statute. In response OEA argues that under the Privacy Act and the laws and regulations governing adverse actions employees are already entitled to the records addressed by the proposal.

B. Analysis and Conclusions

Based on the language of the proposal and the Union's statement of intent, we find that the proposal is not limited to "adverse actions" within the meaning of title 5 of the U.S. Code. 5 U.S.C. 7501 et seq. Rather, it would give employees unrestricted access to any and all "records" used in a manner which would affect them in a negative way. The proposal makes no allowance for instances where disclosure would be inconsistent with law and Government-wide rule or regulation such as divulging medical information contrary to the regulations of the Office of Personnel Management (OPM).

OPM is authorized to issue regulations governing, among other things, disability retirement applications. 5 U.S.C. § 8347. Its regulations concerning applications filed by agencies are codified at 5 CFR §§ 831.1201-1206 and apply generally to employees in the executive branch. 5 CFR §§ 831.201 and 831.1201. The Authority finds that they are Government-wide regulations.[13]

Those regulations incorporate by reference[14] another OPM regulation which prohibits an agency from disclosing medical information "concerning a mental or other condition of such a nature that a prudent physician would hesitate to inform a person suffering from it of its exact nature and probable outcome. . . ." According to this provision an agency may give this type of information only to a licensed physician with no requirement to allow the employee access to it. Because these applications are filed in the context of removing an employee,[15] it is reasonable to conclude that it is an action adversely affecting the employee within the meaning of this proposal.

In another example, the proposal as written could also require that an employee be given access to the records of other employees in violation of the Privacy Act. More specifically, in a promotion action a nonselected employee seeking to challenge the outcome could, under the proposal, demand access to the records of other competing employees. The Authority has previously held that a proposal seeking unqualified access by nonselected employees to records of other employees involved in a promotion action was inconsistent with the Privacy Act and consequently nonnegotiable. National Federation of Federal Employees, Local 1745 and Veterans Administration, 13 FLRA 543 (1983) (Union Proposal 2), appealed as to other matters sub nom. National Federation of Federal Employees, Local 1745 v. FLRA, No. 84-1054 (D.C. Cir. Feb. 16, 1984).

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[13] See discussion of what constitute a Government-wide regulation in section III(B)(1) above.

[14] 5 CFR § 831.1204(b) refers to 5 CFR § 294.401(b). The provisions of 5 CFR § 294.401(b) have been relocated and appear at 5 CFR § 294.106(d). See 47 Fed. Reg. 46513 (1982) and 50 Fed. Reg. 3308 (1985).

[15] See 5 CFR §§ 831.1201, 831.1203.

In summary, because the proposal is framed in a manner that does not allow for observing legitimate legal and regulatory restrictions on disclosure of records, it is inconsistent with section 7117 of the Statute and is not within the duty to bargain. Because we have found that the Agency can not be required to divulge information where prohibited by law or Government-wide regulation, it is unnecessary to address the Agency's arguments that as an alternative to disclosure it would be prevented from exercising various management rights.

VI. Union Proposal 5

Section 3-K:

> Unless otherwise mandated by Federal law or government-wide regulations, employees in the bargaining unit will be responsible only to the Employer with respect to matters that affect their terms and conditions of employment.

A. Positions of the Parties

As explained by OEA, this proposal is intended to exempt employees from any obligation to follow directives given by military personnel but not to prohibit agency supervisors from issuing under their own authority orders of military origin. DoDDS asserts that because the proposal relates to "ancillary services" made available to employees, such as recreational services, housing facilities, and PX and commissary privileges, it does not concern conditions of employment. The Agency argues that because it has no control over the military it cannot bargain over services and facilities which are operated by the military. In support of this argument, it cites the Authority's decision in American Federation of State, County and Municipal

Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982). OEA responds that because the Agency holds employees responsible for following orders of military personnel, the proposal relates to conditions of employment.

B. Analysis and Conclusions

1. Conditions of Employment

Based on OEA's explanation and the language of the proposal itself, the proposal clearly would apply to matters which are conditions of employment. Therefore, we reject the Agency's argument to the contrary.

2. Effect of Military Control on Duty to Bargain

The Authority also rejects the Agency's argument that because control over the matters addressed by the proposal rests with other components of the Department of Defense it has no obligation to bargain. The Authority addressed a similar question in Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984). In that case, the Authority held that where a union holds exclusive recognition in a component of an agency, that component is obligated to bargain over conditions of employment despite the fact that control over a particular condition of employment rests with a different organizational component in the same overall agency. The only limits on an agency's obligation to bargain over conditions of employment, in that circumstance, are those placed on its discretion by provisions of law, Government-wide rule or regulation or agency regulations for which a compelling need exists. American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Union Proposals XI-XIII), enf'd sub nom. Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983) relied upon by DoDDS is inapposite. In Library of Congress authority over a particular condition of employment in the bargaining unit rested outside the agency (Library of Congress) with the Architect of the Capitol. The circumstances in this case are analogous to those in DCASR, Boston, as contrasted to those in Library of Congress. Therefore, the principles set forth in DCASR, Boston are applicable in this case. The fact that Department of Defense organizations other than DoDDS possess control over a matter which is the subject of an otherwise negotiable proposal does not present a basis for finding that proposal nonnegotiable.

3. Management Right to Direct Employees in the Agency

However, the Authority finds that the proposal is nonnegotiable for a reason other than those raised by the Agency. In the conduct of its mission DoDDS utilizes various facilities and services which are under the control of the military departments. The proposal would prevent DoDDS from requiring employees to follow directives given by military personnel in the context of their use of those facilities and services as DoDDS employees. In the Authority's view this would directly interfere with the Agency's supervision and guidance of employees insofar as use of those facilities and services is concerned. The proposal therefore conflicts with the Agency's right under section 7106(a)(2)(A) to direct employees. See National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769, 775 (1980), aff'd sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), in which the Authority discussed what is encompassed in the management right "to direct . . . employees in the agency." Thus, it is not within the duty to bargain. Compare American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672 (1983) (Union Proposal 1) (a proposal which would preclude certain individuals from making work assignments to employees was held to conflict with the agency's right under section 7106(a)(2)(B) to assign work).

VII. Union Proposal 6

ARTICLE 6 - DUES WITHHOLDING

Section 2-A:

Unit employees may have Association dues withheld from their pay on a biweekly basis during the school year in the amount established by the Association and authorized by the eligible employee. The Employer shall take what action is necessary to ensure the monies withheld will be forwarded within fourteen calendar days of each pay period to the appropriate official designated by the Association. Remittance checks will be accompanied by a listing of the names, amount withheld, and total income remitted, as well as the names of those employees for whom allotments have been temporarily or permanently stopped and the reason therefore.

A. Positions of the Parties

Because its payroll functions are administered by the military departments, DODDS argues that the underscored portion of the proposal is nonnegotiable. It also asserts that the proposal is contrary to law. OEA asserts that the fact that the military departments provide payroll services to DODDS does not relieve DODDS of its responsibility under section 7115 of the Statute to implement dues deductions for its employees.

B. Analysis and Conclusions

The record indicates that military departments provide payroll services to DODDS under support or service agreements and as DODDS' agents. This arrangement does not relieve DODDS of its statutorily prescribed responsibility under section 7115 to implement dues allotments for its employees who are in the OEA bargaining unit. The Agency's contention that the proposal is not within its duty to bargain because its payroll function is administered by the military departments is rejected. We note that, even if the military departments were acting under their own delegated authority rather than under a servicing agreement, the proposal would be negotiable. See discussion in section VI(B)(2) above.

DODDS has failed to cite any specific provision and none is apparent to support its claim that the proposal conflicts with law. This contention is, therefore, rejected. Union Proposal 6 is within the duty to bargain.

VIII. Union Proposal 7

> Section 3:
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> Deductions for allotments shall begin on the first full pay period in October of the school year. Authorizations for allotments not received by the servicing finance office before the first full pay period in October shall become effective on the next biweekly pay period. The amount for such allotments shall be the annual dues divided by the number of full pay periods left in the school year. Dues shall be withheld only for full pay periods during the school year. By mutual agreement, an appropriate finance office and Association Representative may vary the terms of this section.

A. Positions of the Parties

DoDDS contends that the underscored portion of Union Proposal 7 conflicts with section 7115 of the Statute. By requiring payment of a total annual amount regardless of when during the year allotment is initiated the proposal would require the payment of back dues, contrary to the requirement in section 7115 that dues allotments be made on a "regular and periodic" basis.

OEA states that its dues are an annual amount. Thus, a member is expected to pay the total yearly amount regardless of the point during the year at which he/she joins and authorizes withholding. It contends that the proposal reflects its flat membership fee type of dues structure rather than requiring payment of "back dues."

B. Analysis and Conclusions

Based on the Union's explanation of the proposal, we do not view the proposal as seeking collection of "back dues." Nor do we interpret the proposal to require the Agency to continue allotments after a revocation request or other circumstance (for example, promotion out of the bargaining unit) which would dictate termination.

In the Authority's view section 7115 establishes a mechanism for the payment of dues by bargaining unit employees as opposed to prescribing a permissible dues structure for the labor organizations. Nothing in it prohibits dues collection based on a particular "flat fee" dues structure. Consequently, we find that this proposal does not conflict with section 7115 of the Statute and is within the duty to bargain.

IX. Union Proposal 8

> ARTICLE 7 - USE OF OFFICIAL FACILITIES
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> Section 2:
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> The Employer/Designee recognizes that the Association Representative(s) has exclusive right to distribute all Union literature in the school international distribution boxes for unit employees. It is understood that the Civilian Personnel Office may distribute information on government-wide health benefit plans.

A. Positions of the Parties

DoDDS contends that the underscored portion of this proposal would require it to limit access to its internal mail system to OEA even when a competing union had "equivalent status." This would be inconsistent with section 7116(a)(3) of the Statute. OEA states that the proposal is not intended to prevent a competing union from having access to the mail system "if there is a question concerning representation after the expiration of the contract." Union Reply Brief at 16.

B. Analysis and Conclusions

This proposal expressly applies to "all Union literature" and, thus, would encompass the distribution of Union campaign literature. A question concerning representation (QCR) can be raised, and a rival union can therefore gain "equivalent status" with an incumbent exclusive representative, prior to the expiration of a collective bargaining agreement. 5 U.S.C. § 7111(f)(3). Section 7116(a)(3) of the Statute obliges agencies to furnish customary and routine facilities and services to labor organizations having equivalent status. This proposal would require OEA to have exclusive use of the Agency mail system for the distribution of, among other things, union campaign literature even when a competing union had equivalent status. Because of this, it conflicts with section 7116(a)(3) of the Statute and is not within the duty to bargain.

X. Union Proposal 9

Section 4:

The Employer/Designee shall provide Association Representatives/Staff who are not employees of ODE/DoDDS with appropriate documents requesting utilization of military facilities and services overseas when such Representatives/Staff are acting pursuant to the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code.

A. Positions of the Parties

DoDDS argues that this proposal is nonnegotiable because it relates solely to individuals who are neither DoDDS employees nor bargaining unit members. OEA contends that the matters proposed would facilitate its ability to represent unit employees and, consequently, the proposal is negotiable.

B. Analysis and Conclusions

The Authority finds that this proposal concerns exclusively individuals who are neither employees of the Agency nor in the bargaining unit. The obligation of an agency to bargain concerning conditions of employment extends only to those employees in an appropriate bargaining unit represented by the exclusive representative. See, for example, United States Department of Defense, Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, 15 FLRA 998 (1984). For the reasons expressed in Kelly Air Force Base, Union Proposal 9 is not within the duty to bargain.

XI. Union Proposal 10

> Section 5-A:
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> A. The Employer/Designee shall provide Association Representatives/Staff who are employees of ODE/DoDDS with appropriate government Travel Orders for transportation for the purposes of conducting representational duties and to include a designation of the equivalent Management counterpart grade.

A. Positions of the Parties

DoDDS asserts that the proposal is nonnegotiable because it conflicts with various provisions of the Department of Defense Joint Travel Regulations (JTRs). This claim centers on two Comptroller General (CG) decisions: Unpublished Decision of the Comptroller General B-158880, April 28, 1966 and Unpublished Decision of the Comptroller General B-158880, October 27, 1966, which the Agency interprets as requiring uniform application of the JTRs to all employees -- unit and nonunit alike. The Agency argues the proposal would require it to either "waive" conflicting JTR provisions for unit employees or apply the terms of the proposal to nonunit employees. Either result places the proposal outside the duty to bargain. To require it to waive JTR provisions is inconsistent with the CG decisions which it contends are Government-wide rules and regulations as well as a nondiscretionary mandate of an outside authority which establishes a compelling need for the JTRs under section 2424.11(c) of the Authority's Rules and Regulations. To require it to apply the terms of the proposal to nonunit employees extends beyond its duty to bargain.

OEA argues that the CG decisions cited by DoDDS are not relevant to the question of whether under section 7117 of the Statute parties can agree to contract provisions which are inconsistent with provisions of agency regulations.

B. Analysis and Conclusions

Section 7117(a) of the Statute specifically provides that the duty to bargain extends to matters which are the subject of an agency regulation where there is no compelling need for the regulation. This allows negotiations over proposed conditions of employment of bargaining unit employees which may differ from unilaterally established conditions of employment set forth in agency regulations. The Agency's strained interpretation of the Comptroller General's decisions deprives the compelling need provisions of the Statute of their intended meaning and is not supportable. Those decisions addressed the question of whether agencies could arbitrarily waive regulatory provisions in individual cases.16/ This question is

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16/ Citing an earlier decision, the Comptroller General held:

> [I]n 37 Comp. Gen. 820 . . . we held that a statute which authorizes an administrative officer to prescribe regulations does not imply authority to include a waiver provision in the regulations which would permit the administrator in his discretion to disregard the regulations in certain individual cases and enforce them in others. Also, as we stated in that decision, regulations must contain a guide or standard alike to all individuals similarly situated, so that anyone interested may determine his own rights or exemptions therein.

Unpublished Decision of the Comptroller General B-158880, October 27, 1966.

distinguishable from that presented by this case which is whether parties have a statutory right to negotiate conditions of employment applying to bargaining unit employees which differ from those set forth in agency regulations. This proposal, by merely seeking to negotiate over matters covered by JTRs, does not conflict with the cited Comptroller General decisions themselves,[17] or with any requirements they may place on the manner in which the JTRs are administered. Additionally, the Authority finds that nothing in the cited Comptroller General decisions would require that any provisions negotiated be applied to nonunit employees.

Based on these reasons the Authority rejects the Agency's arguments. Our finding that in this case the Agency has not established a compelling need for any part of the JTRs, does not of course imply that a compelling need could not be established under other circumstances. Compare National Federation of Federal Employees, Local 561 and Department of the Army, U.S. Army Corps of Engineers, Mobile, Alabama, 17 FLRA 759 (1985) aff'd sub nom. National Federation of Federal Employees, Local 29 v. FLRA, No. 85-1398 (D.C. Cir. April 1, 1986) where the Authority found that a compelling need had been established for a portion of the JTRs. The Authority finds, based on the record here, that Union Proposal 10 is within the duty to bargain.

XII. Union Proposals 11 and 12

[Union Proposal 11]

Section 5-B:

> B. Association Representatives/Staff who are not employees of ODE/DoDDS shall be issued appropriate government Travel Orders on a reimbursable basis from the Association for transportation for the purpose of conducting representational duties and to include a designation of the equivalent Management counterpart grade.

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[17] In view of this, it is unnecessary to, and the Authority does not, decide under what circumstances decisions of the Comptroller General might constitute Government-wide rules and regulations.

[Union Proposal 12]

Section 6:

Association Representatives/Staff who are not ODE/DODDS employees and are stationed outside the United States shall be given access to services and facilities provided by the Department of Defense as employees of the Department of Defense on a reimbursable basis or on the same basis that members of the American Red Cross, USO, U.S. commercial contractors, Boy Scout leaders, or traveling clergy are treated.

A. Positions of the Parties

The positions of the parties regarding these two proposals are essentially the same as those expressed regarding Union Proposal 9. See section X(A) above.

B. Analysis and Conclusion

Union Proposals 11 and 12, like Union Proposal 9, deal exclusively with matters concerning individuals who are not in the bargaining unit. Based on the reasons expressed and the case cited in conjunction with Union Proposal 9, the Authority finds that Union Proposals 11 and 12 are not within the duty to bargain. See section X(B) above.

XIII. Union Proposal 13

Section 11:

The Employer/Designee shall provide an area with a minimum of a desk, chair, file cabinet, typewriter and Class A telephone for the Association at the national and regional levels. An identical area shall be provided at the local level provided that an Association Representative represents at least 50 bargaining unit members. If the Association Representative represents fewer than 50 bargaining unit members, said area shall be provided if available.

A. Positions of the Parties

The Agency argues that the underlined portion of the proposal is nonnegotiable because the military components of the Department of Defense rather than DoDDS, control the allocation of telephone resources. OEA argues that DoDDS can procure telephone services from the military through servicing support agreements.

B. Analysis and Conclusions

The Agency's argument is essentially the same as the one raised in conjunction with Union Proposal 5. It is rejected here for the reasons expressed above in section VI(B)(2). Union Proposal 13 is, therefore, within the Agency's obligation to bargain.

XIV. Union Proposal 14

> Section 14:
>
> The Employer/Designee shall take what action it can to provide each school with a faculty lounge and a Class A telephone. In any event, employees shall be given reasonable access to military and civilian telephones at the work site.

A. Positions of the Parties

DoDDS argues that: to the extent the telephones are to be used for official business, the proposal concerns the methods and means by which the Agency accomplishes its work and under section 7106(b)(1) it is not within the duty to bargain; and to the extent the telephones are to be used for personal business, the proposal conflicts with a Government-wide rule or regulation, specifically a GSA regulation found at 41 CFR, Part 101-37.

OEA argues that DoDDS has not demonstrated that use of the telephone is "principally related to the performance of the Agency's work." Thus, it has not shown that the proposal interferes with its determination of the methods, means and technology of performing work. In response to the Agency's assertion that use of the telephone for personal business conflicts with a GSA regulation, OEA asserts that the particular regulation only prohibits using long distance telephone service for personal reasons. Under the proposal, the Agency retains the right to prohibit employees from making long distance calls.

B. Analysis and Conclusions

1. Conflict with Section 7106(b)(1)

Because the proposal would require that telephones, or access to them, be provided employees for the purpose of conducting the business of the Agency, it is to the same effect as Union Proposal 3 in American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA 902 (1984). In that case, the Authority found that the proposal, which required that sufficient telephones for the conduct of Government business be furnished, concerned the technology of performing work within the meaning of section 7106(b)(1) of the Statute. For the same reasons, Union Proposal 14 as written is an elective subject on which the Agency has chosen not to bargain.

2. Conflict with a Government-wide Rule or Regulation

The particular regulation on which DoDDS relies has been supplanted during the pendancy of the case by a provision in the Federal Information Resources Management Regulation (FIRMR). Specifically, the FIRMR limits use of "the FTS and other Government provided long distance services" to Government business only. 41 CFR § 201-38.007. However, it does not appear that the FIRMR applies to Department of Defense installations in the geographical areas involved in this case. Specifically, 41 CFR § 201-1.103(c)(3) provides:

> (3) The applicability of the telecommunications resources provisions of the FIRMR to the Department of Defense (DoD) is governed by the statement of areas of understanding between DoD and GSA (15 FR 8226, December 1, 1950).

The statement of areas of understanding referred to provides in relevant part:

> 1. The areas of understanding herein set forth were worked out pursuant to order of the President of July 1, 1949, directed to the Secretary of Defense, the Director, Bureau of the Budget, and the Administrator of General Services.
>
> 2. The areas of understanding with respect to communications services are:
>
> . . . .

> m. This area of understanding is applicable to communications services within the Continental United States, Hawaii, Puerto Rico and the Virgin Islands. The Department of Defense shall be exempt from action taken by the Administrator with respect to communication services under section 201(a) of Public Law 152 [The Federal Property and Administrative Services Act of 1949] in other geographical areas.

In view of this, the Agency's assertion that the proposal conflicts with 41 CFR § 201-38.007 cannot be sustained and would not, by itself, provide a basis for finding the proposal nonnegotiable.

XV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union proposals 1, 2 (except insofar as it addresses Living Quarters Allowances and post allowances), 3, 6, 7, 10 and 13.[18] IT IS FURTHER ORDERED that the Union's petition for review as it relates to Union Proposals 2 (insofar as it addresses Living Quarters Allowances and post allowances), 4, 5, 8, 9, 11, 12 and 14 be, and it thereby is, dismissed.

Issued, Washington, D.C. July 7, 1986.

J. C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[18] In finding these proposals within the duty to bargain the Authority makes no judgment as to their merits.

APPENDIX

3/ 012 Exercise of Authority

The Secretary of State hereby prescribes the following regulations governing allowances, differentials, and defraying of official residence expenses in foreign areas. These regulations and any amendments and revisions to them shall govern:

a. Granting of quarters allowances, cost-of-living allowances, post differential, and danger pay allowance authorized by 5 U.S.C. 5921-5925, and 5928 for employees defined in section 014i and for employees defined in section 040j who may be authorized by other provisions of law to be paid allowances and differentials;

b. Allotment of funds to defray official residence expenses authorized by 5 U.S.C. 5913;

c. Granting of representation allowances authorized by section 905 of the Foreign Service Act of 1980, for officers or employees of the Foreign Service, and similar allowances authorized by other provisions of law (including section 235 (a)(2) of Title 38 of the United States Code) for employees (Sec. 040i) other than employees of the Foreign Service unless authority to prescribe regulations for such employees under any such act has been vested in, or specifically delegated to, someone other than the Secretary of State;

d. Granting of quarters allowances, cost-of-living allowances and post differential authorized by sections 7 (a) and 8 (a) (1) and (2) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (20 U.S.C. 905 (a) and 20 U.S.C. 906 (a)(1) and (2), as amended (2) U.S.C. 901 et seq.);

e. Maximum rates of per diem allowances for travel in foreign areas authorized by 5 U.S.C. 5702;

f. The payment of compensation, post differential and allowances in the event of an emergency evacuation of employees or their dependents, or both, from duty stations for military or other reasons or because of imminent danger to their lives (5 U.S.C. 5521-5527);

g. The payment of a housing supplement to certain employees assigned to the U.S. Mission to the United Nations, and the payment of a housing and subsistence expense allowance to U.S. delegates and alternates to the United Nations General Assembly; authorized by Section 9 of the United Nations Participation Act of 1945, as amended (59 Stat. 619).

h. Granting of compensatory time off to employees at certain posts in foreign areas authorized by 5 U.S.C. 5926.

i. Granting of relocation allowances authorized by 38 U.S.C. 235(6) and (7) for Veterans Administration.

j. Advances of pay to employees entering foreign area assignments authorized by 5 U.S.C. 5927.

4/ The DSSRs define employee as follows:

040 Definitions

The following definitions apply to all chapters of these regulations, unless waived or modified in specific instances. Supplementary definitions which apply to specific chapters or sections only will be found in the General Provisions of those chapters and subchapters.

. . . .

i. "Employee" means an individual employed in the civilian service of a government agency (including ambassadors, ministers, and members of the Foreign Service of the United States under the Department of State) who is

(1) a citizen of the United States; (except under sec. 312);

(2) officially stationed in a foreign area, except as otherwise specifically provided in these regulations;

(3) receiving basic compensation (See Sec. 040k); and

(4) eligible for allowances or differential under sub-chapter 030.

Teachers are considered "employees." Section 040(n) provides:

> n. "Teacher" means an employee who is a teacher as defined in section 2(2) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (73 Stat. 213) and regulations issued thereunder by the Department of Defense. Substitute teachers are not considered to be teachers for the purpose of these regulations.

5/ Section 013 of the DSSRs provides in part:

013 Authority of Head of Agency

> When authorized by law, the head of an agency may . . . grant post differential, special incentive differential, danger pay allowance, quarters, cost-of-living, representation allowances, compensatory time off at certain posts and advances of pay to employee of his/her agency and require an accounting therefore, subject to the provisions of these regulations and the availability of funds. Within the scope of these regulations, the head of an agency may issue such further implementing regulations as he/she may deem necessary for the guidance of his/her agency with regard to the granting of and accounting for these payments.

6/ Chapter 700 provides in part:

> 710 General
>
> Under the general provisions of Chapter 000 and the modifying provisions of this chapter, a teacher (Sec. 040n.) who is assigned to a teaching position at a post (Sec. 040h) may be granted quarters allowances in accordance with Chapter 100, cost-of-living allowances in accordance with chapter 200, and be paid a post differential in accordance with Chapter 500. [Emphasis added.]

7/ Rep. Ford's remarks were as follows:

> By also permitting negotiation of matters that are the subject of agency regulations that are not Government-wide rules or regulations, problems such as those that have occurred with overseas schoolteachers should be eliminated. While these teachers are employees of the Defense Department, the Department of State has been given the authority, in some instances, to issue regulations regarding these teachers. The Defense Department has indicated that they could not negotiate on these matters, since they did not issue the regulations. The State Department will not negotiate on the matters, since the employees organizations representing these teachers do not have exclusive recognition with State. Title VII prevents management from continuing this practice or from extending this type of maneuver to other agencies in order to avoid the duty to bargain by making "matters" that are the subject of non-Government-wide regulations (as opposed to regulations themselves) negotiable.
>
> [124 Cong. Rec. H 9650 daily ed. Sept. 13, 1978].

8/ The conference report stated as follows:

> The conferees note that the Senate and House versions of chapter 10 did not differ. The chapter 10 provisions resulted from an amendment adopted in subcommittee in the House which was modeled after title VII of the Civil Service Reform Act of 1978. The conferees wish to make clear that chapter 10 is to be interpreted consistent with the legislative history of the Reform Act, except where a specific departure is provided in the bill. As an example

(Continued)

(Continued)

> of a departure, the bill excepts from the duty to bargain multi-agency responsibilities (such as the Uniform Standardized Regulations issued under 5 U.S.C. 5921-25) as well as those meeting the strict definition of "Government-wide". [Emphasis in original.]
>
> [H.R. Rep. No. 96-1432, 96th Cong., 2d Sess. 117 reprinted in [1980] U.S. Code Cong. & Ad. News 4419, 4551.]

9/ The DSSRs provide in relevant part:

> * 050 PAYMENTS (See subchapter 030 - Applicability)
>
> 051 Allowance Payments
>
> . . . .
>
> 051.2 Employees in Non-Pay Status
>
> All allowances granted under these regulations may continue during periods while the employee is in non-pay status not in excess of 14 calendar days at any one time. For periods in non-pay status longer than 14 calendar days, payments under allowance grants are to be suspended as of the day the employee enters the non-pay status, and payment is not to be made for any part of such period, unless otherwise specifically provided in these regulations (Sec. 132.2b(2)).
>
> 132.2 Continuance of Grant
>
> The LQA grant may continue, provided the employee maintains and pays for his/her quarters at the post:
>
> . . . .
>
> b. When the head of agency determines that continuance of the grant would be in the public interest

(Continued)

(Continued)

. . . .

> (2) while the employee is in non-pay status not in excess of 30 calendar days at any one time. For periods in non-pay status longer than 30 calendar days, payment shall be suspended as of the day the employee enters such status, and payment is not to be made for any part of such period.

22 FLRA No. 35

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY AVIATION
SYSTEMS COMMAND

Activity

and

Case No. 0-AR-1088

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 405

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Paul E. Fitzsimmons filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.*/

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerned the grievant's failure to be selected for a supervisory professional engineer position. A grievance was filed and submitted to arbitration on the issue of whether the selection action conformed to applicable laws, rules, and regulations. The Arbitrator determined that there were substantial errors in the selection action that required remedial action. With respect to the remedy, the Arbitrator stated that he was not qualified to determine the relative qualifications of the grievant and the employee selected for the engineer position. Accordingly, as his award, the Arbitrator ordered that the selection and recruitment process for the position be rerun in accordance with applicable laws, rules, and regulations and that the selected employee be retained in the position pending the corrective action. In addition, the Arbitrator ordered as follows:

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*/ In its opposition the Union notes a provision of the parties' collective bargaining agreement stating that within 10 days after receipt of an arbitrator's award, there will be written notification by the parties of any intent to file exceptions. The Union maintains that there was no such notification in this case and that the Authority on this basis should dismiss the Agency's exception. The Authority concludes that the parties' agreement provides no basis for dismissing the Agency's exception that conforms to the requirements of section 7122(a) and the Authority's Rules and Regulations.

> 3. Pursuant to the provisions of 5 U.S.C. §§ 5596, 7701, [the] Attorney for the Grievant is to be compensated by the Employer, upon submission of an itemized bill at the rate of [$75.00] per hour for services rendered. The total fee shall not exceed [$1500.00].

III. EXCEPTION

A. Contentions of the Agency

In its exception the Agency contends that paragraph 3 of the award is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that the Arbitrator was not authorized under the Back Pay Act to award attorney fees to the grievant.

B. Opposition of the Union

In its opposition the Union maintains that the Back Pay Act is not the only authority for an award of attorney fees by an arbitrator. In particular, the Union argues that in cases of prohibited personnel practices, an arbitrator may award attorney fees under the terms of 5 U.S.C. § 7701(g), independent of the Back Pay Act, and that in this case section 7701(g) supports the award.

IV. ANALYSIS AND CONCLUSIONS

Contrary to the position of the Union, the Authority has indicated that an arbitrator is authorized to award attorney fees in cases of unjustified or unwarranted personnel actions only under the terms of the Back Pay Act. Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986); see also International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680 (1984). Thus, an arbitrator is not authorized to award attorney fees solely under the terms of section 7701(g), independent of the terms of the Back Pay Act, even in cases of prohibited personnel practices.

consequently, attorney fees were properly awarded by the Arbitrator only if authorized under the requirements of the Back Pay Act. As previously recognized by the Authority, the Act requires that in order to be eligible for attorney fees, the employee must be found by appropriate authority, under applicable law, rule, regulation or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials. Additionally, the fee award must be in conjunction with an award of backpay on the correction of the unjustified or unwarranted personnel action; the fee award must be reasonable and related to the personnel action; and the fee award must be in accordance with standards established under section 7701(g). *Id*.

In this case the Authority concludes that the Arbitrator's award of attorney fees is not in accordance with the requirements of the Act. Although the Arbitrator determined that the grievant had been affected by the improper selection action, he did not determine that this resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials, and consequently he awarded no backpay to the grievant. Thus, the Arbitrator's award of attorney fees was not in conjunction with an award of backpay on correction of the improper selection action. For this reason, and apart from other considerations, the award is deficient as contrary to an express requirement of the Back Pay Act. *See Audie L. Murphy Veterans Administration Hospital, San Antonio, Texas and American Federation of Government Employees, AFL-CIO, Local No. 3511*, 16 FLRA 1079 (1984); *Department of Defense Dependents Schools and Overseas Education Association*, 3 FLRA 259 (1980).

V. DECISION

Accordingly, paragraph 3 is struck from the Arbitrator's award.

Issued, Washington, D.C., July 7, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 36

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Activity

and

Case No. 0-AR-1039

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 830

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator James P. Martin filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerned the Activity's failure to permanently promote the grievant to the position of planner and estimator, WD-8. According to the Arbitrator, the grievant is a journeyman electrician who was temporarily promoted on September 5, 1982, to the position of assistant planner and estimator, WD-5, in the Activity's public works department. In 1983 after a commercial activity study, it was determined to contract out the public works functions. On March 15, 1984, the grievant's temporary promotion to assistant planner was terminated and he was temporarily promoted to the position of planner and estimator to assist in the transition to contractor operation of the public works functions which were contracted out on June 1, 1984. The grievance was filed when the grievant was only temporarily rather than permanently promoted to planner and estimator.

The Arbitrator concluded that the written documentation of the grievant's temporary promotion to assistant planner fully complied with regulation. He acknowledged that the documentation confirmed that the promotion was temporary and that although a permanent promotion to the position of planner was possible, no promise of such promotion was made in writing. However, the Arbitrator found that orally the grievant was continuously promised that he would be permanently promoted to planner when it was possible and that these oral inducements completely contradicted the merit promotion regulation. He also found that contrary to that regulation, the Activity had used the temporary promotion of the grievant to assistant planner to train or evaluate him for the planner position. While acknowledging that the determination to contract out had abolished the position for which the grievant claimed a permanent promotion, the Arbitrator concluded that the grievant should have been permanently promoted to the position of planner and estimator on March 15, 1984. Accordingly, the Arbitrator ordered that the grievant be promoted on a permanent basis to planner and estimator effective March 15, 1984.

III. EXCEPTIONS

In one of its exceptions, the Agency contends that the award interferes with management's right to select in violation of section 7106(a)(2)(C) of the Statute and FPM chapter 335, subchapter 1-4, Requirement 4.

IV. ANALYSIS AND CONCLUSIONS

The Authority has specifically held that management's right under the Statute and the FPM to make the actual selections for promotion can only be abridged by an award of an arbitrator when the arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected for promotion. U.S. Army Missile Command, U.S. Army Communications Command Agency--Redstone, U.S. Army Commissary, Redstone Arsenal, Alabama and American Federation of Government Employees, Local 1858, AFL-CIO, 20 FLRA No. 94 (1985). It is necessary for arbitrators in these cases to reconstruct, on the basis of the evidence presented, what the responsible selecting or appointing officials would have done if the unwarranted agency actions had not occurred. See American Federation of Government Employees, Local 2811 and U.S. Government District Office, Social Security Administration, St. Paul, Minnesota, 7 FLRA 618, 620 (1982). In particular, in order to require an agency to select a particular employee for a permanent promotion, an arbitrator must find on the basis of the reconstruction that the responsible selecting official would have selected that employee but for the unwarranted actions.

See American Federation of Government Employees, Local 3553, AFL-CIO and Veterans Administration Medical Center, New Orleans, Louisiana, 18 FLRA No. 65 (1985).

In this case the Authority concludes that the Arbitrator's award of a permanent promotion is contrary to section 7106(a)(2)(C) of the Statute and FPM chapter 335. As noted, the Arbitrator found that the grievant "should have been . . . promoted" as the result of the improper oral inducements and the improper use of a temporary promotion. In view of the Arbitrator's express acknowledgement that the written documentation of the personnel actions confirmed that no promise of permanent promotion to the position of planner was to be implied and that the planner position had been abolished by the decision to contract out, the Arbitrator's finding that the grievant should have been promoted does not support the award of a permanent promotion. The Arbitrator's finding does not constitute the necessary finding that but for the unwarranted actions, the responsible selecting official would have selected the grievant for a permanent promotion to planner and estimator effective March 15, 1984. Consequently, the award is deficient and must be modified.

V. DECISION

For these reasons the award is modified by striking the order that the grievent be permanently promoted to planner and estimator effective March 15, 1984.*/

Issued, Washington, D.C., July 7, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary to address the Agency's other exceptions.

22 FLRA No. 37

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2298

Union

and

Case No. O-NG-1214

DEPARTMENT OF THE NAVY
NAVY EXCHANGE
CHARLESTON, SOUTH CAROLINA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor Management Relations Statute (the Statute) and concerns the negotiability of one Union proposal.

II. Union Proposal

Article 19 - Promotions and Assignments

> Section 5: Normally rating and ranking panels will not be used for unit positions, however, if they are used, the selecting official will not be a member of the panel and the Union will be provided the opportunity to have an observer present to review the deliberations of the panel.

A. Positions of the Parties

The Agency contends the proposal violates its right, to direct employees, to assign work, and to select employees for promotion under section 7106(a)(2)(A), (B) and (C) of the Statute, respectively.

The Union argues that the proposal does not violate management's rights because it asserts that as the proposal "simply allows a union representative to observe the proceedings," it differs from proposals found nonnegotiable which have called for union participation in the rating and ranking process. The Union contends that while it does "not envision the observer as being able to stop the proceedings, or having the authority to interfere in the timely rating and ranking, [it] do[es] see the observer as being able to challenge questionable practices of the panel. Such matters could and likely would be resolved . . . on the spot." Union Reply Brief at 3.

The Union also describes the clause as "a form of 'sunshine act'" and asserts that the "management decisional process is not shielded from observation by the privacy act, any other law, nor any government-wide regulation." Union Reply Brief at 3.

B. Analysis

While the Union claims that its representative on the rating and ranking panels would only be an observer, its statements that such representative would be "able to challenge questionable practices of the panel" and that "[s]uch matters . . . likely would be resolved . . . on the spot" indicate a more active role for its representative in proceedings of the panels. However, such distinction in the actual intended role of the Union's representative does not affect the negotiability of this proposal.

The Authority has held that a provision requiring participation of a union representative on a promotion rating panel interfered with management's right to select under section 7106(a)(2)(C) of the Statute. American Federation of Government Employees, AFL-CIO, Mint Council 157 and Department of the Treasury, Bureau of the Mint, 19 FLRA No. 81 (1985)(provision 3). The Authority has also held that even a purely passive role of a union observer at management meetings concerning the exercise of management rights (in that case involving the development of performance standards) would interfere with an agency's right freely to engage in internal discussion and deliberations prior to making decisions on those management rights. American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center, Ft. Knox, Kentucky, 15 FLRA 17, 18-19 (1984) (Union proposal 2). Thus, even if the Union observer contemplated by this proposal were to play only a passive role in attending deliberations of the panel, the proposal must be found to be nonnegotiable because such presence would interfere with management's right to select under section 7106(a)(2)(C).

Finally, the Union's reliance on the Authority's decisions in *National Federation of Federal Employees, Local 541 and Veterans Administration Hospital, Long Beach, California*, 12 FLRA 270 (1983) and *National Federation of Federal Employees, Local 1579 and Veterans Administration Regional Office, Louisville, Kentucky*, 12 FLRA 600 (1983) is misplaced. Unlike the proposal in this case, the proposal found negotiable in *Veterans Administration Hospital, Long Beach* and Proposal 1 found negotiable in *Veterans Administration Regional Office, Louisville*, provided for union participation in incentive awards programs which did not concern the exercise of management rights.

The Agency has not demonstrated how this proposal would interfere with management's rights to direct employees under section 7106(a)(2)(A), or to assign work under section 7106(a)(2)(B) of the Statute. The Authority shall, therefore, make no determinations on those claims.

C. Conclusion

The Union proposal is inconsistent with management's right to select under section 7106(a)(2)(C) of the Statute and therefore is not negotiable.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition be, and it hereby is, dismissed.

Issued, Washington, D.C. July 7, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 38

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF MEAT GRADING
LOCALS, AFL-CIO

Union

and

Case No. 0-NG-1000

DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
MEAT GRADING AND CERTIFICATION
BRANCH

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of six provisions relating to travel and per diem and two relating to reduction-in-force (RIF). The Union's petition also included a ninth provision which the Union has since withdrawn. The underlined portions of the provisions were disapproved by the Agency head in reviewing a negotiated agreement under section 7114(c) of the Statute.

II. Travel and Per Diem Provisions

[Provisions 1-6]

Employer-Union Cooperation

Section 2.1

> The Employer and the Union agree to establish a National Joint Labor-Management Committee consisting of three (3) members from each party. However, if the NJLM Committee should meet in the official duty station of a local

union president, if not already a member of the Committee, he or his designee, located in the same duty station, will be invited to attend the meeting. Similarly, the local Main Station Supervisor may also attend. It will meet semi-annually--usually during the months of April and October--if there are subjects to be discussed at a location designated by the Chief of the Meat Grading and Certification Branch. If either the Union or the Employer has topics for discussion, they will notify their counterpart in March or September of each year that a meeting is requested. The parties agree to exchange a list of subjects to be discussed at least fifteen (15) working days prior to the date of the scheduled meeting. The arrangements for these meetings will be worked out by mutual agreement between the members of the Committee. Transportation and per diem expenses for the meeting will be borne by the Employer according to applicable regulations.

Section 2.2

A Joint Labor-Management Committee, consisting of the Main Station Supervisor, or his designee, and the President of the Local, or his designee, shall be established in those main stations in which a local has been organized. The Committee may be expanded, at the discretion of the members to include an additional representative of the main station and the local. If established, the Committee will meet monthly at the Main Station office or another location if there are subjects to discuss at the concurrence of the Main Station Supervisor and the President of the Local, if a situation precludes a "monthly" meeting, it can be rescheduled at the nearest agreeable time. Date, time and place are to be determined by the Main Station Supervisor, after consultation with the Union. A reasonable amount of official time shall be provided for these meetings. Transportation and per diem expenses of the participating employee will be borne by the Employer. Copies of the minutes will be provided to both parties.

ARTICLE 6

Grievances

Section 6.5 a(2)

In regard to travel expenses for the grievant and representative for the first step of the grievance procedure, the Employer will pay one-half (1/2) of such expense up to $125.00.

ARTICLE 7

Arbitration

Section 7.3

The arbitration hearing will be held at a site designated by the Employer and if possible during the regular day shift hours of the basic workweek. Official time will be allowed for the employee, his/her representative, and witness(es) not to exceed three (3) to present material in arbitration. The employee and his/her witness(es) will be allowed official travel time, transportation expenses, and per diem expenses according to applicable regulations and instructions to attend the hearing. The employee's representative will be allowed official travel time in accordance with applicable regulations and instructions not to exceed 8 hours. Travel expenses for the representative will be allowed according to applicable regulations and instructions not to exceed a total of $200. Official time for the employee and his/her representative to prepare for the arbitration will be granted in accordance with Section 1.11 of this Agreement. If the employee's representative is not an employee of the Meat Grading and Certification Branch, the President of the National Meat Grader Council (NMGC) will be granted travel time, transportation expenses, and per diem expenses as prescribed above for the representative to assist the designated representative.

When Employer initiated arbitrations are filed, the President of the NMGC and necessary witnesses not to exceed (3), shall be provided reasonable preparation time which shall not be counted against bank hours of representation from 1.11 of this Agreement. The Union representative and witnesses not to exceed three (3), will also receive official time to present the arbitration and official travel time, transportation expenses, and per diem expenses in accordance with applicable regulations and instructions.

ARTICLE 10-I

Disciplinary Actions

Section 10.3(h)

Reasonable and necessary official time will be provided the Union representative in presenting any response(s) under the provisions of this Article. Travel expenses not to exceed $125.00 combined will be paid to the employee and the employee's representative.

ARTICLE 10-II

Adverse Actions

Section 10.5(f)

Reasonable and necessary official time will be provided the Union representative in presenting any response(s) under the provisions of this Article. Travel expenses not to exceed $125.00 combined will be paid to the employee and the employee's representative.

A. Positions of the Parties

The Agency states that although the negotiated agreement was executed after the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1963) (BATF), the disapproved language was agreed to prior to that decision. It asserts that the disputed portions of the provisions are not within the duty to bargain for the following reasons:

a. They do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

b. they are inconsistent with Federal law and Government-wide regulation; and

c. they conflict with an agency regulation for which a compelling need exists.

The Union asserts that the provisions represent negotiation of a condition of employment about which the Agency has discretion, that is, whether to allow travel and per diem for travel occurring in the context of union representational activities. It contends that the Agency has not established a compelling need for Personnel Letter 711-10, the agency regulation which is claimed to bar negotiations.

B. Analysis

1. Conditions of Employment

The Agency makes essentially the same "conditions of employment" argument as that made by the agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1192 (D.C. Cir. Mar. 27, 1986). The Authority rejected that argument in Customs Service. It is rejected here for the same reasons as set forth in that case.

2. Inconsistent with Federal Law or Government-Wide Rules or Regulations

Under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, as interpreted by the Comptroller General,[1] agencies possess discretion to make determinations that travel in the context of union activity is sufficiently within the interest of the Government to constitute official business. Upon this determination, otherwise proper travel and per diem expenses may be paid from agency funds. Contrary to the Agency's argument, nothing in these authorities requires that this necessary determination be made only by management and only on a case by case basis. Customs Service. The Agency here makes no argument that travel flowing from the particular types of activities and circumstances set forth in the provisions could not meet this required standard. Additionally, nothing in the provisions themselves or the parties' arguments suggests that these provisions would preclude case by case determinations as to the appropriateness of specific travel and expenses which are necessary and proper under law and governing regulations. Given these circumstances, and for the reasons expressed in Customs Service, the Agency's assertion that the provisions are inconsistent with law and Government-wide regulations must be rejected.

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[1] 46 Comp. Gen. 21 (1966)

3. Inconsistent with an Agency Regulation for Which a Compelling Need Exists

The Agency regulation, Personnel Letter No. 711-10, upon which the Agency relies, was issued by the Department of Agriculture and purports to establish procedures for the payment of travel and per diem expenses to union representatives when official time has been granted under section 7131(a) and (d) of the Statute. The regulation provides that determinations on whether to pay travel and per diem may be made only on a case by case basis and solely by management. The Agency argues that the regulation is essential to comply with the Comptroller General's decision in 46 Comp. Gen. 21 (1966). As set forth above, we have found that neither the Comptroller General's decision nor the authorities to which it applies require that a determination that travel in the context of a particular activity is sufficiently within the interest of the Government so as to constitute official business be made unilaterally and only on a case by case basis. Therefore, there is no support for the Agency's assertion that its regulation implements in an essentially nondiscretionary manner a mandate to it by an outside authority. Its argument that a compelling need exists for Personnel Letter No. 711-10 cannot be sustained.

C. Conclusion

Based on the foregoing analysis, the Authority finds that the provisions concern a condition of employment and are not inconsistent with law or Government-wide regulation. The provisions are not barred from negotiations because they are inconsistent with an agency regulation for which a compelling need exists. Therefore, they are within the duty to bargain.2/

2/ In finding the provision to be within the duty to bargain the Authority makes no judgment as to its merits.

III. RIF Proposals

[Provisions 7-8]

Section 12.7

Competitive levels shall be established in accordance with FPM Chapter 351 and Agency regulations.

Section 12.20

The Employer will establish re-employment priority lists composed of all Category I and II employees separated due to RIF in accordance with FPM Chapter 351 and 330, and the Department and Agency Re-Employment Priority Program.

A. Positions of the Parties

The Agency argues that these provisions are nonnegotiable because they fail to include reference to Department of Agriculture regulations for which there is a compelling need.

The Union asserts that, because the contract contains a provision relating to the agreement as a whole which acknowledges the applicability of those agency regulations in effect at the time of contract approval, the Agency's declaration of nonnegotiability is frivolous.[3] It contends that the language encompasses Department of Agriculture regulations. It also argues that the Agency has failed to establish a compelling need for its regulations.

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[3] The contract language to which the Union refers states in relevant part:

> ARTICLE 1
>
> Section 1.7 Laws, Regulations, and Policies: In the administration of all matters covered by this Agreement, officials and employees are governed by:
>
> . . . .
>
> b. Rules and regulations of appropriate authorities and other government-wide regulations in existence at the time this Agreement was approved;
>
> (Continued)

B. Analysis and Conclusions

The Agency contends that the term "Agency" as contained in the contract, does not encompass the Departmental level but is limited to its primary national subdivisions--as relevant to this case, the Agricultural Marketing Service. It asserts with respect to both provisions that the Departmental regulations, upon which it relies, are a nondiscretionary implementation of Office of Personnel Management (OPM) regulations relating to RIFs and Re-employment Priority List. The Authority notes that the language of the provisions specifically requires compliance with the Federal Personnel Manual (FPM) Chapters which reflect the OPM regulations. The Agency has not shown any actual inconsistency between the provisions and the Departmental regulations nor is any apparent to us.

As to the Re-employment Priority List provision, the Agency suggests that there may be a discrepancy between the number of Lists required by the provision and the Department regulation. The regulation provides for a single agency-wide list, while the provision refers to lists in plural. However, the Agency has not elaborated on this point and has, in our view, simply failed to establish that the provisions are inconsistent with the Agency regulations for which it claims a compelling need exists. See Association of Civilian Technicians, Pennsylvania State Council and the Adjutant General, Department of Military Affairs,

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(Continued)

c. Published Agency policies and regulations in existence at the time this Agreement was approved; and

d. Subsequently published policies, rules, and regulations which are not in conflict with this Agreement, which are required by law, or which are authorized by the terms of a controlling agreement at a higher agency level. The effect of such changes as they affect the personnel policies, practices and conditions of employment of employees in the unit shall be negotiated, if appropriate and requested by the Union.

Commonwealth of Pennsylvania, 3 FLRA 50 (1980). Consequently, the Agency's contention that these provisions are nonnegotiable cannot be sustained. *See American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania*, 2 FLRA 451 (1980) in which the Authority stated that the agency bears the burden of demonstrating that a proposal conflicts with an agency-wide regulation for which a compelling need exists.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of Provisions 1 through 8 which were bargained on and agreed to by the parties at the local level.

Issued, Washington, D.C., July 7, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN
TECHNICIANS

Union

and

Case No. O-NG-1169

THE ADJUTANT GENERAL OF
MASSACHUSETTS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents an issue concerning the negotiability of a single Union proposal.*/

II. Union Proposal

Integrated Combat Turns (ICT)

> No technician will perform ICTs while in a technician status.

III. Positions of the Parties

The Agency contends that the proposal interferes with its management rights under section 7106(a)(2)(A) and (B) of the Statute to assign employees and work because the proposal would restrict the Agency in making new assignments and would forbid the Agency from assigning duties to a military technician. In response, the Union asserts that the proposal concerns a safety issue, i.e., the fueling, loading of bombs and maintenance of aircraft being simultaneoulsy performed. According to the Union, previously this function, which is an integrated combat turn, was a military requirement performed in military status and only recently was made a requirement of civilian technicians. Therefore, the Union maintains that the proposal is a procedure to be used in implementing the change in working conditions.

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*/ The Union has withdrawn a proposal concerning a voluntary physical fitness program. Therefore, the proposal will not be considered further here.

IV. Analysis and Conclusion

The explicit language of the proposal requires that the Agency assign no ICT duties to civilian technicians. The Authority has held that a proposal prohibiting the assignment of work or duties is violative of the Agency's right to assign work under section 7106(a)(2)(B) of the Statute. American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 FLRA No. 95 (1985) (Proposal 2) and cases cited therein. Since the proposal in this case would also prohibit the assignment of work, i.e., ICT duties, it is also violative of the Agency's right to assign work under the Statute. Since the proposal directly interferes with the exercise of the Agency's right to assign work, it is not a negotiable procedure under the Statute.

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 9, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 40

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
OUTPATIENT CLINIC
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 8-CA-50180

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2297, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision and the entire record the Authority adopts the Judge's findings,1/ conclusions, and recommended Order.2/

1/ The Respondent excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

2/ Having found that the Respondent had in fact bargained and agreed to the lunch-break area, in agreement with the Judge the Authority finds it unnecessary to address the Respondent's arguments going to the initial bargaining obligation.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Veterans Administration Outpatient Clinic, Los Angeles, California shall:

1. Cease and desist from:

(a) Failing and refusing to implement the agreement with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

(b) Post at its Los Angeles California Outpatient Clinic copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Clinic Director, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 40]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

____
(Activity)

Dated:____________________ By:____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is: (213) 688-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION
OUTPATIENT CLINIC,
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 8-CA-50180

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2297, AFL-CIO

Charging Party

. . . .

Ruth M. Weil, Esq.
For the Respondent

Deborah S. Wagner, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by American Federation of Government Employees, Local 2297, AFL-CIO (herein referred to as the Union) against the Veterans Administration Outpatient Clinic, Los Angeles, California (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region VIII, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing and refusing to effectuate an agreement reached with the Union concerning establishing a break area for employees at an office facility located at 417 South Hill Street, Los Angeles, California.

A hearing on the Complaint was conducted in Los Angeles, California at which Respondent and the General Counsel were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the American Federation of Government Employees, AFL-CIO, has been the exclusive collective bargaining representative of certain of Respondent's employees working in its Outpatient Clinic in various portions of the Subway Terminal Building, a privately owned structure located at 417 - 425 South Hill Street, Los Angeles. Officers of Local 2297 represent bargaining unit employees in dealings with Respondent at that site. In early 1984 the Union became aware that Respondent was considering relocating some of the employees to the second floor of 417 South Hill Street, a floor not previously leased by Respondent[1] containing almost 11,000 square feet of space. As plans progressed the Union made various inquiries into the matter. According to the testimony of Vincent Mannino, Local 2297 Chief Steward, the Union conveyed specific concerns to Respondent in a Labor-Management meeting on June 21, 1984 attended by Mannino, Local 2297 President Lula Mae Jones, Harold T. Rowan, Personnel Officer and a "recorder".[2] Mannino testified that part of the Union's concerns discussed on June 21 included moving Union offices then located at 425 South Hill Street to larger quarters in the new space at 417 South Hill Street and providing employees who would be located on the second floor with a lunch-break area. Management's minutes of this meeting stated, inter alia:

> "3. Space-Moves:
>
> "Union request the Personnel Officer to remind management of contractual obligation to keep them informed of any space-move which will involve bargaining unit employees. Regarding the 2 proposed moves, some of the items AFGE is concerned about are:

---

[1] Around this same time plans were being developed by Respondent to erect another facility at Temple and Alameda Streets in Los Angeles.

[2] The parties held Labor-Management meetings on a regular monthly basis. Management prepared minutes of such meetings and provided the Union with a copy of the minutes.

"a. New Building:

1. Parking for employees.
2. AFGE's office location.
3. Carpeting.
4. Lounge areas, how many, where located.
5. Cafeteria - Restrooms, where located.
6. Reserved parking for the AFGE officials, handicapped employees.

"b. Second Floor - 417 South Hill Street:

1. Has the space been approved?
2. When will the move take place?
3. What employees will be affected?
4. Health, safety, security precautions."

Mannino testified management indicated during the meeting that it would "get back to" the Union on their requests. Although the June 21 minutes do not mention the Union office or the lounge-break area matters, a June 26, 1984 memorandum sent to the then Clinic Director, Dean Stordahl, from Personnel Officer Rowan states:

> "1. AFGE wishes to set a Management/Union meeting with you and possibly Sal and/or Joyce and me as soon as possible.
>
> "2. Their concerns have been narrowed to the following:
>
> A. 2nd. floor move:
>
> 1. Approval, (Does Clinic have CO's approval to proceed).
> 2. Move plan date (projected).
> 3. Number of employees affected by move.
> 4. Plan for bathrooms, lounge area.
>
> B. New bldg. move:
>
> 1. AFGE office, where located, (Amount of space).
> 2. Relocation date plan.
> 3. Bathrooms, lounges and cafeterias for employees, (location).
> 4. Parking for employees.
> 5. Reserved parking for AFGE officials."

Mannino testified that the parties again discussed the moves during the regular Labor-Management meeting held on July 24, 1984 at which time the Union raised questions concerning the second floor Union office, the lunch-break area, bathrooms for employees and access for the handicapped.[3] Accordingly to Mannino, during this session management tentatively agreed to provide the Union with space in order to move the Union office but there was no agreement on the precise amount of space. With regard to other matters, Mannino testified:

> "They had agreed that they would present us with the plans which would show where the break area would be, which would show where the bathrooms were going to be, hand -- or handicapped access. They would have all those plans. They didn't have them yet. So we tentatively agreed that we would wait until they had them, but we wanted to see where everything was going to be situated."

Thus, while Mannino's recollection of this meeting was somewhat vague, the thrust of his testimony was that management did not yet have all the data it needed on the move and would subsequently respond to the issues raised by the Union and review the floor plans with them. The only reference to the 417 South Hill Street matter contained in the minutes of that meeting states:

> "4. The move to the second floor has been approved. Director stated that he asked Sal Carlos to divide the 300 feet given to the Credit Union with AFGE for office space."

The next discussion with management concerning the move to the second floor, according to Mannino, occurred during the August regularly scheduled Labor-Management meeting.[4] Mannino testified:

> ". . . August is where we had reached agreement on the -- basic agreement on the office and we had -- they had then told us that there (was) going to be locked bathrooms for the employees on the second floor, and we had agreed to that. We had raised questions as to who was going to get the keys. They told us that

---

[3] Present at this meeting was Mannino, Local President Jones, Clinic Director Stordahl, Personnel Officer Rowan and a Personnel Management Specialist.

[4] Neither testimony nor the minutes of this session indicate the precise date of the meeting.

there was going to be a patrolling security officer. We agreed with that, as far as security for the people being concerned.

"We had made -- They told us there would be handicapped access. We agreed with that.

"They told us there was going to be a break area in between the two wings of the second floor. Now, we had agreed to that, but it was hard to conceptualize it or visualize it because we didn't have the plans in front of us.

. . . . . .

"They also said that there was a little room that would have vending machines and maybe a microwave oven right off of where the break room was going to be. We agreed to that.

"They said there was going to be a sink there. We said, 'Fine' to that. We agreed with that.

"BY MS. WAGNER:

"Q. So was there anything left open at the end of this meeting?

"A. Yes.

"We wanted to find out the exact amount of space for the Union office, to see where it looked -- you know, where it was located, what it looked like. We wanted to see the exact space where the break area was going to be, how big it was going to be. They had mentioned something about partitions. We wanted to see what it looked like, because up until this time we had not seen anything. We wanted to 'see' where all the exits were for the -- you know, for fire and stuff for people to get in and to get out. We hadn't seen any of that at that time. We agreed with what they had said that there was going to be that stuff, but we still wanted to see where the location was.

"Q. So what was management's response to that, when you wanted to 'see' where the location was?

"A. They said they didn't have the plans at that time, and that they would show us the plans when -- as soon as they got them because at this meeting we had asked to see them. They didn't have any."

The minutes of the August meeting contain the following comments listed under the caption "Move to the Second Floor":

> "a. Tour every Wednesday at 3:00 p.m. until completion.
>
> "b. Completion date set for November 15, 1984.
>
> "c. Safety: 1. Fire access
> 2. Adequate access for handicapped
> 3. Patrolling Police Officer
> 4. Locked restrooms on floor for employees
> 5. Rest area for employees (B.U.)[5]
>
> "d. Telephone number will remain the same."

Mannino testified that in late September or early October 1984 management called the Union to Director Stordahl's office to discuss the move to the second floor. Present were Stordahl, Rowan, Mannino and Jones. Mannino testified:

> "At that meeting they showed us the plans. That was the first time we had seen it, and they had pointed out to us there where the Union office was going to be. We had some questions because it seemed from the drawings that they were going to -- that the Union office was smaller than the other office which supposedly had been cut in half, but then they showed us where the break area was going to be, and they said there was going to be some partitions and we agreed that that was good. We agreed to that. Then they showed us where the secretaries were going to sit. We had some questions there because they had the -- they showed the secretaries sitting out in the hallways, and upon some questioning back and forth they had said that they would have partitions up so that, you know, they would be kind of like cut off so people just wouldn't be walking by them all the time out in the open.
>
> "And after that we had agreed to everything they showed us and the meeting ended."

When examined on the specific conversation pertaining to the break area, Mannino stated:

---

[5] B.U. stands for Bargaining Unit.

> ". . . when I looked at the break area, I had asked where the tables and chairs were going to be, and it was Mr. Rowan, if I'm not mistaken, that said they were going to be along the window and there was going a partition here (sic) and a partition in -- in the back, and there was going to be a sink placed right across from this little room which he said may have a microwave oven in it and some vending machine, but they weren't sure because some electrical stuff had to go in there and they may not be able to do it; but he pointed that out to me on the plans. Where the sink would be, the chairs and tables would be, where the partition would be."

Mannino further testified:

> "We were told the break area was going to be along here (indicating), and that it will be a partition here and a partition here (indicating). Here was where the little room was supposed to be, and here was where the sink was going to be (indicating). And it was right close to where a lot of people worked in here. . . ."

A copy of the blueprint of the second floor layout was put in evidence and used during examination and cross-examination of witnesses. The break area in dispute herein is in a hallway, which, from my reading, measures approximately 39 feet long by 12 feet wide and connects two wings of the second floor office space. The blueprint reveals that one side of the 39 foot hallway contains a sink and one long wall which contains numerous windows. The opposite side of the hallway is primarily solid wall except for one window on one end of the hallway and a door, opposite the sink, at the other end leading to a room marked "Tel" which opens on two other rooms. The Union office is adjacent to the doorway to the "Tel" room. Mannino indicated that he understood tables and chairs would be located along the hallway wall containing the windows and sink and a partition placed on either end of the line of tables and chairs, thereby keeping the other side of the hallway open as a walkway.

In mid-November 1984 approximately 25 employees were relocated to the second floor at 417 South Hill Street and a sink was installed in the hallway. According to Mannino, in late November or early December he had a conversation with Joyce McIntyre, Health Systems Specialist, who had some responsibility for planning the move. Mannino testified that during this conversation McIntyre showed him a catalogue with different types of partitions and indicated which ones she was going to order for secretaries and the break area.6/

6/ McIntyre denied any such conversation ever occurred.

In early January 1985 Mannino was informed by some employees they heard rumors that the Director had changed his mind and decided not to have a break area on the second floor. Mannino questioned Personnel Officer Rowan on the matter and, after management refused to acknowledge any agreement to have a lunch-break area on the second floor, the Union's officers met and on January 31, 1985 sent the Director a memorandum stating, inter alia:

> "1. Due to your unilateral abrogation of an agreed upon verbal commitment to Local 2297 to have a break and lunch area on the second floor of 417 S. Hill Street for the employees working on that floor, we are requesting immediate negotiations over this change in conditions of employment."

On February 5, 1985 the Director replied to the Union as follows:

> "1. Discussion of a proposed lunch and break area on the second floor in 417 So. Hill Street indeed took place. No promise to establish such an area ever occurred, however; nor was any such matter 'negotiated' upon. All VA OPC employees have designated places for lunch and breaks that have long been established, recognized, and are accessible. No additional area was or will be designated for this purpose at this time, and neither has any new area been utilized for this purpose.
>
> "2. You Memorandum indicates a 'change in conditions of employment.' I fail to see how conditions that have never existed constitute a change. This subject is therefore not negotiable."

Counsel for the General Counsel also called Lula Mae Jones, President of Local 2297, as a witness. Although her recollection of events was less clear than that of Mannino, her testimony concerning discussions involving the second floor move nevertheless generally supported his testimony. More specifically, Jones recalled that during the June Labor-Management meeting, along with expressing concerns as to what services would be relocated, restrooms and space for a Union office, the Union representatives asked if there would be a break area and management responded "yes." Although Jones' recollection and testimony regarding the regular July and August Labor-Management meetings was vague, she did testify that she thought they discussed the break area at all of their meetings. In any event, as to the September or early October meeting at which she was present with Mannino, Stordahl and Rowan, Jones testified they were first shown plans of the second floor layout including the passageway where the break area would be located. According to Jones, whose testimony deviated from Mannino's in only minor respect, Stordahl went over the floor plans indicating the location of the various offices and facilities, and regarding the break area, Jones testified:

> "His explanation to us was that this would be the lunch break area. In the lunch area would be chairs -- table(s), chairs, and partitions. Okay. With a sink and maybe a microwave oven. He did not say where the sink would be placed. He just said 'a sink'. He did not say where the microwave oven would be; but he said, 'There would be tables and chairs along the wall with a partition in front of the table(s) and chairs, leaving an opening for walkway from one corridor to the other one.'
>
> . . . . .
>
> "That was my understanding, because there was a window over there, and he said, 'There would be tables and chairs at the window.' Okay. And there is a window over there, and it was my understanding that it would not be as many table(s) and chairs on this side of the wall as there was on this side, because the window area here was longer."[7]

According to Jones, after Stordahl concluded his explanation of the break area, the Union representatives indicated they "accepted it."

Jones also testified that sometime in late October 1984 she was present when a group of eight or ten employees was given a tour of the second floor facility by Sal Carlos, Facility Manager of the Outpatient Clinic and Brian Murphy, Subway Terminal Building Manager, a representative of the owner of that property. According to Jones, Carlos and Murphy were at the head of the group and Jones was at the rear. As the group approached the hallway area in the vicinity of the door to the "Tel" room, an employee towards the front of the group asked a question concerning the location of a microwave oven. Jones recalled that either Carlos or Murphy responded that they were not sure, and continued: "but there will be tables and chairs over here and over here."

Suzette Mitchell, an employee called as a witness by counsel for the General Counsel, also testified that she was present with approximately five other employees at a tour of the second floor. She testified that her tour, sometime in early November 1984, was conducted only by Carlos. According to Mitchell, while the group was still some distance from the hallway, although in view of it, an employee asked where the lunch area was going to be and Carlos responded: ". . . down that way," indicating towards the hallway and stating that tables and chairs would be placed there.

---

[7] Jones' testimony of the placement of the partitions differs from Mannino's in that Jones understood the partition's would be lined horizontally to the long walls of the hallway thus keeping the tables and chairs from view of passersby using the walkway.

Personnel Officer Rowan, called as a witness by counsel for Respondent, testified that a meeting with Union representatives in June 1984 gave rise to his memorandum to the Clinic Director dated June 26, 1984, supra. Thereafter, according to Rowan, he and Stordahl met with the Union sometime in early July 1984 at which time preliminary plans of both the new building and the second floor at 417 South Hill Street were reviewed. According to Rowan's account of this meeting, Stordahl explained the layouts of both facilities and answered questions. The new building consisted of six floors and accordingly, more time was spent reviewing the plans for the new building. In this regard, Rowan testified, inter alia;

> "Ms. Jones was concerned about the location of her Union office in the new building and asked the Director if it could be located in a different area other than the sixth floor of the brand new building. She wanted it located on the second floor, which was adjacent to employee lockers, lounges, and a cafeteria; and a considerable amount of conversation took place about this particular subject.
>
> "As I recall, Ms. Jones was quite concerned that if her Union office was not in a place where it would be easily accessible to employees then the Union wouldn't be available, et cetera. . .
>
> . . . . .
>
> "Ms. Jones was concerned about parking. She wanted to know if there would be free parking available for employees and reserved parking or a space for her Union — herself and Union officials. . .
>
> . . . . .
>
> ". . . the conversation then began to center around her accessibility to her bargaining unit members and the second floor of the new building, which was described by the Clinic Director as having an outside patio, which was -- would be conductive to employees enjoying their lunch breaks and — and the like . . . (and) whether or not it would be appropriate to have the Union office on the second floor or on the sixth floor, which is what the plans showed at the time."

The new facility contained a lunch room on its second floor and Rowan also recalled Stordahl pointing out the future location of tables and chairs in that room.

The second floor plans for the 417 South Hill Street building were also discussed, specifically with regard to the matters of Union concern listed on Rowan's June 26 memorandum, supra. Rowan testified that the parties talked about two places where a lounge area might be appropriate: the room marked "Tel" on the blueprint; and the corridor between the two work areas which appeared at the time "might be feasible for a lounge area." However, according to Rowan, the parties reached no agreement as to the location of a lounge area at 417 South Hill Street.

With regard to the August regular Labor-Management meeting, Rowan testified that Chief Engineer Sal Carlos was present at that meeting to explain the hazards of bargaining unit employees going into the second floor area unescorted before its completion and informing the Union of how management was arranging guided tours for employees. Although Rowan acknowledged that the matter of a break area came up at more than one meeting and indicated no discussion of the break area took place after the August meeting, Rowan gave no testimony regarding any discussion of a rest area during the August session nor did he attempt to explain the notation on the minutes of the August 1984 Labor-Management meeting: "5. Rest area for employees (B.U.)."

Rowan stated that he never received any request to bargain on the second floor move nor did he know the Union wished to negotiate on the matters they expressed interest in relating to the move. Rowan also testified that at other times when the Union desired to bargain on a matter it would send a memorandum specifically indicating the problem and the area of the contract involved. However, Rowan further stated that the regularly scheduled Labor-Management meetings covered ". . . items that AFGE felt they wanted information on that might have an affect on their bargaining unit members. And, of course, items they felt they could negotiate with management on."

Clinic Director Stordahl also testified that he met with Rowan, Jones and Mannino in early July 1984 as a result of Rowan's June 26 memorandum to him which indicated the Union had concerns regarding the move to the second floor and the new building, supra. Stordahl indicated the meeting was for the purpose of bringing the Union up to date on the planning for the new six-story building and to discuss ". . . what some of our preliminary thinking was if and when (they) got the second floor approved. . ." which was at that time in the "initial planning phase." According to Stordahl, at the meeting Respondent had blueprints of the new building and "some line drawings of the second floor potential expansion" which had not been developed by an architect. Regarding a lunch room at 417 South Hill Street, Stordahl testified, inter alia:

> "Well, we were talking about what we could bring over there to try to fill the space. I was really, in the initial stages of it, trying to get enough things into there . . . to fill it up to justify renting it, quite frankly; and in the process of -- of considering the number of alternatives, a -- the space that's shown here as 'Mechanical Room', we told them that we'd like

> to put a lunch room in that. The -- There's about three steps up, or two steps up, into that space. I guess, actually on this diagram, its' called 'Telephone Room'.
>
> "There's about two steps up into this space that we felt you could close the door to and make it out to be some type of a break room.
>
> "The building owner subsequently advised us that that was not possible because he had -- he needed access to the mechanical space and the telephone equipment space."

Stordahl did not recall any discussion concerning placing the lunch room in the hallway or mention of vending machines but did recall he pointed out a plumbing outlet in the hallway indicating that the property owner offered to install a sink so employees "could wash their coffee cups, or water their plants, or whatever."

Stordahl also testified that the Union asked for office space on the second floor and, although no agreement was reached during the early July meeting on this or any other matter, a room originally designated "Credit Union" on the plans was changed to "Union Office" and, at the request of the Union, that space was subsequently enlarged.

With regard to the new building, Stordahl testified that during the early July meeting management reviewed all the blueprints with the Union including pointing out the area on the second floor marked "Canteen" and pointing out where tables and chairs would be.

Stordahl further testified that sometime between the early July meeting and the regular Labor-Management meeting held on July 24 management concluded that it would give the Union office space on the second floor of the 417 South Hill Street building and at the July 24 meeting agreed that if the lease for the space was entered into, the Union could have the office space and subsequent thereto, the space allotted to the Union was enlarged. Stordahl recalled no further meetings with the Union on the second floor move in which he participated.

In addition, Stordahl expressed his opinion that a lunch-break area in the hallway would retard traffic and be "disruptive" in appearance in that moving visitors through an area where food is being eaten or prepared would not properly reflect a business environment. Stordahl indicated that if tables and chairs were permitted the next step would be people asking for a microwave and heating up leftovers.

Facility Manager Carlos acknowledged that he was present at the August 1984 regular Labor-Management meeting, supra, but recalled no discussion concerning a lunch or break area on the second floor of 417 South Hill

Street. However, Carlos testified he was not present during that entire session. Carlos further testified that on three occasions he participated in taking employees on tours of the second floor facility, all of which were in the company of Subway Terminal Building Manager Murphy. Carlos denied saying the corridor would be used for a break area but did recall that a response to a question by an employee as to the function of the "Tel" room, he replied they had considered putting tables and chairs in the room for use as a break area but they concluded the room would be too noisy for that purpose due to the proximity of air conditioning apparatus.[8] No testimony was elicited from Carlos as to the source of this information except that the matter had been considered but due to the noise factor, it was "immediately" quashed. Carlos testified that either he or Murphy mentioned that a sink would be placed in the hallway area and he may have explained that the sink could be used for washing utensils after coffee breaks.

Building Manager Murphy testified that other than asking Respondent whether they needed a lunch room on the second floor early on and being told they did not, he had no discussion with anyone concerning such a facility. Murphy also testified he did not hear Carlos say anything about a lunch-break room during the two employee tours (around 10 employees each time) of the second floor which he participated in.[9]

Evidence was also received regarding the physical arrangements at the 417-425 South Hill Street facility. Thus, the two addresses are in reality two entrances to the same building, about 50 feet apart and the 425 South Hill section has a lunch room for employees. While it would take only a few minutes to go from the second floor of the 417 section to the 425 lunch room, the two sections are not connected internally thereby requiring one to exit one section in order to enter the other.

Ultimate Findings, Discussion and Conclusions

Counsel for the General Counsel contends that Respondent failed to negotiate in good faith with the Union when, after agreeing to establish a break area on the second floor of 417 South Hill Street by placing tables and chairs along one wall of a corridor and enclosing this section with partitions so the area was separated from the passageway, Respondent failed and refused to effectuate this agreement.

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[8] It is not clear from Carlos' testimony whether this explanation was given on one or more tours.

[9] Murphy also testified that the California Uniform Building Code closely regulates the construction of dining facilities and the use and obstruction of hallways.

Respondent denies that any agreement was reached on the matter, contending that the Union never made a request to bargain on the subject. Respondent also argues that management has no obligation to bargain on the matter since the absence of a lunch-break area on the second floor had no "substantial adverse impact" on unit employees.

Essential to a determination herein is a resolution of credibility. Thus, Chief Steward Mannino and Local President Jones testified to facts which, if credited, would establish that an agreement was reached by the parties to have a lunch-break area in the second floor hallway. On the other hand, Personnel Officer Rowan and Clinic Director Stordahl denied any agreement and gave testimony which, at most, would indicate that the matter was discussed but left unresolved. Based upon the witnesses' demeanor and my evaluation of the evidence, in the total context of the situation, I find and conclude the parties agreed to a lunch-break room on the second floor as alleged. In this regard I was particularly impressed with the demeanor of Mannino, whose testimony was substantially corroborated by Jones. Thus, I find that beginning in June 1984 the Union made known to Respondent its desire to have a lunch-break area for employees. The matter was thereafter discussed at the July and August regular monthly Labor-Management meetings and at no time did Respondent indicate its opposition to the concept.[10] I further find that the parties met in September or early October, as set forth more fully above in Mannino's testimony, at which time Respondent clearly conveyed its plan or intention to locate a lunch-break area in the hallway with tables, chairs and partitions, and the Union's expressed its agreement with this decision. I conclude that absent any evidence of a subsequent timely discussion or agreement to the contrary, this constituted a binding agreement on the matter.[11] With regard to partitions, I find that while Respondent agreed to furnish partitions to set off the lunch-break area from a passageway between the two wings, it would appear from the somewhat divergent accounts of Mannino and Jones that no final decision was made as to specifically how the partitions would be displayed. In any event, the final details concerning the arrangement of the lunch-break area must comport with existing laws and regulations, including the California Building Code. Respondent may well have had second thoughts on the feasibility of the location of the lunch-break area, but negotiations and not abrogation was the course of action necessary for Respondent to follow if it wished to fulfill its obligation under the Statute.[12]

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[10] Indeed, Respondent's own minutes of the regular August Labor-Management meeting, supra, indicates that at least as of that time the Union was still concerned with a rest area for bargaining unit employees. The minutes thus support Mannino's testimony on this and Respondent's failure to adequately explain the notation on the minutes, in view of the general thrust of the testimony of Rowan and Stordahl, raises substantial questions as to their credibility, especially that of Rowan who was present at the August meeting.

[11] Contrary to Respondent's contention I find and conclude that the meetings on the second floor relocation constituted bargaining on the matter. Indeed it is quite obvious from the testimony of Respondent's own witnesses that the parties, beyond question, discussed and reached agreement on the issue of second floor office space for the Union, an integral part of the overall discussion. The Statute does not require that negotiations must follow any prescribed procedure and the fact that bargaining between the parties might have been more formal at other times is immaterial.

In view of my findings and conclusions, supra, I reject Respondent's argument that management had no obligation to bargain since the absence of a lunch-break area on the second floor had no "substantial adverse impact" on employees. Thus, I have found Respondent did bargain on the matter and in fact agreed to the lunch-break area. In such circumstances arguments going to the initial bargaining obligation need not be addressed.

Accordingly, in view of the entire foregoing I conclude Respondent, by the conduct described herein, failed and refused to negotiate in good faith with the Union and thereby violated section 7116(a)(1) and (5) of the Statute and I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Veterans Administration Outpatient Clinic, Los Angeles, California shall:

1. Cease and desist from:

    (a) Failing and refusing to implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

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[12] In reaching these findings and conclusions I have not relied upon the testimony of Jones and Mitchell with regard to the statements they indicated were made on the tours by Facility Manager Carlos or Building Manager Murphy. It is quite possible that, as Carlos testified, statements were made relating to previously considering using the "Tel" room for a break area and the comments were misinterpreted in view of the physical locations of Jones and Mitchell when the comments were made and the circumstances of the situation. I also make no credibility finding with regard to the purported discussion between Mannino and Health Systems Specialist McIntyre regarding partitions, supra.

(b) In any like to related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

(b) Post at its Los Angeles California Outpatient Clinic copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Clinic Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: November 15, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL implement the agreement reached with the American Federation of Government Employees, Local 2297, AFL-CIO, the employees' exclusive representative, concerning the establishment of a lunch-break area on the second floor of 417 South Hill Street, Los Angeles, California consonant with laws and regulations governing such matters.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 lnd whose telephone number is: (213) 688-3805.

[illegible]

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE,
FOOD SAFETY AND INSPECTION SERVICE,
SOUTHWESTERN REGION

Agency

and

Case No. 0-AR-1141

NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS, AFGE, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Louis Aronin filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 7, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NEWARK AIR FORCE STATION
HEATH, OHIO

Activity

and

Case No. 0-AR-1143

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2221,
HEATH, OHIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert Bressler filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 7, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS BUREAUS AND OFFICES

Activity

and

Case No. 0-AR-1145

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John N. Gentry filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 7, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 376

Federal Labor Relations Authority

Washington, D.C. 20424

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UNFAIR LABOR PRACTICE CASES

22 FLRA No. 41 (July 9, 1986)

Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, Local 1501, AFL-CIO, Case No. 9-CA-40003

22 FLRA No. 42 (July 9, 1986)

Health Care Financing Administration and American Federation of Government Employees, Local 1923, AFL-CIO, Case No. 3-CA-30618

22 FLRA No. 46 (July 9, 1986)

U.S. Army Adjutant General, Publications Center, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 2761, Case No. 7-CA-40543

22 FLRA No. 47 (July 9, 1986)

Department of the Air Force, Lowry Air Force Base, Denver, Colorado and American Federation of Government Employees, AFL-CIO, Local 1974, Case No. 7-CA-1379

*Case No. 2-CA-40021 (Decision and Order on Motion for Reconsideration of 21 FLRA No. 47) (July 9, 1986)

Immigration and Naturalization Service and American Federation of Government Employees, Local 1917, AFL-CIO

*Case No. 2-CA-50074 (Order Denying Request for Reconsideration of Authority's Order of April 24, 1986) (July 9, 1986)

Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Newark District Office and National Treasury Employees Union and National Treasury Employees Union, Chapter 60

NEGOTIABILITY CASES

22 FLRA No. 45 (July 9, 1986)

National Association of Agricultural Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Case No. 0-NG-1028

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22 FLRA No. 49 (July 9, 1986)

American Federation of Government Employees, Local 32, AFL-CIO and Office Personnel Management, Case No. 0-NG-914 (14 FLRA 754)

*Case No. 0-NG-1202 (Order Denying Motion for Reconsideration of 21 FLRA No. 9) (July 9, 1986)

American Federation of Government Employees, AFL-CIO, National GSA Council and General Services Administration

ARBITRATION CASES

22 FLRA No. 43 (July 9, 1986)

National Marine Fisheries Service, Northeast Region, National Oceanic and Atmospheric Administration, United States Department of Commerce, Gloucester, Massachusetts and International Organization of Master, Mates and Pilots AFL-CIO, Boston, Massachusetts (Graham, Arbitrator), Case No. 0-AR-1008

22 FLRA No. 44 (July 9, 1986)

American Federation of Government Employees, Local 3230, AFL-CIO and Equal Employment Opportunity Commission (Henderson, Arbitrator), Case No. 0-AR-1064

22 FLRA No. 48 (July 9, 1986)

Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002 (Owen, Arbitrator), Case No. 0-AR-1062

*Case No. 0-AR-1133 (Order Denying Request for Reconsideration of 21 FLRA No. 75)

Veterans Administration Medical Center, Roseburg, Oregon and American Federation of Government Employees, Local 1042

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

July 9, 1986

0-AR-1140 0-AR-1150

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

22 FLRA No. 41

Federal Labor Relations Authority

SSA, Baltimore, Md. and AFGE Local 1501, Case No. 9-CA-40003 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1) and (2)
Agency Violation	7116(d)
Discrimination as to Conditions of Employment	7118

- Unfair Labor Practice
  - Agency Violation
    - Discrimination as to Conditions of Employment
      - Overtime Denial Would Have Occurred Absent Union Animus
  - Procedure
    - Administrative Notice
      - Judge Declined to Take Notice of Other Judge's Factual Findings in Related Case
        - An Error That Was Not Prejudicial (Chairman)
        - Not Necessary to Pass upon Whether Error (Member)
    - Forums
      - Selection of Grievance or ULP Proceedings
        - Different Issues

DIGEST NOTES

The Authority adopted the Judge's decision that the agency did not violate § 7116(a)(1) and (2) by denying an employee overtime. Regarding the issue of proper forum, the Judge concluded that the complaint was not barred by § 7116(d) as two grievances did not raise issues identical to the issue raised in the complaint, and did not cover the same period of the alleged discrimination. On the merits, the Judge concluded that while the employee received significantly less overtime during the relevant period than other employees similarly situated, it was not due to union activities. The Authority noted particularly that while there was some indication of union animus toward the employee, in agreement with the Judge, the record indicated the denial of overtime would have occurred even in the absence of such animus. On a procedural matter, the Chairman concluded, in agreement with the General Counsel, that the Judge erred in refusing to take administrative notice of another administrative law Judge's factual findings establishing union animus in a related case. However, the error was deemed not prejudicial given the outcome that the denial of overtime would have occurred even in the absence of such animus. The remaining Member, on the other hand, found it unnecessary in the circumstances of this case to pass upon the General Counsel's exceptions in this regard.

READEX FICHE best copy available

22 FLRA No. 42

Federal Labor Relations Authority

Health Care Financing Administration and AFGE Local 1923, Case No. 3-CA-30618 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1) and (8)
Agency Violation	7121

Unfair Labor Practice
  Agency Violation
    Arbitration
      Refusal to Proceed to Arbitration
        Option to Other Party to Proceed *Ex Parte* Is No Defense
        Question of Arbitrability Is No Defense
    Refusal to Comply with Statute
      § 7121
  Procedure
    Stipulation of Facts
  Remedy
    Upon Request, Proceed to Arbitration

DIGEST NOTES

The agency's refusal to proceed to arbitration constituted a failure to comply with the requirements of § 7121 in violation of § 7116(a)(1) and (8). Neither the agency's assertion that the subject matter of the union's grievance was not arbitrable, nor the agency's contention that its refusal to participate did not prevent the union from invoking arbitration and proceeding *ex parte* constituted a defense for the agency's failure to comply with the requirements of §7121. As a remedy, the agency was ordered to proceed to arbitration upon request.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

22 FLRA No. 43

Nat'l Marine Fisheries Service,
Northeast Region, NOAA, Dept of
Commerce, Gloucester, Mass. and
Int'l Org'n of Masters, Mates
and Pilots, Boston, Mass.
(Graham, Arbitrator), Case No.
0-AR-1008 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B)
Award Modified	7106(b)(2)
Award Contrary to 5 U.S.C. § 5596 (Back Pay Act)	7122(a)

Arbitration
  Award Modified
    Award Contrary to 5 U.S.C. § 5596
    (Back Pay Act)
  Exceptions Asserted in Appeal
    Award Contrary to 5 U.S.C. § 5596
    (Back Pay Act)
    Award Contrary to FSLMR Statute
    § 7106(a)(2)(B)
  Assign Work
    1st Preference to Permanent vs. Temporary Fishery Inspectors
  Remedy
    Backpay
Negotiability
  Management Rights
    Assign Work
    Determine Personnel
      Permanent and Temporary Fishery Inspectors Both Qualified
  Mandatory Subjects of Bargaining
    Procedures for Implementing Agency Decisions
      1st Preference to Permanent vs. Temporary Fishery Inspectors

DIGEST NOTES

The arbitrator determined that the agency violated the terms of the parties agreement by failing to give permanent fishery inspectors first preference for all deployments for foreign fishing vessel observation work. Thus, the arbitrator found the agency's practice of giving permanent inspectors preference only on the initial deployments rather than also placing them ahead of temporary inspectors upon return from an assignment did not comply with the negotiated agreement. As a remedy, the arbitrator directed the agency to comply with the agreement and to provide restitution for all losses incurred by the permanent inspectors.

In its first exception, the agency contended that the arbitrator's award interferes with management's right under

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

§ 7106(a)(2)(B) to determine the personnel by which agency operations will be conducted, and to determine which employees will receive particular work assignments. The Authority found that the agency had already exercised rights under § 7106(a)(2)(B) by determinations that: foreign fishing vessel observation work would be performed by fishery inspectors; and both permanent and temporary inspectors were qualified to perform the work. Further, the Authority found that the parties' agreement, as interpreted and applied by the arbitrator, does not directly interfere with either of the agency's determinations in the exercise of its rights. Thus, the Authority noted that the procedure by which employees -- previously judged by management to be equally qualified -- will be selected to perform the work is negotiable under § 7106(b)(2), and when negotiated into an agreement is enforceable by grievance and arbitration. The Authority concluded that the arbitrator simply enforced the procedure for deployments provided for in the parties' agreement, and therefore that the agency failed to establish that the arbitrator's award is contrary to § 7106(a) as alleged.

In its second exception, the agency contended that the arbitrator's award is contrary to the Back Pay Act, 5 U.S.C. § 5596. The Authority found that although the arbitrator determined that the agency's scheduling practice adversely affected the income of permanent inspectors, he did not specifically find that but for management's unwarranted action, the grievants would have been offered, would have accepted, would have worked, and would have been paid for any particular deployments. Thus, the arbitrator did not determine that there were any specific instances where permanent inspectors were available for deployment and management failed to give them preference for the assignment in violation of the parties' agreement. Accordingly, the Authority modified the award by striking the order of backpay for permanent inspectors.

Federal Labor Relations Authority

22 FLRA No. 44

EEOC and AFGE Local 3230
(Henderson, Arbitrator),
Case No. 0-AR-1064 (Decided
July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7121(d)
Exceptions Asserted in Appeal	7122(a)

Award Contrary to FSLMR Statute
§ 7121(d)
Prohibited Personnel Practice under 5 U.S.C. § 2302(b)(1)
Raised under Statutory EEO Procedures
Grievance Procedure
Matter Raised As Grievance Different from Prohibited Personnel Practice under 5 U.S.C. § 2302(b)(1) Raised under Statutory EEO Procedures
Procedure
Forums
Selection of Grievance or Statutory Procedure [§ 7121(d)]
Issues Different

DIGEST NOTES

Contrary to the agency's assertion, the arbitrator determined that the matter raised under the negotiated grievance procedure was not the same matter that the grievant had raised under the statutory equal employment opportunity (EEO) complaint procedures. Accordingly, the arbitrator ruled on this basis that the grievance was not precluded. On the merits, the arbitrator set aside the suspension, which was the subject of the grievance, finding that it violated the parties' negotiated agreement.

In its exception, the agency contended that the arbitrator's award is contrary to § 7121(d). Authority noted that § 7121(d) effectively provides that when an employee affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) has raised the matter under a statutory procedure, the matter may not later be raised as a grievance. Thus, for a grievance to be precluded, both elements of § 7121(d) must attach: (1) the matter which is the subject of the grievance must be the same matter which is the subject of the action initiated under the statutory procedure; and (2) such matter must have been raised earlier by timely initiation of an action under the statutory procedure by the employee. Having found in agreement with the arbitrator that the matter which was the subject of the grievance is not the same as any of the matters which were the subject of the EEO complaint filed with the agency, the Authority concluded that the agency had failed to establish a basis for finding the award deficient.

Federal Labor Relations Authority

22 FLRA No. 45

National Association of Agricultural Employees and Dept of Agriculture, Animal and Plant Health Inspection Service, Case No. 0-NG-1028
(Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
  Conditions for Review
    Inconsistent with Agency Regulation
    for which a Compelling Need Exists
      Dept. of Agriculture Personnel Letter No. 711-10
    Inconsistent with Federal Law
      Travel Expense Act [5 U.S.C. §§ 5701 *et seq.*]
    Inconsistent with Government-wide Rule or Regulation
      Federal Travel Regulations [41 CFR, Part 101-7]
  Compelling Need
    Agency Regulation Mandated by Outside Authority
      Federal Travel Regulations [41 CFR, Part 101-7]
      Travel Expense Act [5 U.S.C. §§ 5701 *et seq.*]
      46 Comp. Gen. 21 (1966)
  Procedure
    Forums
      Representation Procedures: Raise Union's Standing to Appeal
    Lack of Specificity

STATUTE

7103(a)(14)
7105(a)(2)(D) and (E)

DIGEST NOTES

A proposal was not sufficiently specific and delimited to form the basis for a negotiability determination. The proposal was nothing more than a general request to bargain over agency Personnel Letter No. 711-10 which articulates the agency's policy concerning payment of travel and per diem to employee union representatives. The Authority went on to note the agency's argument that its Personnel Letter is not subject to bargaining because it is an agency-wide regulation for which a compelling need exists. The Authority summarily rejected the argument for the reasons set forth in *American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service*, 21 FLRA No. 21 (1986) *appealed sub nom. Department of Agriculture, Federal Grain Inspection Service v. FLRA*, No. 86-1295 (D.C. Cir. May 21, 1986). (proposal 1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal concerning travel and per diem is nonnegotiable. However, the agency's argument that the proposal does not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986) *appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1192 (D.C. Cir. Mar. 27, 1986). The Authority also found that neither 46 Comp. Gen. 21 (1966) nor the authorities to which it applies -- Travel Expense Act, 5 U.S.C. §§ 5701 *et seq.*, and the Federal Travel Regulations, 41 CFR, Part 101-7 -- require a determination to be made only by management and only on a case by case basis that travel in the context of a particular activity is sufficiently within the interest of the Government so as to constitute official business. Nevertheless, the Authority found that the proposal appears to require payment of travel and per diem without regard to whether the statutory and regulatory requirements for payment, discussed in *Customs Service*, have been met. Accordingly, the Authority found the proposal to be inconsistent with law and Government-wide regulations. (proposal 2)

As to the agency's argument that the union lacks standing to file the petition for review in this case because the union's name does not correspond to that listed on the documents relating to its recognition as exclusive representative for the bargaining unit involved, the Authority found that such a question should more appropriately be raised through representation procedures rather than negotiability procedures. Accordingly, in its decision the Authority decided only the negotiability issues raised under § 7105(a)(2)(D) and (E).

22 FLRA No. 46

Federal Labor Relations Authority

U.S. Army Adjutant General Publications Center, St. Louis, Mo. and AFGE Local 2761, Case No. 7-CA-40543
(Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Impact and Implementation (Procedures and Appropriate Arrangements)
        - Mail System, Access to
        - Photocopy Machine, Access to
  - Mail System, Access to
  - Photocopy Machine, Access to
  - Remedy
    - *Status Quo Ante*
      - Disruption of Agency's Operations
        - Internal Security Practices
      - Violation Based on Agency's Failure to Negotiate
        - Impact and Implementation (Procedures and Appropriate Arrangements)

STATUTE

7106(a)(1)
7116(a)(1) and (5)
7118

DIGEST NOTES

In agreement with the Judge, and noting the absence of exceptions on the issue, the Authority found that the agency violated § 7116(a)(1) and (5) of the Statute by changing the established procedures by which the union used the photocopy machine and internal mail system, without first providing the union with notice and an opportunity to bargain over the impact and implementation of the changes.

However, in disagreement with the Judge, the Authority found that a *status quo ante* remedy is not warranted. In the Authority's view, where a management action is based on its right under § 7106(a)(1) to determine internal security practices of the agency, then greater weight must be given to the disruptive effect on the agency's operations when applying the factors contained in *Federal Correctional Institution*, 8 FLRA 604 (1982).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 47

Federal Labor Relations Authority

Lowry Air Force Base, Denver, Colo. and AFGE Local 1974, Case No. 7-CA-1379 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Ruling Unnecessary If No Conflict with Regulation
  - Conditions for Review
    - Inconsistent with an Agency Regulation for which a Compelling Need Exists
      - Air Force Regulation 40-452
  - Management Rights
    - Assign Work
      - Performance Standards
    - Direct Employees
      - Performance Standards
  - Performance Standards
    - Critical Elements
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Performance Appraisal System
      - Time to Bargain Deemed Sufficient
  - Procedure
    - Credibility Resolutions
    - Forums
      - Compelling Need Determination May Be Decided in ULP
    - Hearing
      - Conflict of Interest
        - No Prejudice Caused by Judge's Ruling Restricting GC Attorney's Participation on Basis of Apparent C-of-I

STATUTE

7106(a)(2)(A) and (B)
7116(a)(1) and (5)
7117(b)
7118

DIGEST NOTES

The Authority determined that the union proposal defining "critical element," is nonnegotiable. The Judge concluded, based on his resolution of credibility, that the union's intent was that critical elements should be "grade controlling." Thus, the Authority found the proposal to be outside the duty to bargain as it has held that a proposal which would require that the critical elements of a position be based only on grade controlling factors of a position is inconsistent with § 7106(a)(2)(A) and (B). (section 2.B.)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The union proposals prescribing and defining rating levels of employee performance were found by the Authority to be nonnegotiable. As the proposals would prescribe the levels of performance that management must accept in evaluating an employee's overall performance as well as establish the number of rating levels to evaluate such performance, the Authority concluded that the proposals would directly interfere with management's right to direct employees and assign work under § 7106(a)(2)(A) and (B). (section 2.E. through 2.H., and sectio 4.b.2.)

The Authority found the remaining union proposals (section 2.A., 2.C., 2.D., and 2.I. through 2.K.) to be negotiable. The Authority determined that because section 2.A. defining "job elements" and the related definitions in the remaining union proposals only subject management to the procedural requirement that the position description involved accurately reflect the work assigned, the proposals would not interfere with the agency right to direct employees and assign work under § 7106(a)(2)(A) and (B). Similarly, the Authority found the proposals not to be inconsistent, that is, incompatible or irreconcilable, with Air Force Regulation (AFR) 40-452 as the proposals would only require the agency to procedurally amend an employee's position description to achieve consistency with the duties assigned. Moreover, although the definition of "non-critical" element in section 2.C. does not denote a consequence for failing to meet the described objective standard, the proposal is not inconsiste with the regulatory definition because, as the Authority has hel in all cases involving remedial action, where the proposal is silent, the regulation would govern. Finally, in the absence of exceptions to the Judge's determination that union proposals section 2.J., Performance Appraisal, and 2.K., Training, are negotiable, the Authority adopted that determination. (section 2.A., 2.C., 2.D., and 2.I. through 2.K.)

Subsequent to the Judge's finding to the contrary, the Authority has decided that the compelling need for an agency's rule or regulation may be decided in an unfair labor practice proceeding. Based on the finding that the proposals do not conflict with the regulation, the Authority found it unnecessary to rule on whether a compelling need exists for AFR 40-452.

Having determined that certain union proposals are negotiable, and are not incompatible or irreconcilable with AFR 40-452, the Authority concluded that the agency violated § 7116 (a)(1) and (5) when it implemented its performance appraisal system without having negotiated with the union over those proposals. The Authority further found that the agency's need to implement the system by a certain date did not negate its obligation to bargain over the negotiable proposals because, in the Authority's view, the more than three and one-half months between the union's submission of its proposals and the agency's implementation date was, absent indications to the contrary, sufficient time to bargain.

The General Counsel excepted to the Judge's ruling granting the Respondent's motion to restrict the participation during the hearing of one of the General Counsel's attorneys on the basis of an appearance of a conflict of interest. Without passing on whether there was either a real or apparent conflict of interest, the Authority affirmed the Judge's ruling as there had been no showing of prejudice caused by the ruling. In this regard, the Authority noted particularly that the attorney in question was permitted to remain at the hearing throughout the proceeding and to actively assist the other attorney for the General Counsel in presenting the General Counsel's case.

22 FLRA No. 48

Federal Labor Relations Authority

Southwestern Power Administration and IBEW Local 1002 (Owen, Arbitrator), Case No. 0-AR-1062 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B)
Award Modified	7122(a)

Arbitration
  Award Modified
    Award Conflicts with FSLMR Statute
      § 7106(a)(2)(B)
  Exceptions Asserted in Appeal
    Award Conflicts with FSLMR Statute
      § 7106(a)(2)(B)
  Assign Work
    Assignment of Bargaining-Unit Work
    to Nonbargaining-Unit Personnel
Negotiability
  Management Rights
    Assign Work
      Assignment of Bargaining-Unit Work
      to Nonbargaining-Unit Personnel
    Generally
      Arbitral Review

DIGEST NOTES

The arbitrator directed that the agency refrain from assigning bargaining-unit work to general foremen and other nonbargaining-unit personnel on the basis of his determination that the collective bargaining agreement prohibited such assignments. The Authority concluded that the arbitrator's award is deficient as contrary to § 7106(a)(2)(B) by interpreting and enforcing the collective bargaining agreement so as to improperly interfere with management's discretion to determine which personnel will receive particular work assignments. Accordingly, the Authority modified the award by striking the order to the agency pertaining to the assignment of bargaining-unit work.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 49

Federal Labor Relations Authority

AFGE Local 32 and *OPM*, Case No. 0-NG-914 (Decided July 9, 1986)

SUBJECT MATTER INDEX ENTRIES

- Federal Service Labor-Management Relations Statute
  - Differences from Private Sector Law
- Negotiability
  - Competitive Areas
    - Encompassing Non-Bargaining Unit Employees
    - Reduction-In-Force
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Competitive Areas
        - Reduction-In-Force
  - Reduction-In-Force
    - Competitive Areas
      - Encompassing Non-Bargaining Unit Employees
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Conditions of Employment of Non-Bargaining Unit Employees
        - Proposal Would Affirmatively Establish or Define
    - Mandatory Subjects of Bargaining
      - Conditions of Employment of Non-Bargaining Unit Employees
        - Proposal Has Only a Limited or Indirect Effect
- 5 CFR 351.202(c)(5) (1986)
- 5 U.S.C. § 3502

STATUTE

7101
7103(a)(12)
7114(a)(1)
7135(b)

DIGEST NOTES

In *Local 32, American Federation of Government Employees v. FLRA*, 774 F.2d 498 (D.C. Cir. 1985), the D.C. Circuit remanded the subject case (*Local 32*) and directed the Authority to address and resolve an apparent inconsistency between *Local 32* (holding that a union proposal defining the competitive area to be used for RIF to be outside the duty to bargain) and *Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard*, 14 FLRA 38 (1984) (ACT) (holding that a proposed competitive area was within the duty to bargain).

The Authority explained that the proposals in both the *ACT* and *Local 32* cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected conditions of employment of nonunit employees indirectly -- it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed non-bargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.

The Authority stated that it has attempted to strike an appropriate balance between the right of the union to negotiate over the conditions of employment of bargaining unit employees and the right of the agency to set the conditions of employment of non-bargaining unit employees; indeed, the requirement that they be set consistent with Government-wide rules and regulations. To balance these conflicting rights, the Authority has distinguished (1) permissively negotiable proposals which would affirmatively establish or define a condition of employment for nonunit employees or positions from (2) mandatorily negotiable proposals which would affect conditions of employment of nonunit employees or positions only to as lesser degree.

Thus, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain. Further, under Authority precedent, any agency could properly bargain over the definition of a competitive area which would include nonunit employees, as the agency in Local 32 apparently did in the past. Nonetheless, in Federal as in the private sector, previous bargaining over a permissive matter would not prevent an agency negotiating a new agreement from changing its position and refusing to bargain over an elective subject.

To the extent that its approach differs from that in the private sector, the Authority noted that the Congress did not intend to require that the Federal sector labor relations be a mirror image of the private sector scheme. Thus, the Statute's antecedents are in the Executive Order program rather than the National Labor Relations Act.

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22 FLRA No. 41

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and Case No. 9-CA-40003

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1501, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and a supporting brief.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommendation that the complaint be dismissed.

The Authority concludes that the General Counsel has not met the burden of proving that a unit employee, John Mack, was denied overtime because of his protected union activities.

In adopting the Judge's conclusion that the complaint should be dismissed, the Authority notes particularly his findings that overtime for Title 2 claims employees was granted to those employees who had unmanageable backlogged cases, and that the Activity determined employee Mack's backlog of cases in relation to other employees' backlogs was insufficient to warrant assigning him overtime.

While there was some indication of union animus toward Mack, we conclude, in agreement with the Judge, that the record indicates the denial of overtime would have occurred even in the absence of such animus.*/ *Internal Revenue Service, Washington, D.C.*, 6 FLRA 96 (1981). *See also American Federation of Government Employees v. FLRA*, 716 F.2d 47 (D.C. Cir. 1983), *enforcing Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 9 FLRA 73 (1982). Accordingly, the complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 9-CA-40003 be, and it hereby is, dismissed.

Issued, Washington, D.C. July 9, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ Chairman Calhoun concludes, in agreement with the General Counsel, that the Judge erred in refusing to take administrative notice of another administrative law judge's factual findings establishing union animus in a related case. In view of the outcome of this case, that error is not prejudicial. Member Frazier finds it unnecessary in the circumstances of this case to pass upon the General Counsel's exceptions in this regard.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1501, AFL-CIO

Charging Party

Case No. 9-CA-40003[1]

Wilson Schuerholz
For the Respondent

Josanna Berkow, Esq.
For the General Counsel

Michael A. Teefy
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 6, 1984, by the Regional Director for the Federal Labor Relations Authority, Region IX, a hearing was held before the undersigned on March 22, and 21, 1984 at Seattle, Washington.

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[1] Under date of February 27, 1984, an Order was issued by the Regional Director, Federal Labor Relations Authority, Region IX, consolidating Case No. 9-CA-40003 and Case No. 9-CA-40108, as well as a Complaint and Notice of Hearing involving Case No. 9-CA-40108. Thereafter, under date of March 16, 1984, the same Regional Director issued an Order severing these cases and withdrawing the Complaint and Notice of Hearing in Case No. 9-CA-40108.

This is a proceeding which arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (here called the Statute). It is based on a charge filed on January 3, 1984, by American Federation of Government Employees, Local 1501, AFL-CIO (herein called the Union) against Social Security Administration, Baltimore, Maryland (herein called Respondent).

The Complaint alleged, in substance, that in August and/or September, 1983 Respondent denied John C. Mack, an employee, the opportunity to work overtime; that said John Mack was the alternate local union representative for Respondent's South Seattle Branch office, Seattle, Washington, as well as Technical advisor for employees and Union officials in the Puget Sound area; that the denial to Mack of an opportunity to work overtime was because of the aforesaid activity engaged in by Mack on behalf of the Union -- all in violation of Section 7116(a)(1) and (2) of the Statute.

Respondent's Answer, dated January 23, 1984, denied that Mack was not afforded an opportunity to work overtime; that it did so based on Mack's union activities. It also denied the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs[2] were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor. and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein American Federation of Government Employees, AFL-CIO, was the certified bargaining representative of Respondent Social Security Administration's employees in a specified unit. Included within said unit, at all times material herein, have been the claims representatives as well as other employees, who are employed at Respondent's South Seattle Branch office, Seattle, Washington.

2. At all times material herein American Federation of Government Employees, Local 1501, AFL-CIO, was the designated and authorized agent, on behalf of American Federation of Government Employees, AFL-CIO, to

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[2] General Counsel's brief contains a Motion to Correct Hearing Transcript. No objections having been filed thereto, the said motion is granted and the transcript is corrected as requested.

represent and act for the unit employees of Respondent's South Seattle Branch office, Seattle, Washington.[3]

3. Respondent and American Federation of Government Employees, AFL-CIO, are parties to a National Collective Bargaining Agreement which, by its terms, became effective in June 11, 1982 for a three year period. Said agreement is, and has been at all times material herein, applicable to the unit employees at Respondent's South Seattle Branch, Washington, D.C.

4. The said collective bargaining agreement provides inter alia, that[4]: (a) The Administration shall not interfere with, or coerce Union representatives in the exercise of their rights under 5 U.S.C. 71 and this agreement, (Article 2, Section 1B); (b) Each employee has the right to join or assist the Union, to be protected in the exercise of these rights, and to act for a labor organization as a representative when dealing with an agency. (Article 3, Section 1); overtime should not be distributed or withheld as a reward or penalty. (Article 10, Section 2B); employees may, when approved by management, accrue and use compensatory time. When feasible, the employer shall grant a request for such time rather than payment for overtime. (Article 10, Section 2E); when the Administration decides to use overtime, qualified volunteers shall be used before non-volunteers. (Article 10, Section 4A); all qualified employees whose performance is at least fully satisfactory will be notified of the availability of overtime. (Article 10, Section 4B); overtime will be assigned fairly and equitably. (Article 11, Section 4C).

5. The South Seattle Branch office, in its Title 2 unit, is responsible for handling retirement and survivors benefits (RSI cases) and disability claims (DIB cases). Its title 16 unit administered social security claims which are designated as SSI cases.

6. John Mack, who has been employed at the South Seattle Branch since July, 1976, is a claims representative in the Title 2 unit. As such, Mack handles RSI and DIB claims which originate from either direct interviews (about 95%), or by way of mail and telephone (about 5%).

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[3] American Federation of Government Employees, Local 3937, AFL-CIO, which was formerly a part of Local 1501, is the current representative at this branch office.

[4] The undersigned has set forth, in substance, the particular contractual provisions referred to by the Union in its grievances concerning a denial of overtime.

7. At all times material herein Mack has been an alternate representative of the local union at the South Seattle Branch. In that capacity he steps in when the local representative is unable to handle a grievance, complaint, an EEO matter, or during negotiations with management. Mack also functions as advisor to union representatives in most Puget Sound area offices, helping them directly or by means of telephone calls made by the representatives to him at his office. In addition, Mack is contacted regarding grievances or unfair labor practices and he is the formal step 3 grievance official. In the past twelve months Mack has handled at least 46 grievances and 39 unfair labor practice charges against Respondent. About 39 of the grievances involved the South Seattle Branch, while all unfair labor practice cases concerned this branch.

8. The subject of official time is dealt with in Respondent's Manual Circular - Labor Relations Handbook. Part VI entitled "Administering the Agreement - Use of Time and Facilities" - sets forth guidelines for managers concerning official time usage. Provision is made therein for granting such time to union representatives for union related functions. The guidelines also provide that, except for incoming phone calls, official time must be requested by the representative and approved in advance. Further, it is deemed reasonable to allow a union representative to accept an incoming call and complete same if it doesn't last over five minutes. If it will last beyond that time, the representative should contact the supervisor and seek official time. (G.C. Exhibit 2, page 2).

9. In March, 1983, all but one of the Title 2 claims representatives submitted a written request for overtime to supervisor Frank Allard. Mack testified that he needed overtime since his work as a claims representative backlogged badly by the end of February. In the few months prior to March, Mack had been involved in 18-20 grievances, which took away much of his time from case handling. Allard denied the request.

10. Under date of April 8, 1983 Mack and Zee Williams filed a grievance[5] as a result of the denial by Allard of the March request for overtime. In the grievance Mack alleged that management violated Articles 2, 3, and 10, heretofore referred to, by denying his request. He stated that his work was backlogged; that he submitted a detailed list of such items; that the overtime or compensatory time was necessary to complete the work; that overtime was being granted to others for backlogged workloads.

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[5] Article 24 of the National Agreement provides for a Grievance Procedure which may be utilized by the parties or an employee in the event of a complaint. It includes a three step procedure for grievance presentation.

11. Allard denied the aforesaid grievance in a letter dated July 5, 1983,[6] addressed to Mary O'Malley, AFGE Local Representative. He stated, inter alia, that the request for overtime was not justified at the time; that overtime had not been accorded title 2 claims activities; that if and when it becomes available, all qualified employees will be notified, and that it will be assigned equally and fairly.

12. Mack made an informal oral request for overtime in May or June to clean up his backlog before going on leave.[7] He went on leave from June 20 until July 10. Between July 11 and July 31, Mack was engaged in labor-management relations activities for 18 of 80 hours. On July 26 he made a second written request for overtime. His statement to Allard recited that there were over 46 files backlogged upon his return from leave; that he had not received overtime or extra adjudication time despite his requests; that he had been on official time for 16 hours since July 11 and was scheduled for another 11 hours within the next few days; that he had at least 34 files[8] on his desk, of which some were high priority; that he needed at least 3-4 hours overtime to clear the highest priority ones.

13. In a memo dated July 27, Allard denied the request and stated that he reviewed the statistical data for the weeks of 7/15/83 and 7/22/83; that during those 10 work days the unit took in 110 claims in DOWR categories 1, 2, and 4; that Mack had 9 receipts, or 8.2% of all claims receipts; that the other 4 claims representatives had 17, 29, 24 and 21 claims respectively. Further, Allard noted that during this period the claims unit took 175 RSHDI interviews, of which Mack took 32 or 18.3%, that another claims representative had 23 interviews and receipted 21 claims whereas Mack had only receipted 9 claims. The supervisor stated that, even taking into account Mack's official time usage and annual leave, the employee's claims production is not competitive. Allard commented that the backlog consists of actions Mack should have taken previously; that the 3 hours of adjudication time scheduled for Friday is sufficient to handle backlog. He concluded by stating Mack's problem is one of time management and concentration. Allard also requested a status report from the employee.

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[6] Unless otherwise indicated, all dates hereinafter referred to occurred in 1983.

[7] Though it does not appear in the record, this request was presumably denied.

[8] Listed in his status report was the type of work to be done in each file. It involves such tasks as review, memo to write, hearings, etc. Eleven files were designated as "miscellaneous." (G.C. Exhibit 6).

14. In his status report dated July 29 Mack again set forth a report of cases on hand and work to be done. He recited that 20 backlogged files have been resolved and moved to the next stage; that 12 of original 34 files remain and though 11 of the 12 have low priority, he has received 12 new files to be reviewed.[9] Mack repeated that it was not physically possible to clear a backlog of 40 files, take a full share of interviews, and be out of the unit for 18 of 80 hours Allard testified.

15. Record facts show that between July and September the claims representatives in Title 2 unit were John Mack, Tiny Briscoe, Barbara Larson, Sharon Mirante, Dave Rokowski, who left at the end of August, and Fran Zacher, who replaced Rokowski.

16. Record facts show that Briscoe requested overtime in June or July but was not permitted to work overtime. She requested it again in August and her supervisor, Frank Allard, suggested she submit a memo stating why she needed overtime. Based on her backlog of pending cases, she was given overtime to perform adjudication duties.

17. In late June, or early July, Mirante gave Allard a written statement indicating she was very backlogged in her work. She had been interviewing non-stop for a long period of time, and there was little adjudication time available. Mirante does not recall that she asked for overtime - just that she wanted Allard to know the situation. Allard told her he would take it up with Ruth Saunders, the Branch Manager of the South Seattle office. A week later Allard informed her overtime would be available. In August Allard approached Mirante and told her overtime was available; that if she needed it, Mirante should advise Allard and he would see if it could be arranged.

18. Mirante also testified that on one occasion in September she was asked by Allard to work on some of Mack's old RSI cases because nothing had been done on them. She worked on them one afternoon and was finishing up one morning on one particular case. At that time Mack was out of the office on labor matters.

19. Based on a stipulation entered into by the parties at the hearing, the record reflects that:

> (a) Tiny Briscoe worked overtime for 5 1/2 hours in August and 9 hours in September. Of this amount, 1/4 hour was on late interviews and 14 hours on adjudication of RSI and DIB claims.

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[9] Mack testified that of the approximate 45-50 cases that were on his desk after he returned from leave in July, none was RSI or DIB cases. They pertained to reconsiderations, hearings, H-memo's, impacting benefits and miscellaneous.

(b) Sharon Mirante worked overtime for 4 hours in July, 2 1/2 hours in August, and 7 1/4 hours in September. Of this amount, 3/4 hour was on late interviews and 13 hours were worked on RSI and DIB claims.

(c) Barbara Larson worked overtime for 7 1/2 hours in July and 5 1/4 hours in September. All except 1/4 hours were worked on RSI and DIB cases.

(d) Dave Rokowski worked overtime for 1/4 hour in July and 35 minutes in August - all on late interviews.

(e) Fran Zacher worked no overtime in August or September.

20. A 2nd step grievance meeting, involving the April 8 grievance, was held on July 27. Carl Rabun, Assistant Deputy Manager for Respondent's downtown office, presided for management. Mack and O'Malley were present, but Zee had retired and did not attend. The employees told Rabun that Title 2 was short-staffed as much as Title 16 but that different conditions prevailed. Thus, the supervisor in Title 16 approached employees for overtime, and the employees did not have to ask for it. Rabun was informed that Williams and Mack were told overtime wasn't necessarily for Title 2 employees. The union representatives also stated that both Mack and Williams were fearful that Allard's memorandum of July 27 regarding their request for overtime would be kept in the file and utilized for appraisal purposes. There was no attempt to amend the grievance to indicate the denial by management of the July request by Mack for overtime. Neither was there any mention of said denial being prompted by Mack's union activities. The relief sought includes granting all future employee's rights for compensatory time and removing Allard's July 27 memo from Mack's file.

21. The 2nd step grievance was denied by Rabun in his decision dated August 12 (Resp. Exh. 1). He stated that management must decide, on a case by case basis, when compensatory time is appropriate; that management decided, in regard to Mack, neither compensatory nor overtime was warranted as his caseload was not unreasonable or unbalanced; that the memo of July 27 must remain to support Allard's decision.

22. In early September Mack told Allard his backlog was very big and he would be going out again on official time. Allard advised Mack to do his best in handling his work.

23. On September 21 Mack was interviewing a claimant at his desk. He was interrupted by several phone calls, most of which were from the public regarding claims Mack worked on for them. About 11 A.M., as he was concluding a phone call, Allard came to the desk. The supervisor asked the seated claimant if the call concerned him. Upon being told it did not, Allard stated to Mack that he wanted to speak with him after the interview. About 20 minutes later Allard approached the desk again. The claimant had left the interview. Mack testified that Allard spoke to Mack, saying: "If you ever take another union call while you're interviewing, the next time you do it you'll be reprimanded. And the next time you do it after that, you'll be suspended, and the next time you do it after that, you'll be fired."[10] Mack had never been spoken to regarding receipt of phone calls theretofore.

24. The April 28 grievance reached its 3rd step presentation at a meeting held on September 30. Both O'Malley and Mack attended and management's representative was Dennis Rainey, Respondent's Area Director. In addition to repeating the same contentions made at the 2nd step meeting, Mack also mentioned that some claims representatives had heard it said that union officials would be denied overtime based on their union activities. O'Malley told Rainey she had not checked that out; that she would do so and if it were true, an unfair labor practice charge would be filed. In the presentation of the grievance neither Mack nor O'Malley raised anti-union animus as part of the grievance.[11]

Both Mack and Rainey testified, and I find, that the Union representatives consented to Rainey's writing one decision covering the April 8 grievance and the matters to be included in the October 7 grievance. Rainey also testified that it was common for the Union, at a 3rd step grievance session, to raise matters of LMR[12] concerns which are not part of a pending grievance. The Union representatives, however, did not consider the April 8 and October 7 grievance as merged.

25. Rainey's administrative assistant, June Riston, reported back to her supervisor that she had conducted an investigation and found no support for the contention that overtime was denied to union members or union activists.

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[10] Allard did not controvert having made these statements.

[11] Mack testified that, after the grievance closed, O'Malley did mention that they were becoming aware of a pattern of anti-union animus; that the Union may be filing charges based on such a pattern.

[12] Labor Management Relations.

26. A grievance dated October 7 was filed by Mack and O'Malley alleging that on September 9 management scheduled overtime for the following Saturday and violated the National Agreement, Article 10, Section 2B, 4A, 4B and 4C. It was also alleged that in September 9 the Union became aware that management's failure to abide by the contract had been ongoing and continues. Both employees sought, as relief, back pay for overtime where it was scheduled in violation of the contract; and that management cease its discriminatory scheduling of overtime.

27. Rainey rendered his written decision regarding the 3rd step grievance session on October 24. He stated therein, inter alia, that: (a) an investigation showed no discriminatory assignment of overtime; (b) he began reducing overtime in 1980 for Area I due to its excessive use thereof, and in 1982 and 1983 he required that managers request specific hours of needed overtime and justify its requirement; (c) concerning Mack's request for overtime on March 25, Rainey ascertained that during the first quarter of the year Mack's claims receipt averaged 7 2/3 per week which was not a particularly heavy load - it was about 1/2 the receipt per claims representatives for another D O in the Seattle area, and in most offices would be considered an average or below average workload. Rainey concluded by stating that he agreed with the management staff, which reviewed Mack's caseload, that overtime for him was not justified and be denied the grievance.

28. Respondent issued a program report for Mack covering the period from 10/29/82 to 9/31/83. His performance was characterized as fully satisfactory as of 2/23/83 and also as of 8/3/83.[13] The narrative, which is dated 2/23/83, put forth goals which Mack should strive to meet.[14] The comments dated 8/3/83 by supervisor Allard were as follows:

> Your performance continues to be fully satisfactory overall. My opinion takes into account the variables that require you to be away from your desk: LMR activities and use of leave.

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[13] Mack was rated as fully satisfactory for months of July, August and September.

[14] This Progress review Report was involved in another case, 9-CA-30242, which went to hearing before Judge Oliver. General Counsel requested the undersigned to take administrative notes of Administrative Law Judge Oliver's findings based on credibility resolutions regarding Mack's February 23 Progress Report, as well as alleged anti-union statements directed to Mack in that case. The undersigned denies that request. It is not deemed proper to take such notice of factual findings by another administrative law judge made in connection with another case. As of this writing, the Authority has not issued its decision in 9-CA-30242.

29. On October 10, Mack was assigned to handle post-entitlement claims. This was effected since the initial claims, which Mack handled theretofore, required quick action which could not be accomplished when Mack was out on official time. Thus, by this reassignment, Mack would not be stuck in short time frames.

30. Supervisor Allard testified that, in evaluating Mack's request for overtime, the employee's union activities were not considered. In respect to appraising Mack's work, Allard stated he subtracts the union time from the amount of time Mack is on the job to determine whether the employee has handled the proper volume of work and whether it is timely or not.

31. Branch Manager Ruth Saunders testified that no overtime was necessary for Title 2 claims representatives prior to July. This differed from the situation in the Title 16 unit where the number of claims representatives had been reduced but the case load had not diminished. The situation changed in July since employees in Title 2 were going on vacation. Allard asked her for overtime for the RSI unit, stating that several claims representatives were backlogged and had requested overtime. Saunders inquired as to why adjudication time [15] would't suffice. Allard said the employees were interviewing constantly and not getting adjudication time. Whereupon Saunders approached Manager Barnes and asked for overtime for the Title 2 unit. Justification for the request was the vacation schedules of the employees. She obtained 15 hours per month for July, August and September.

32. Further testimony by Saunders reflects that claims representative Briscoe asked for overtime due to backlog and was denied by Allard. Then the employee came to Saunders stating she had heavy interviewing and no adjudication time. Saunders arranged for her to work adjudication time. Briscoe came to her again in mid-July and asked for overtime, and thereafter Saunders approached Barnes for overtime for Title 2 people.

33. In July Allard told Saunders that Mack had wanted to work overtime. Saunders looked at the workload reports which showed Mack had two high priority cases (retirement survivor).[16] She told Allard there didn't seem to be a need for overtime at this point, and Mack had adjudication time scheduled for later that week. Saunders did not check Mack's desk after July 11.

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[15] Respondent gave 3 hours per week to each claims representative to adjudicate claims. This involves actual case work - processing cases toward completion.

[16] Saunders claimed she worked Mack's desk while he was on vacation; that he had, in addition to those two cases, two DIS cases to be handled.

34. Mack testified he told Allard on September 6 that he would be leaving again for official time and working on arbitration cases. He further advised the supervisor that he had about 60 files; that Allard said he wanted Mack to review and prioritize that week. When Mack indicated he doesn't have time, Allard told the employee to ask for one hour's overtime.

35. Saunders testified that Mack requested overtime orally on September 7; that she looked at the work and concluded it was the first time his request was justified. Accordingly, Saunders told Allard to approve it. Saunders further testified she was surprised to note that the overtime slip showed that Mack had reviewed and prioritized his cases rather than working them. She approved one hour for overtime and 5 1/2 hours of compensatory time.[17] Saunders stated that Mack is entitled to receive overtime if he should need it.

Conclusions

The principal issues for determination herein are as follows: (1) whether the Complaint is barred by section 7116(d) of the Statute in view of the April 8 and October 7 1983 grievances regarding the denial of overtime to Mack by Respondent; (2) assuming *arguendo*, the Complaint is not so based, whether Mack was denied overtime in July, August and September 1983 based on his union activities and thus discriminated against in violation of section 7116(a)(1) and (2) of the Statute.

(1) The pertinent part of section 7116(d) of the Statute provides that:

> . . . issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

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[17] Respondent's Exhibit 4 is the overtime form which Mack filled out to report the time granted beforehand. This form is submitted by the employee *after* the individual has worked the overtime. This exhibit shows Mack worked one hour overtime in September 7 in reviewing and prioritizing cases. Saunders testified she understood the request by Mack was to work overtime on his caseload - not to prioritize his backlog - and she believed that the approval of one hour overtime was granted to handle his caseload. The exhibit showed he worked otherwise.

Respondent contends that the April 8 grievance was escalated to cover, at the 2nd and 3rd step grievance presentations, the same demand of overtime to Mack as set forth in the Complaint. Further, it is maintained that the October 7 grievance referenced denials of overtime in September to Mack based on violations of the contract preserving the right of employees to union activity.

The undersigned is not persuaded that 7116(d) of the Statute does operate to bar the instant complaint. The April 8 grievance concerns the denial of overtime to Mack prior to that date. While it does refer to specific sections of the master agreement which assure employees the right to engage in union activities, that grievance does not relate to the denial of overtime in July, August and September, as alleged in the complaint.

Moreover, I am not convinced that the discussion at the 2nd and 3rd step grievance meetings were intended to include the denial of overtime during those said months as part of the April 8 grievance. At the 2nd step meeting O'Malley told Assistant District Manager Rabun that the union wanted Allard's July 27 memo removed from the file; that employees Mack and Williams were afraid it might be used in an appraisal rating against them. While some discussion may have ensued concerning Mack's being denied overtime at that stage, there was no attempt to amend the April 8 grievance to cover later denials. Neither was any mention made thereat regarding Mack's being denied overtime by reason of union activities. At the 3rd step grievance session reference was made by Mack to the fact that some employees heard comments that overtime would be denied to officers of the union. However, O'Malley stated she had not heard those remarks and would file a charge if they were proven true. While she did make mention of union animus, it was done after the grievance meeting was finished.

In respect to the October 7 grievance, that was an attempt to grieve management's scheduling overtime on September 9 in contravention of the right assured employees under the master agreement. The grievance does not purport to cover any other period, nor does it contain any specifics in regard to any alleged discrimination.

In order to bar an unfair labor practice complaint based upon a prior or pending grievance, it must be shown that the said complaint raises the same issues as are involved in the grievance procedure. Social Security Administration, 16 FLRA 434; Department of Health and Human Services, etc. 5 FLRA 504. The issue raised in the April 8 grievance, as well as that posed in the October 7 grievance, is not identical to the issue raised in the instant complaint, and those grievances do not cover the same period of alleged discriminations. Accordingly, I conclude that the complaint herein is not barred by Section 7116(d) of the Statute.

(2) General Counsel insists that Mack was denied overtime by reason of his activities as a union representative. While conceding that no direct evidence upholds that conclusion, it is argued that discrimination may be inferred from the circumstances. In support of such inference General Counsel contends that the record reflects disparate treatment between Mack and the other claims representatives in Title 2; that union animus is apparent from the statements made by Allard to Mack on September 21; and that the pretextual nature of the denial of overtime to Mack can be seen from the unwarranted assertions by management regarding Mack's performance problems, as well as the failure to grant him such time in the face of his backlog of work.

As correctly stated by General Counsel, an employee engaged in protected activity may not, under the statute, be discriminated against because of such activity. Thus, an employee who is active on behalf of a union may not be treated adversely by reasons thereof without management running afoul of Section 7116(a)(1) and (2) of the Statute. Directorate of Supply Operations, Defense Logistics Agency, Headquarters, Defense Logistics Agency, 2 FLRA 937. It is also true that discriminatory conduct on the part of an employer may be inferred on the basis of the circumstances which exist in a particular special case. See Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 15 FLRA 867. While it may be argued that Respondent herein denied overtime to Mack during July, August and September because of his union activities, I am constrained to conclude that the record does not warrant that inference. The factors recited by General Counsel do not establish, in my opinion, a prima facie case of discriminatory conduct toward Mack. They do not justify concluding that an illegal motive was the predicate for the fact that this individual did not receive similar overtime during said months.

It is argued that disparate treatment of Mack by Respondent is one factor reflecting discrimination. General Counsel adverts to the fact that overtime was accorded the other claims representatives in Title 2, while it was denied to Mack. The record shows that none of these individuals received overtime prior to July, 1983. Claims representative Briscoe was also denied overtime in June and July although she requested it, and Fran Zacher worked no overtime. It is true that, as stipulated, Briscoe worked overtime in August and September; Mirante did so in all three months; Larson worked overtime in July and September; and Rokowski worked for a short overtime period in July and August. Note is taken, however, that 80% of the work for the claims representative arises from the interviews taken by each individual. Thus, since Mack was out of the office a good deal attending to labor relations matters, the remaining four claims representatives were taking most of the interviews. Accordingly, these individuals were responsible for handling most of the cases or claims in Title 2. The record does not contain the exact amount of case backlog for each of the other claims representatives. It is however, reasonably inferable that their backlog would be high and supportive of overtime to handle their cases. Moreover, manager Saunders worked Mack's desk in his absence, and she concluded that since he only had two priority cases there was no justification for overtime being granted to him. Further, the record indicates Mack did not seek overtime in August, and that around that time, in September, he was 'in pretty good shape'. Although I recognize that Mack had a considerable amount of work to be completed - much of which did not necessarily involve processing of initial claims, one must recognize that management may exercise its own discretion in the allotment of overtime. The assignment of overtime is a judgment call, and it would be difficult, at best, to substitute another judgment for that of management in such an instance. In the event that other considerations prevail which clearly demonstrate that the disparate allotment was predicated on an employee's unionism, then management's decision in this respect may well be deemed pretextual. However, I am not persuaded that such was the case in so far as Mack was concerned.

As a predicate for establishing illegal motivation in not granting overtime to Mack, it is contended that the statements of Allard to Mack on September 21, evince discriminatory intent by Respondent. The comments by Allard on that date may well, in my opinion, show union animus on the part of the supervisor.[18] Nevertheless, I am not convinced that a nexus exists between those remarks and the failure to allot overtime to Mack by Respondent during July, August and September. While these remarks demonstrate annoyance on the part of Allard with Mack's receiving union related phone calls, it does not follow that the failure to grant overtime was due to his activity as a union representative. The final approval of overtime, or denial thereof, was in the hands of Saunders, who displayed no animus in that regard. Moreover, Allard rated Mack as "fully satisfactory" in the appraisals of the employee for July, August and September. Those ratings go a long way toward dispelling any inference of discrimination which General Counsel contends is manifest from the Progress Reports concerning Mack's performance. Finally, it is difficult to conclude that the September 21 statements constitute union animus which demonstrate illegal motivation in the treatment of this employee, when it is seen that Mack was later transferred to Title 16 so as not to be stuck in work with short time frames.

Apart from the fact that the Branch Manager never thwarted Mack in respect to his union activities or disapproved official time for such duties, there is no evidence that Saunders' decision regarding overtime was influenced by Mack's representational duties. Despite the confusion in regard to the overtime granted Mack on September 7 for one hour, Saunders understood the overtime was for processing cases as needed at that time.

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[18] The Complaint does not, however, allege that said statements were violative of Section 7116(a)(1) of the Statute.

In sum, while the record discloses that Mack received significantly less overtime than tree of the other five claims representatives employed during the July-September, 1983 period, I conclude it does not appear that this was due to his union activities. Thus, I also conclude Respondent did not violate Section 7116(a)(1) and (2) of the Statute. Accordingly, it is recommended that the Complaint herein be dismissed in its entirety.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Date: February 26, 1985
Washington D.C.

22 FLRA No. 42

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEALTH CARE FINANCING ADMINISTRATION

Respondent

and

Case No. 3-CA-30618

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and the General Counsel. The complaint alleges that the Respondent, Health Care Financing Administration, violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to participate in the arbitration of a grievance filed on behalf of a bargaining unit employee by the American Federation of Government Employees, Local 1923, AFL-CIO (the Union), the agent of the American Federation of Government Employees, AFL-CIO (AFGE) in matters concerning the Respondent's Headquarters employees.

II. Facts

The Union filed a grievance on behalf of employee Floyd McDaniels on March 31, 1983, pursuant to the negotiated grievance procedure contained in the agreement between AFGE and the Respondent. On May 10, 1983, the Union advised the Respondent that it was referring McDaniels' grievance to arbitration in accordance with the negotiated grievance procedure. On June 1, 1983, the Union submitted a signed copy of a Federal Mediation and Conciliation Service "Request for Arbitration Panel" to the Respondent for its concurring signature. On June 6, 1983, the Respondent advised the Union that it was refusing to participate in the arbitration proceeding because the issue raised was "not an appropriate grievance under our negotiated grievance procedure."

III. The Issue

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by refusing to participate in the arbitration of a grievance filed by the Union on March 31, 1983, on behalf of a bargaining unit employee, under the parties' negotiated grievance procedure.

IV. Positions of the Parties

The General Counsel contends that the Respondent violated section 7116(a)(1) and (8) of the Statute by refusing to proceed to arbitration on the grounds that the matter was not grievable under the parties' negotiated agreement. The General Counsel specifically relies on the Authority's rationale in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA 456 (1983), in which an agency was found to have failed to comply with the requirements of section 7121 of the Statute by refusing to participate in binding arbitration of a grievance which it believed to pose an issue that was excluded by the terms of the parties' negotiated agreement.

The Respondent contends that its refusal to participate in the arbitration proceeding based on the belief that the subject matter of the Union's grievance, contracting out, was not an appropriate subject for arbitration pursuant to the parties' agreement, did not prevent the Union from proceeding to arbitration on its own. The Respondent further contends that it never expressed an unwillingness to be bound by such an arbitrability award or to share in the costs of the Union's decision to proceed to arbitration. In conclusion, the Respondent asserts that the intent of section 7121 of the Statute is to permit either party to proceed with arbitration alone, and that the process is not discouraged despite the Authority's contrary views in prior decisions.

V. Analysis

It has long been established that section 7121 of the Statute mandates that each collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability, and unless the parties, consistent with law, mutually agree otherwise, such procedures must be read as providing that all questions of arbitrability not otherwise resolved shall be submitted to arbitration. See Interpretation and Guidance, 2 FLRA 273, 278 n.7 (1979). Further, as stated by the Authority in Department of Labor, Employment Standards Administration/ Wage and Hour Division, Washington, D.C., 10 FLRA 316, 321 (1982), and reaffirmed here, "[w]hile nothing in the Statute precludes either party from invoking arbitration and proceeding ex parte if necessary, a refusal by the other party to participate in the 'procedures for the settlement of grievances, including questions of arbitrability' . . . conflicts with the requirements of section 7121." As found in the Department of Labor case, such a failure to comply with the requirements of section 7121 constitutes a violation of section 7116(a)(1) and (8) of the Statute. See also Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA 456 (1983), and Department of the Army, 83rd United States Army Command, Columbus, Ohio, 11 FLRA 55 (1983). Further, without deciding whether the result would have been different in this case if the Respondent had signified its willingness to be bound by and share the costs of the arbitrator's decision, the record contains no evidence that the Respondent notified the Union of any such intentions.

VI. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties. The Authority concludes that the Respondent's refusal to proceed to arbitration constituted a failure to comply with the requirements of section 7121 of the Statute in violation of section 7116(a)(1) and (8).

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Health Care Financing Administration shall:

1. Cease and desist from:

(a) Unilaterally refusing or failing to proceed to arbitration regarding a grievance filed by the American Federation of Government Employees, Local 1923, AFL-CIO, as the agent for the American Federation of Government

Employees, AFL-CIO, the employees' exclusive representative, regarding the conversion of the functions of the Office of Direct Reimbursement (ODR) to the private sector, after receiving timely notice of the exclusive representative's desire to invoke arbitration.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, proceed to arbitration regarding the grievance filed by the American Federation of Government Employees, Local 1923, AFL-CIO, regarding the conversion of the functions of the Office of Direct Reimbursement (ODR) to the private sector.

(b) Post at its Headquarters facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrator, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., July 9 , 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally refuse or fail to proceed to arbitration regarding a grievance filed by the American Federation of Government Employees, Local 1923, AFL-CIO, as the agent for the American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, regarding the conversion of the functions of the Office of Direct Reimbursement (ODR) to the private sector, after receiving timely notice of the exclusive representative's desire to invoke arbitration.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, proceed to arbitration regarding the grievance filed by the American Federation of Government Employees, Local 1923, AFL-CIO, regarding the conversion of the functions of the Office of Direct Reimbursement (ODR) to the private sector.

____
(Agency or Activity)

Dated:__________________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL MARINE FISHERIES SERVICE,
NORTHEAST REGION, NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION,
UNITED STATES DEPARTMENT OF COMMERCE,
GLOUCESTER, MASSACHUSETTS

Activity

and Case No. 0-AR-1008

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS, AFL-CIO,
BOSTON, MASSACHUSETTS

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on exceptions to the award of Arbitrator John J. Graham filed by the Department of Commerce (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned the preference to which permanent inspectors were entitled in assignments to foreign fishing vessels in the foreign fisheries observer program. According to the Agency, the program involves monitoring foreign fishing vessels in the United States fisheries conservation zone by placing fishery inspectors on the vessels. Beginning in 1983, the Agency has been required to place inspectors on all foreign fishing vessels in the zone. In order to meet requirements during peak fishing periods, the Agency employs inspectors on temporary appointments, in addition to its permanent inspectors. All of the inspectors, permanent and temporary, are assigned to vessels from a single deployment list or roster.

The parties in this dispute negotiated a provision, Article 2, in their collective bargaining agreement, which provides that "[w]here possible, management will give first preference for deployments and other duties to permanent inspectors." The Activity gave preference to the permanent inspectors only in initial assignments by placing their names at the top of the deployment roster at the beginning of the fishing season. After the permanent inspectors were initially assigned, however, the Activity did not give them any further preference in assignments. Rather, upon deployment, their names were placed at the bottom of the roster and they were not offered another assignment until all other inspectors had been assigned and their names again reached the top of the list. The Union essentially claimed that under Article 2 of the parties' agreement "first preference" meant that whenever permanent inspectors returned from an assignment, their names should be placed on the deployment roster ahead of temporary inspectors. The Arbitrator agreed with the Union's position. The Arbitrator found that management had demonstrated a policy of preference for temporary inspectors and that its deployment practice had adversely affected the income of permanent inspectors. As his award, the Arbitrator determined that management had violated Article 2 of the parties' collective bargaining agreement by refusing and failing to give first preference for deployments and other duties to permanent inspectors. Further, as a remedy, the Arbitrator directed the Activity to comply with the agreement and to provide restitution for all losses incurred by the permanent inspectors.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Agency contends that the Arbitrator's award is contrary to section 7106(a) of the Statute. In support of this contention, the Agency argues that the Arbitrator's award interferes with management's right under section 7106(a)(2)(B) to determine the personnel by which Agency operations will be conducted and to determine which employees will receive particular work assignments. The Agency further argues that the agreement provision interpreted by the Arbitrator is not a proper procedure under section 7106(b)(2) of the Statute since it is directly related to the exercise of management's right to assign inspectors to foreign fishing vessels.

B. Analysis and Conclusions

As relevant to the Agency's exception, section 7106(a)(2)(B) of the Statute reserves to management officials the authority to assign work. Encompassed within that right is the discretion to determine the particular employees to whom work will be assigned, Department of the Air Force, Carswell Air Force Base and American Federation of Government Employees, Local 1364, 19 FLRA No. 51, slip op. at 2 (1986), and the discretion to establish the particular qualifications and skills needed to perform the work to be done and to exercise judgment in determining whether a particular employee meets those qualifications. Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California, 9 FLRA 703, 706 (1982). However, the Authority has expressly held that when two or more employees are equally qualified and capable of performing the work involved, the selection of any one of those employees to perform the work would be consistent with management's exercise of its discretion in accordance with section 7106(a). In these circumstances the procedure by which employees previously judged by management to be equally qualified will be selected to perform the work is negotiable under section 7106(b)(2) of the Statute, and when negotiated by the parties is enforceable by grievance and arbitration. National Treasury Employees Union and U.S. Customs Service, 18 FLRA No. 94 (1985). In this case, management exercised its right under section 7106(a)(2)(B) of the Statute in determining that foreign fishing vessel observation work would be performed by fishery inspectors and in determining that both permanent and temporary inspectors were qualified to perform the work. Article 2 of the parties' agreement, as interpreted and applied by the Arbitrator, does not directly interfere with either determination in management's exercise of its right. As interpreted by the Arbitrator, Article 2 provides a procedure for the assignment of work to employees management has determined are qualified to perform the work, that is, that permanent inspectors be given first preference for all deployments, not just the initial deployments, by placing them ahead of temporary inspectors on the deployment roster when they return from an assignment. The Authority concludes that the Arbitrator simply enforced the procedure for deployments provided for in the parties' agreement. The Authority therefore concludes that the Agency has failed to establish that the Arbitrator's award is contrary to section 7106(a) of the Statute as alleged.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency contends that the Arbitrator's award is contrary to the Back Pay Act, 5 U.S.C § 5596. In support of this contention, the Agency argues that even if it committed an unjustified personnel action in its scheduling of inspectors for deployments, there was no evidence that the scheduling practice caused any permanent employees to lose pay, other than the statements of two permanent inspectors that their income was less in the year the practice was initiated than the previous year, and no evidence that but for the scheduling practice, the permanent employees would not have suffered a reduction in pay.

B. Analysis and Conclusions

In order for an award of backpay to be authorized by the Back Pay Act, the arbitrator must determine that the aggrieved employee was affected by an unjustified or unwarranted personnel action, that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials, and that but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, 21 FLRA No. 39 (1986). In this case, the Arbitrator determined that the Activity violated the parties' agreement by failing and refusing to give first preference for deployments and other duties to permanent inspectors. The Arbitrator also expressly found that management's scheduling practice adversely affected the income of permanent inspectors. The Arbitrator did not, however, specifically find that but for management's unwarranted action, the grievants would have been offered, would have accepted, would have worked, and would have been paid for any particular deployments. Compare Department of the Treasury, U.S. Customs Service and National Treasury Employees Union, 13 FLRA 386 (1983) (In which case the arbitrator determined that backpay was necessary to compensate bargaining-unit inspectors for overtime pay lost as a result of the activity's unwarranted assignment practice and directed that the parties determine the amounts due individual employees. The agency filed an exception contending that the award was contrary to the Back Pay Act because there was no finding that the practice had directly resulted in the loss of overtime pay of specific inspectors. In denying the exception, the Authority concluded that the findings required by the Back Pay Act had been made because the arbitrator specifically determined that in every disputed instance of overtime being assigned in violation of personnel policy and the parties' collective bargaining agreement, bargaining-unit inspectors were available to perform such work. The Authority explained that in view of this finding, there was no additional requirement to identify specific employees.) In this case, the Arbitrator did not determine that there were any specific instances where permanent inspectors were available for deployment and management failed to give them preference for the assignment in violation of the parties' agreement. Consequently, the Authority concludes that the Arbitrator's award of retroactive compensation for permanent inspectors is contrary to the Back Pay Act.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified by striking the order of backpay for permanent inspectors.

Issued, Washington, D.C., July 9, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 44

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3230, AFL-CIO

Union

and

Case No. 0-AR-1064

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Joe H. Henderson filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

On June 5, 1984, the grievant was issued a notice of decision suspending him for two days for failing to follow instructions of his supervisor. On June 21, 1984, the grievant filed with the Agency a formal complaint of discrimination because of race and reprisal. In the complaint the grievant alleged that he had been subjected to unwarranted disciplinary actions because he was black and as a reprisal for representing a former employee in a hearing on her complaint of discrimination. He claimed that his work had been subjected to greater scrutiny, that he had been unfairly counseled, and that he had been verbally harassed on a recurring basis. He also claimed that blacks, as a class, were subjected to disparate discipline and received fewer incentive awards. As corrective action, he sought written apologies from his supervisor and from the district director. On June 26, 1984, a grievance was filed on the grievant's behalf, and ultimately submitted to arbitration, contending that the grievant's suspension did not promote the efficiency of the service, but instead was motivated by personal animosity.

Before the Arbitrator, the Activity argued that the grievance was barred by section 7121(d) of the Statute*/ and the corresponding provision of the parties' collective bargaining agreement. Specifically, the Activity maintained that by filing the formal complaint of discrimination and mentioning "unwarranted disciplinary actions," the grievant had raised the matter of his suspension under the statutory equal employment opportunity (EEO) complaint procedures. Consequently, the Activity argued that the raising of the matter of his suspension subsequently under the negotiated grievance procedure was precluded by section 7121 and the agreement which permit an employee to raise such a matter under the statutory EEO procedures or the negotiated grievance procedure, but not under both. The Arbitrator however determined that the "matter" raised under the negotiated grievance procedure was not the same "matter" that the grievant had raised under the statutory EEO procedures. Accordingly, the Arbitrator ruled on this basis that the grievance was not precluded. On the merits the Arbitrator set aside the suspension finding that it violated the parties' collective bargaining agreement.

III. EXCEPTION

A. Contentions

As its exception the Agency contends that the award is contrary to section 7121(d) of the Statute. The Agency's position is that the grievance was precluded because the grievant raised the matter of his suspension under the statutory EEO procedures prior to the filing of the grievance.

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*/ Section 7121(d) pertinently provides:

> (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first.

IV. ANALYSIS AND CONCLUSIONS

Section 7121(d) effectively provides that when an employee affected by a prohibited personnel practice under section 2302(b)(1) has raised the matter under a statutory procedure, the matter subsequently may not be raised as a grievance. Thus, the elements of section 7121(d), both of which must attach in order for a grievance to be precluded, are: (1) the matter which is the subject of the grievance is the same matter which is the subject of the action initiated under the statutory procedure, and (2) such matter was earlier raised by the employee timely initiating an action under the statutory procedure.

In this case the Arbitrator ruled that the matter raised under the statutory EEO procedures was different from the matter of the grievant's suspension raised under the negotiated grievance procedure and that consequently the grievance was not precluded. The Authority concludes that the Agency fails to establish otherwise and that therefore no basis is provided for finding the award deficient. Specifically, the Authority finds contrary to the position of the Agency that with no express reference to the June 5th suspension and with no requested corrective action relating to that suspension in the grievant's EEO complaint, the matter which was the subject of the grievance is not the same as any of the matters which were the subject of the EEO complaint filed with the Agency.

V. DECISION

Accordingly, the Agency's exception is denied.

Issued, Washington, D.C., July 9, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 45

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
AGRICULTURAL EMPLOYEES

Union

and

Case No. O-NG-1028

U.S. DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION
SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of two Union proposals. The Union presented these two proposals in response to the issuance of an Agency regulation which set forth procedures regarding the payment of travel and per diem expenses to employee union representatives. Among other things, the Agency regulation, issued in reaction to the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) (BATF), declared unenforceable any labor agreements providing for the payment of travel and per diem expenses to union representatives.

II. Union Proposals

[Union Proposal 1]

> NAAE requests to bargain to the full extent allowed by law, rule and regulation on Personnel Letter No. 711-10, payment of travel and per diem expenses for employees representing labor organizations.

[Union Proposal 2]

> In regard to NAAE's request to bargain on Personnel Letter No. 711-10, NAAE's initial proposal is that PPQ honor the letter and intent of the alleged current collective bargaining agreement provisions concerning payment of travel and per diem expenses for employees representing labor organizations until a new collective bargaining agreement is negotiated.

III. Positions of the Parties

The Union states that Union Proposal 1 is intended to request bargaining to the extent legally permissible over what it contends was the Agency's proposed change in the past practice of paying travel and per diem expenses for employee union representatives. Union Proposal 2 seeks to continue the past practice, as embodied in a collective bargaining agreement negotiated prior to the BATF decision, with respect to payment of travel and per diem. The Union describes this practice as recognizing an automatic right to travel and per diem for employee union representatives attending "official meetings."

Prior to 1981 the Union's name was Federal Plant Quarantine Inspectors' National Association (FPQINA). The Agency asserts that the Union has never filed a petition to change the name on its unit recognition or certification to reflect the 1981 change. Because there is no certification showing the Union, as currently named, as exclusive representative of the bargaining unit involved, the Agency argues that the Union lacks standing to file the petition in this case.

As to the merits of the proposals, the Agency contends that both lack sufficient specificity to comply with the conditions for review of negotiability issues which are set forth in the Statute and the Authority's Rules and Regulations. It also argues that both proposals conflict with an Agency regulation for which a compelling need exists. As to Proposal 2, the Agency argues that the contract provisions which the proposal seeks to continue are inconsistent with the Supreme Court's decision in BATF and, therefore, unenforceable. It contends that they are also inconsistent with the Travel Expense Act, the Federal Travel Regulations and a Comptroller General's decision, 46 Comp. Gen. 21 (1966), which limits payment of travel and per diem to employee union representatives to those situations where it has been determined that their travel is in the primary interest of the Government. The Agency asserts that this necessary determination can only be made on a case by case basis and unilaterally by management. The Agency also contends that travel and per diem is a matter specifically provided for by Federal statute and, consequently, is not a condition of employment under the Statute.

The Union did not file a response to the Agency's statement of position.

IV. Procedural Issues

A. Legal Standing of the Union

As to the Agency's argument that the Union's name does not correspond to that listed on the documents relating to its recognition as exclusive representative for the bargaining unit involved, the Authority finds that such a question should more appropriately be raised through representation procedures rather than negotiability procedures. Therefore, in this decision the Authority decides only the negotiability issues raised under section 7105(a)(2)(D) and (E) of the Statute. If it wishes, the Agency may pursue whatever question it has about the Union's status as exclusive representative by filing an appropriate representation petition. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 at 306, n. 6 (1984).

B. Lack of Specificity

Union Proposal 1 is nothing more than a general request to bargain over the Agency's Personnel Letter which articulated its policy concerning payment of travel and per diem to employee union representatives. This proposal is not sufficiently specific and delimited and does not meet the conditions for review set forth in section 2424.1 of the Authority's Rules and Regulations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States

Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) (Union Proposals 2-4). However, the Authority would like to note that it has previously rejected the Agency's argument that its Personnel Letter is not subject to bargaining because it is an agency-wide regulation for which a compelling need exists. The arguments presented in this case are identical to those presented in American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986) petition for review filed sub nom. Department of Agriculture, Federal Grain Inspection Service v. FLRA, No. 86-1295 (D.C. Cir. May 21, 1986). The Agency's argument is rejected in this case for the same reasons that it was rejected in that case.

Union Proposal 2 is distinguishable from Union Proposal 1 in that it is sufficiently specific and delimited to meet the statutory and regulatory conditions for review. As contrasted with a general request for bargaining, it specifically proposes the continuation of previous practices as provided in the parties' agreement instead of the adoption of the new practices set forth in the Agency's Personnel Letter. The Agency's assertion that Union Proposal 2 is procedurally deficient is rejected. See National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 68 (1980), remanded as to other matters sub nom. Department of Defense, Department of the Army v. FLRA, 685 F.2d 641 (D.C. Cir. 1982).

V. Analysis and Conclusions as to Union Proposal 2

A. Conditions of Employment

In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986), the Authority rejected the same argument as that made here, namely, that a proposal relating to travel and per diem for employee union representatives did not concern conditions of employment. For the reasons expressed in that decision, the Authority finds that Union Proposal 2 does concern a condition of employment.

B. Inconsistent with Federal Law and Government-wide Rules and Regulations

As interpreted by the Comptroller General,[1] the Travel Expense Act and Federal Travel Regulations (FTRs) allow payment of otherwise proper travel and per diem expenses to employee union representatives when it has been determined that they have been incurred primarily in the interest of the Government. In Customs Service the Authority, noting that this determination was within the agency's discretion, found a proposal which effectively sought to negotiate over the exercise of that discretion within the duty to bargain. Contrary to the Agency's argument, the Authority finds that nothing in the Travel Expense Act, the FTRs or the Comptroller General's decision requires that this necessary determination be made only by management and only on a case by case basis. See Customs Service. However, the determination must be made in order for travel expenses to be paid from agency funds. Unlike the circumstances in Customs Service, where the union expressly stated that it was seeking to negotiate over this determination, there is nothing in the record of this case to show that Union Proposal 2 would allow for this determination to be made as a prerequisite to payment of any travel and per diem for travel relating to union activities. Rather, as described by the Union, this proposal appears to require payment of travel and per diem without regard to whether the statutory and regulatory requirements for payment, discussed in Customs Service, have been met.[2] Because the Authority cannot conclude that Union Proposal 2 would allow for compliance with the requirements of the Travel Expense Act and the FTRs, it finds the proposal is not consistent with Federal law and Government-wide rule or regulation.[3] It, therefore, is not within the duty to bargain.

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[1] 46 Comp. Gen. 21 (1966).

[2] As noted in Customs Service, for a travel and per diem proposal to be found negotiable, it must also allow for compliance with the various other requirements of the Travel Expense Act and FTRs as well as the primary interest of the Government determination.

[3] The FTRs are a Government-wide rule or regulation. Customs Service, n. 2.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulation, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C. July 9, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 46

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ADJUTANT GENERAL
PUBLICATIONS CENTER
ST. LOUIS, MISSOURI

Respondent

and Case No. 7-CA-40543

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2761

Charging Party/Union

DECISION AND ORDER

I. Statement of the Case

This case comes before the Authority as the result of exceptions being filed by the U.S. Army Adjutant General Publications Center, St. Louis, Missouri (Respondent) to the Administrative Law Judge's Decision in which she found that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute). The General Counsel filed an opposition to Respondent's exceptions. The issue in this case involves whether the Respondent violated section 7116(a)(1) and (5) of the Statute by changing unilaterally and without notice, the established procedures by which the American Federation of Government Employees, AFL-CIO, Local 2761 (AFGE) was allowed to utilize Respondent's photocopy machine and internal mail system.

II. Facts

AFGE is the exclusive representative of the employees of the Respondent. The AFGE and Respondent were parties to a collective bargaining agreement that was signed in 1981 and has since expired but whose established conditions of employment still remain in effect. From 1978 until May 30, 1984, four AFGE officers had access to the Respondent's copying facilities and internal mail system which they used on a daily basis for union business. The AFGE made use of these facilities pursuant to permission it had received from Respondent.

The record indicates that in the interest of security and pursuant to its management rights under section 7106(a)(1) of the Statute to determine the internal security practices of the agency, on May 30, 1984, the Respondent moved the photocopy machine and internal mail system into a room with restricted access. AFGE was informed on May 31, 1984, that in order to use this facility, it would have to submit its mail to the mail and file clerk who would place it in the internal mail system; further to obtain copies, AFGE must place the material in an incoming box where it would be handled as soon as possible by the mail and file clerk. AFGE was not given prior notification of Respondent's intent to make these changes nor was it given any chance to give input on these changes. On May 31, 1984, upon learning of the changes, AFGE requested the Respondent to bargain about such changes but the request was ignored.

III. Judge's Determination

The Judge concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the established procedures by which AFGE utilized the photocopy machine and internal mail system without providing adequate prior notice or an opportunity to bargain over the procedures and appropriate arrangements for employees adversely affected by the exercise of such management rights. Applying the criteria set forth in Federal Correctional Institution, 8 FLRA 604, 606 (1982), the Judge found that a status quo ante remedy would be appropriate and ordered the Respondent to rescind its changes and bargain concerning the implementation procedures and the impact upon adversely affected employees of any changes proposed in the procedures by which AFGE may use the photocopy machine and the internal mail system.

IV. Positions of the Parties

The Respondent does not take exception to the Judge's finding that it violated section 7116(a)(1) and (5) of the Statute but only to the Judge's ordered status quo ante remedy. The Respondent argues that the status quo ante remedy which orders it to rescind the changes would interfere with its internal security and severely disrupt its operations, thus impairing the efficiency and effectiveness of such operations.

The General Counsel argues, in its opposition, that the status quo ante remedy is appropriate noting that Respondent introduced no evidence to substantiate its assertions that a return to the status quo would be time consuming, expensive and cumbersome.

V. Analysis

In agreement with the Judge, and noting the absence of exceptions, the Authority finds that the Respondent violated section 7116(a)(1) and (5) of the Statute by changing the established procedures by which the AFGE utilized the photocopy machine and internal mail system, without providing AFGE with prior notice and an opportunity to bargain over the impact and implementation of the changes.

However in disagreement with the Judge, the Authority finds that the *status quo ante* order is not warranted. In this regard, the Authority notes that the Judge found and the parties agreed that the May 31, 1984 changes made by the Respondent were an exercise of its right to determine internal security practices under section 7106(a)(1) of the Statute.[1] In the Authority's view, where a management action is based on its right to determine internal security practices of the agency, greater weight must be given to the disruptive effect in applying the factors contained in *Federal Correctional Institution*, 8 FLRA 604 (1982). To require the Respondent to rescind the changes which involved Respondent's internal security would be by its very nature disruptive to Respondent's operation. Further, the Authority notes that Respondent's changes were not made willfully for the purpose of preventing AFGE from using the internal mail system and photocopy machine, but rather only changed the procedure by which AFGE could gain access to these facilities. Although it is true that the changes in procedures did make access more difficult, in the Authority's view, these problems would best be resolved through mutual give and take bargaining concerning the procedures to be observed in implementing the changes involved to the satisfaction of all parties.[2]

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[1] Section 7106(a)(1) of the Statute provides in pertinent part, that:

> § 7106. Management rights
>
> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> (1) to determine the . . . internal security practices of the agency[.]

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order only to the extent consistent with the above.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the U.S. Army Adjutant General, Publications Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Instituting changes in the established procedures by which the American Federation of Government Employees, AFL-CIO, Local 2761 uses official facilities, such as the photocopy machine and internal mail system, without giving adequate notice to Local 2761 and affording it the opportunity to negotiate concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees adversely affected by such changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

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[2] See Veterans Administration, Central Office, Washington, D.C. and Veterans Administration Regional Office, Cleveland, Ohio, 20 FLRA No. 27 (1985) and Department of the Treasury, U.S. Customs Service, 19 FLRA No. 128 (1985).

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 2761, the exclusive representative of its employees, of any intended changes in the procedures by which Local 2761 uses official facilities, such as the photocopy machine and the internal mail system, and upon request, negotiate concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees adversely affected by such changes.

(b) Post at its St. Louis, Missouri facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the U.S. Army Adjutant General Publications Center, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in the established procedures by which the American Federation of Government Employees, AFL-CIO, Local 2761 uses official facilities, such as the photocopy machine and internal mail system, without giving adequate notice to Local 2761 and affording it the opportunity to negotiate concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees adversely affected by such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 2761, the exclusive representative of our employees, of any intended changes in the procedures by which Local 2761 uses official facilities, such as the photocopy machine and the internal mail system, and upon request, negotiate concerning the procedures to be observed in implementing such changes and concerning appropriate arrangements for employees adversely affected by such changes.

____
(Agency or Activity)

Dated:________________ By:______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224, or FTS 8-564-5224.

22 FLRA No. 47

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
LOWRY AIR FORCE BASE
DENVER, COLORADO

Respondent

and Case No. 7-CA-1379

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1974

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because the General Counsel filed exceptions to the attached Decision of the Administrative Law Judge. The Respondent filed an opposition to the exceptions. The complaint alleged that the Respondent, Department of the Air Force, Lowry Air Force Base, Denver, Colorado (Lowry AFB), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to negotiate with the American Federation of Government Employees, AFL-CIO, Local 1974 (Union) over certain Union collective bargaining proposals regarding implementation of the Respondent's proposed Job Performance Appraisal System (JPAS), and by the Respondent's implementation of the system on October 1, 1981.

II. Facts

The Respondent, by letter dated March 31, 1981, notified each of its employees' exclusive representatives at Lowry AFB, including the Charging Party, that its JPAS must be implemented by October 1, and invited comments regarding the impact and implementation of the JPAS. By letter dated April 14, the Union requested negotiations on the implementation of the JPAS. The parties' first bargaining session occurred on or about June 11, when the Union submitted proposals. During several subsequent meetings, the Respondent declared Union proposals Section 2 A through K and Section 4.b.2 nonnegotiable.

On September 15, the Respondent notified the Union of its intention to implement all the language that the parties had agreed to during negotiations plus Respondent's last best offer on all items over which the parties did not agree.

III. Administrative Law Judge's Decision

The Judge found that because (1) the Union's proposals, considered as a whole, were incompatible or irreconcilable with Air Force Regulation (AFR) 40-452; (2) compelling need issues could not be adjudicated in an unfair labor practice proceeding; and (3) the Union did not first establish under section 7117(b) of the Statute that no compelling need exists for AFR 40-452, Respondent had no obligation to negotiate. Therefore, he recommended that the complaint be dismissed.

IV. Positions of the Parties

The General Counsel excepted to the Judge's findings that compelling need issues could not be adjudicated in an unfair labor practice proceeding; to the Judge's finding that the Union proposals were nonnegotiable; and to his conclusion that the complaint should be dismissed. The General Counsel also excepted to one of the Judge's credibility findings and to his ruling restricting participation at the hearing of one of the General Counsel's attorneys.

The Respondent, in its opposition to the General Counsel's exceptions, asserted that the Judge correctly found the Union proposals, considered as a whole, were incompatible or irreconcilable with AFR 40-452; that he correctly interpreted the Statute with regard to compelling need; that the Charging Party should have first pursued the compelling need issue under the provisions of section 7117(b) of the Statute; and that the Judge's credibility finding was supported by ample evidence. The Respondent also opposed the General Counsel's exception that the Judge erred in disqualifying one of the attorneys for the General Counsel at the hearing.

The Respondent further asserted that there is a compelling need for AFR 40-452 and that Union proposals 2.E-H and 4.b.2. are not otherwise negotiable as such proposals interfere with the Agency's rights to direct employees and assign work contrary to section 7106(a)(2)(A) and (B) of the Statute. The Respondent also argued that it cannot be found in violation of the Statute because it was required by law and Government-wide regulation to implement its JPAS on October 1.

V. Analysis

Both negotiability and compelling need arguments are raised by the parties as to the various proposals at issue. We will now address the negotiability of the proposals and where found negotiable, as appropriate, determine whether the proposals are incompatible or irreconcilable with AFR 40-452.

The Union proposals set out below prescribe and define rating levels of employee performance (Section 2.E. through 2.H., and Section 4.b.2.).

Section 2

For the purpose of this Article, the following definitions will apply:

> E. OUTSTANDING -- The employee has significantly exceeded the established performance standard. The rating is of exceptionally high quality. The employee's performance is beyond the requirements of the position.
>
> F. SATISFACTORY -- The employee has met the established standard. The employee requires an average degree of supervision and normal problems are satisfactorily solved. Assignments are complete and prepared as compared to the average employee.
>
> G. MARGINAL -- The employee has barely met the established standards while overall performance meets the requirements of the position. There are noted deficiencies with room for improvement and more direct supervision may have been required.
>
> H. UNACCEPTABLE -- The employee has failed to meet the established standards, one or more critical elements and has failed to complete assignments in an acceptable manner.

Section 4.b.2.

> 4.b.2. Overall Rating. The range of rating for overall performance shall be one of the four (4) ratings defined below [in actuality, defined in Union Proposal, Section 2.E. through 2.H., set forth above]. The overall rating shall be arrived at

> considering the total performance of the employee by using only the rating elements as prescribed in Section 4 B [sic] 1 above and the definitions of the ratings below. The ratings are:
>
> (a) Outstanding
> (b) Satisfactory
> (c) Marginal
> (d) Unacceptable
>
> A rating other than (b) satisfactory shall be documented in writing and made part of the employee's personnel file. Each employee will be given a copy of the rating and any written documentation.

The Authority finds that these proposals are outside the duty to bargain since they would directly interfere with management's right to direct employees and assign work pursuant to section 7106(a)(2)(A) and (B) of the Statute. These proposals have the same effect as the Union proposal in American Federation of State, County and Municipal Employees, AFL-CIO, Council 26 and U.S. Department of Justice, 13 FLRA 578 (1984). In that case, the Authority determined that the proposal at issue, which would have established the levels of performance in individual job elements necessary to the achievement of a given overall rating and would have established the number of rating levels in the evaluation of an employee's performance, was nonnegotiable as it would have interfered with the exercise of management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. In the instant case, it appears the Union proposals would similarly prescribe the levels of performance that management must accept in evaluating an employee's overall performance as well as establish the number of rating levels to evaluate such performance. Thus, Union Proposals 2.E. through 2.H., and 4.b.2., for the reasons more fully set forth in the Authority's Department of Justice decision, above, likewise would directly interfere with management's right to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute and are outside the duty to bargain.

Of the remaining Union proposals, 2.A. through 2.D., and 2.I. through 2.K., as set forth below, the Authority finds all negotiable except Section 2.B., the Union's definition of "critical element."

Section 2

For the purpose of this Article, the following definitions will apply:

A. A Job Element is any major component of an employee's job that has been included in the official position description which can be objectively measured.

B. A Critical Element is a job element which is of such importance that if it is not performed adequately, acceptable performance of the job as a whole is not possible.

C. A Non-Critical Element is a job element that is not critical, but is important enough to require measurements based on objective criteria.

D. A Performance Standard is a statement of objective requirements measuring various levels of achievement for critical and non-critical elements. All performance standards must be fair, equitable, objective, valid, reliable and job related.

I. WORK PLAN -- The written critical or non-critical elements identified in the major components of an employee's official position description and recorded on AF Form 1282.

J. PERFORMANCE APPRAISAL -- A comparison of an employee's accomplishment of assigned duties and responsibilities with management established performance standards.

K. TRAINING -- To improve performance and acquire new skills and to identify remedial or developmental training required for an employee to meet or exceed a specified performance standard.

The Respondent's essential argument that Union proposals Section 2.A., 2.B., 2.C., 2.D. and 2.I. are nonnegotiable derives from the Union's definition of "job element" in Section 2.A. which, it asserts, controls all the succeeding subsections, since the defined term, "job element," is incorporated in each of them. The Respondent contends the Union's definition of "job element" limits management to rating or appraising employee job performance on those job elements "included within the official position description" of the employee. It also contends that the Union's definition of "non-critical element" is incompatible with AFR 40-452 as it does not denote a consequence of failing to meet the described objective standard. The Authority finds Union proposal 2.A. and the related Union definitions negotiable since, taken together, they only subject management to the procedural requirement that the position description involved accurately reflect the work assigned.

These proposals are substantively identical to the proposal considered by the Authority in American Federation of Government Employees, AFL-CIO, Local 2849 and Office of Personnel Management, New York Regional Office, 7 FLRA 571 (1982) (Union Proposal 1). In that case, the Authority concluded that under the proposal at issue, the right of the agency to direct employees and to assign work through establishing elements and standards remained unaffected, subject to the procedural requirement that the position description involved would accurately reflect the work assigned. Therefore, for the reasons set forth in AFGE, Local 2849, above, the referenced Union proposals in this case would not interfere with management's right to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute and therefore are within the duty to bargain. Similarly, such proposals are not inconsistent, i.e., incompatible or irreconcilable, with AFR 40-452 as the proposals in this case would only require the Activity to procedurally amend an employee's position description to achieve consistency with the duties assigned. The proposals therefore would not prevent management from rating or appraising employee job performance contrary to or inconsistent with AFR 40-452. Moreover, although the Respondent is correct that the Union's definition of "non-critical element" does not denote a consequence of failing to meet the described objective standard, in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980) (Union Proposals 2 and 3), the Authority held that the proposal there was not inconsistent with the regulatory definition merely because it was silent with respect to remedial action. The Authority found that in all cases involving remedial action, where the proposal is silent, the regulation would govern.

Union proposal 2.B. defines the term "critical element." The Judge concluded, based on his resolution of credibility, that the Union's intent was that critical elements should be "grade controlling." Thus, the Authority finds the proposal to be outside the duty to bargain under section 7106(a)(2)(A) and (B) of the Statute. The Authority has held that a proposal which would require that the critical elements of a position be based only on grade controlling factors of a position is inconsistent with section 7106(a) of the Statute. *See American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois*, 7 FLRA 217 (1981) (Union Proposal 1) and *American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York*, 5 FLRA 70 (1981) (Union Proposal 1) *enforced sub nom. American Federation of Government Employees, AFL-CIO, Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2085 (1983).

The Judge found that a determination of compelling need for an agency regulation could not be adjudicated in an unfair labor practice proceeding. Subsequent to the Judge's decision herein, the Authority decided to the contrary. *See Defense Logistics Agency (Cameron Station, Virginia) et al.*, 12 FLRA 412 (1983), *affirmed sub nom. Defense Logistics Agency et al. v. FLRA*, 754 F.2d 1003 (D.C. Cir. 1985). *But see also United States Army Engineer Center v. FLRA*, 762 F.2d 409 (4th Cir. 1985), *rehearing denied*, *reversing U.S. Army Engineer Center and Fort Belvoir*, 13 FLRA 707 (1984). Based on the finding that the proposals in this case did not conflict with the regulation, the Authority finds it unnecessary to rule on whether a compelling need exists for AFR 40-452.

Finally, in the absence of exceptions to the Judge's determination that Union proposals Section 2.J., Performance Appraisal, and 2.K., Training, are negotiable, the Authority adopts that determination.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings.1/ The Authority has considered the

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1/ The General Counsel excepted to the Judge's ruling granting the Respondent's motion to restrict the

(Continued)

Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings,[2] conclusions, and recommended Order as consistent with this decision.

Thus, having concluded that Union proposals Section 2.A., 2.C., 2.D., 2.I., 2.J. and 2.K. are negotiable, and are not incompatible or irreconcilable with AFR 40-452, the Authority concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute when it implemented its performance appraisal system on October 1, 1981, without having negotiated with the Union over those proposals. See Veterans Administration, Veterans Administration Regional Office (Buffalo, New York), 10 FLRA 167 (1982). The Authority further finds that the Respondent's need to implement by that date did not negate its obligation to bargain with the Union over the negotiable proposals because, absent indications to the contrary, it is the Authority's view that there was sufficient time to bargain between the Union's submission of its proposals on June 11, 1981, and implementation on October 1, 1981.

(Continued)

participation during the hearing of one of the General Counsel's attorneys on the basis of an appearance of a conflict of interest. Without passing on whether there was either a real or apparent conflict of interest, the Authority affirms the Judge's ruling as there has been no showing of prejudice caused by the ruling. In this regard, the Authority notes particularly that the attorney in question was permitted to remain at the hearing throughout the proceeding and to actively assist the other attorney for the General Counsel in presenting the General Counsel's case.

[2] The General Counsel excepted to one of the Judge's credibility findings. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge has had the advantage of observing the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all relevant evidence demonstrates such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility finding.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Air Force, Lowry Air Force Base, Denver, Colorado, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the American Federation of Government Employees, AFL-CIO, Local 1974, its employees' exclusive representative, over negotiable proposals found not to be inconsistent with AFR 40-452 regarding the Activity's Job Performance Appraisal System.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of any rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, Local 1974, the employees' exclusive representative, meet and negotiate with such representative concerning any proposal found to be negotiable regarding the Activity's Job Performance Appraisal System.

(b) Post at all of its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Such forms shall be signed by the Commander, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the allegations contained in the complaint in Case No. 7-CA-1379 found not to have been sustained be, and hereby are, dismissed.

Issued, Washington, D.C., July 9, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 47]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to negotiate with the American Federation of Government Employees, AFL-CIO, Local 1974, our employees' exclusive representative, over negotiable proposals found not to be inconsistent with AFR 40-452 regarding the Activity's Job Performance Appraisal System.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of any rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, Local 1974, our employees' exclusive representative, meet and negotiate with such representative concerning any proposal found to be negotiable regarding the Activity's Job Performance Appraisal System.

____
(Activity)

Dated:__________________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

22 FLRA No. 48

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOUTHWESTERN POWER ADMINISTRATION

Activity

and Case No. 0-AR-1062

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1002

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator John P. Owen filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming that the performance by a general foreman of switching duties, which is work regularly performed by bargaining-unit employees, violated Article XXIII, Section 23.1 of the parties' collective bargaining agreement. Article XXIII, Section 23.1 pertinently provided that a general foreman shall not normally perform bargaining-unit work except in situations such as checking the work of others, training of employees, and when life or property is in danger and there are no other qualified persons available to do the work. The Arbitrator determined that the performance by the general foreman of the switching duties in dispute was clearly prohibited by the parties' agreement because none of the exceptions provided applied. Consequently, he ruled that the Activity had violated the agreement. In so ruling he rejected the Activity's argument that such a determination was inconsistent with management's right to assign work in accordance with section 7106(a)(2)(B) of the Statute. He concluded in this respect that although the Statute reserves to management the right to assign work, "it does not prevent an Agency from voluntarily relinquishing that right under negotiated conditions." Accordingly, as his award, the Arbitrator sustained the grievance and directed that the Activity refrain from assigning bargaining-unit work to general foremen and nonbargaining-unit personnel except as provided in Article XXIII, Section 23.1 of the collective bargaining agreement.

III. EXCEPTION

In its exception the Activity contends that the award is deficient because the Arbitrator was not authorized to order the Activity to refrain from assigning bargaining-unit work to general foremen and other nonbargaining-unit personnel.

IV. ANALYSIS AND CONCLUSIONS

Contrary to the conclusion of the Arbitrator, the Authority has repeatedly indicated that management rights under section 7106(a) cannot be waived or relinquished through collective bargaining. See Professional Air Traffic Controllers Organization and Federal Aviation Administration, 5 FLRA 763, 768 (1981). The Authority has consistently emphasized that the plain language of section 7106 provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70, 79 (1981), aff'd sub nom., AFGE Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied 461 U.S. 926 (1983). Thus, the Authority has specifically held that no arbitration award may interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under that section. 172d Infantry Brigade, Fort Richardson, Alaska and American Federation of Government Employees, Locals 1712, 1834 and 1949, 19 FLRA No. 71 (1985). Section 7106(a)(2)(B) of the Statute, in particular, reserves to management officials the authority to assign work. In American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals and Department of Agriculture, Food Safety and Quality Service, Washington, D.C., 9 FLRA 663 (1982), the Authority considered a proposal (proposal 1) which provided, in part, that management could not assign duties normally performed by employees in the bargaining unit to supervisors except in specific circumstances. The Authority found that this disputed portion of the proposal conflicted with management's right to assign work because it would improperly limit management's discretion to determine which personnel will receive particular work assignments.

In this case the Arbitrator directed that the Activity refrain from assigning bargaining-unit work to general foremen and other nonbargaining-unit personnel on the basis of his determination that the collective bargaining agreement prohibited such assignments. The Authority concludes that the Arbitrator's award is therefore deficient as contrary to section 7106(a)(2)(B) by interpreting and enforcing the collective bargaining agreement so as to improperly interfere with management's discretion to determine which personnel will receive particular work assignments. See 172d Infantry Brigade; Department of Transportation, Federal Railroad Administration, Alaska Railroad and United Transportation Union, 16 FLRA 582 (1984).

V. DECISION

For these reasons, the award is modified by striking the direction to the Activity pertaining to the assignment of bargaining-unit work.

Issued, Washington, D.C., July 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 49

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 32, AFL-CIO

Union

and

Case No. O-NG-914
14 FLRA 754

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question involved is whether "competitive areas" within an agency for reduction-in-force (RIF) purposes are within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

In a previous decision in this case, American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984) (Local 32), the Authority held a Union proposal defining the competitive area to be used for RIF to be outside the duty to bargain. On review, the D.C. Circuit found an apparent inconsistency between this Authority finding and the Authority's finding in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (ACT) that a proposed competitive area was within the duty to bargain. It remanded this case and another case with the same holding, National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 75 (1984), and directed the Authority to address and resolve the apparent conflict between its Local

32 and ACT decisions. Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985).

III. Considerations of D.C. Circuit in Remanding Case

The D.C. Circuit highlighted four considerations in remanding this case to the Authority to resolve the apparent conflict between these two decisions:

A. The Authority had previously adhered to the principle that a proposal may be a mandatory subject of bargaining despite its effect on nonbargaining unit employees;

B. the Authority's decisions in these cases appear to be at odds with a familiar principle of private sector labor law that a proposal concerning terms and conditions of employment is within the duty to bargain despite its effects on third parties;

C. the agency involved in this case had previously bargained a similar provision defining competitive area; and

D. the Authority's attempt to distinguish the two cases was incomplete because it did not and could not state that the ACT proposal had no effect on nonbargaining unit employees.

IV. Analysis

A. The Authority's Analysis of Proposals Which Affect Employees Outside the Bargaining Unit

In the Federal as in the private sector, the statutory obligation to negotiate extends only to conditions of employment within the bargaining unit. Matters involving individuals outside the employment relationship normally are excluded.1/

In the Federal sector, laws and regulations sometimes require uniform treatment of employees based upon considerations such as fairness, equity and effective,

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1/ See sections 7103(a)(12) and 7114(a)(1) of the Statute. For discussion of the private sector approach, see Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

efficient administration of Government. As a result, some conditions of employment of bargaining unit employees may be inseparable from those of nonunit employees. The Authority has, in a number of instances, been presented with bargaining proposals regarding the conditions of employment of unit employees which also affect employees outside the unit. Proposals relating to RIF frequently have this result because controlling Government-wide regulations mandate uniform procedures. In such circumstances, the Authority has attempted to strike an appropriate balance between the right of the union to negotiate over the conditions of employment of bargaining unit employees and the right of the agency to set the conditions of employment of nonbargaining unit employees; indeed, the requirement that they be set consistent with Government-wide rules and regulations. This approach is consistent with the analysis and discussion by the Supreme Court in its Allied Chemical decision where it noted that, "other considerations [besides the impact on the interests of bargaining unit employees] such as the effect on the employer's freedom to conduct its business, may be equally important." 404 U.S. 157, 180 n. 19 (1971). On the one hand, it is the Authority's view that the scope of bargaining would be unduly restricted by a rule limiting the bargaining obligation to negotiable proposals which have absolutely no effect on employees outside the bargaining unit. Therefore, it has not adopted such a rule. On the other hand, a rule requiring negotiations on proposals which actually establish conditions of employment of nonunit employees goes beyond the requirements of the Statute and might unduly impede the Agency in functioning effectively and efficiently. To balance these conflicting rights, the Authority has distinguished (1) permissively negotiable proposals which would affirmatively establish or define a condition of employment for nonunit employees or positions[2] from (2) mandatorily negotiable proposals which would affect conditions of employment of nonunit employees or positions only to a lesser degree.[3]

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[2] See, for example, Service Employees' International Union, AFL-CIO, Local 556 and Department of the Army, Office of the Adjutant General, Hale Koa Hotel, Honolulu, Hawaii, 9 FLRA 687 (1982) and International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA 212 (1982).

[3] See, for example, National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275 (1981) (Proposal 2).

B. Departure from Private Sector Approach

The Authority is of course aware that the approach it has taken in administering the Statute differs somewhat from that adopted by the National Labor Relations Board. The Board focuses on whether a matter "vitally affects" terms and conditions of employment of unit employees in resolving questions concerning the scope of the duty to bargain in the private sector. See note 1, *supra*. Congress, however, did not intend to require that Federal sector labor relations be a mirror image of the private sector scheme. There is no indication in either the Statute itself or its legislative history that Congress intended the substantive case precedent of the National Labor Relations Board to apply in the Federal sector. There is indication, rather, that Congress perceived a need to accommodate circumstances present in Government which are different from those in the private sector. In section 7101, Congress stated its purpose in passing the Statute as "to establish procedures which are designed to meet the special needs of Government." Furthermore, that section mandates that the Statute be "interpreted in a manner consistent with the requirements of an effective and efficient Government."

Additionally, the Statute's antecedents are in the Executive Order program rather than the National Labor Relations Act. This was emphasized by Congress in passing section 7135(b) of the Statute which expressly provides for the continuation of policies, regulations, procedures and decisions which emanated under the Executive Order program, unless they are superseded by the Statute or by regulations or decisions issued under the Statute. The Authority's approach to dealing with proposals which affect employees outside the bargaining unit is congruent with previous Federal sector practice as contrasted with private sector practice.4/

4/ *See, for example*, *Texas ANG Council of Locals, AFGE and State of Texas National Guard*, 4 FLRC 154 (1976), in which a proposal concerning the filling of threshold supervisory positions was found to be outside the duty to bargain and *Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md.*, 1 FLRC 526, 532-33 (1973), where a proposal which involved a procedure within which unit employees competed with outside applicants for jobs was found to be negotiable.

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Under the Statute, in determining the negotiability of proposals which affect the conditions of employment of unit as well as non-unit employees, the Authority will balance the right of the union to negotiate over the conditions of employment of bargaining unit employees and the right of the agency to set the conditions of employment of nonbargaining unit employees. In weighing the parties' respective rights, we will determine whether the nature and degree of the impact of the proposal is so intrinsically related to the working conditions of nonunit employees so as to invade the purview of other unit representatives or require the agency to act in a way that will have a significant effect on the rights of employees not represented by the union offering the disputed proposal. In such a case, management is not required to bargain. However, where the proposal has only a limited or indirect effect on the interests of employees outside the bargaining unit it will be subject to appropriate negotiations.

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With respect to cases concerning competitive areas, no negotiability decision addressed whether competitive areas were within the duty to bargain. Two ULP decisions addressed issues relating to competitive areas, Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona and Local 1487, NFFE, Blythe, California, 4 FLRC 486 (1976) and Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey and Local 476, NFFE, 5 FLRC 579 (1977). Neither decision specifically addressed whether competitive areas were within the duty to bargain where an agency raised issues as to the effect on nonunit employees. The second case stated in a footnote that it was undisputed that establishment of competitive areas was negotiable. However, it was found that an agency had no obligation to bargain with a NFFE local over changes in competitive areas where the group of employees involved in the change were represented by a different labor organization, although NFFE represented certain employees assigned to and remaining in the affected competitive area. In that case, the bargaining obligations were determined by balancing among the respective interests of the agency, the different groups of employees, and the labor organizations which represent them; defining the obligation to bargain in this manner circumvented practical difficulties which would arise if the agency were required to negotiate separately and independently with each labor organization over the same change.

This approach is consistent with earlier Federal sector practice as well as with our considerations in previous Authority precedent and differs from private sector considerations inasmuch as the Authority will look to the effect of the proposal on nonunit employees and will not limit our examination to the interest of bargaining unit members.

C. Previous Bargaining by the Agency on a Similar Proposal

The Authority has never held that negotiating over competitive areas is prohibited. However, it has held that an agency is not obligated to bargain over proposals which directly determine conditions of employment of nonbargaining unit employees even though it can bargain over these matters if it chooses to do so. Therefore, under Authority precedent any agency could properly bargain over the definition of a competitive area which would include nonunit employees, as the Agency here apparently did in the past. Nonetheless, in the Federal as in the private sector, previous bargaining over a permissive matter would not prevent an agency negotiating a new agreement from changing its position and refusing to bargain over an elective subject. Where an agency, as here, raises the asserted issue as a bar to negotiations, the Authority will not order the parties to bargain because of their prior bargaining history.

D. The Authority's Holdings Concerning Competitive Areas in the Local 32 and ACT Cases

For the employees involved in the Local 32 case, as for most Federal employees, a RIF must be carried out in accordance with regulations prescribed by the Office of Personnel Management (OPM) pursuant to 5 U.S.C. §3502. These regulations establish a comprehensive system for determining which employees will be retained in the positions which remain in an agency undergoing a RIF. Within that system "competitive area" constitutes the basic geographic and organizational boundaries within which employees will compete for retention. The OPM regulations do not allow competitive area to be defined in terms of types of positions, as, for example, bargaining unit positions. Consequently, as a practical matter, most competitive areas which are established under OPM regulations will include both bargaining unit and nonunit positions and employees.[5]

In Local 32, the proposal would have defined the competitive area for RIF as the Washington Metropolitan Area. The Agency asserted and the Union did not dispute that the proposed competitive area would include nonbargaining unit employees. The Authority considered whether the nature and degree of the impact of the proposal was so intrinsically related to the working conditions of nonunit employees so as to directly determine and prescribe their conditions of employment. Our result was dictated by the fact that the disputed proposal, by defining the competitive area as the Washington Metropolitan Area, would undoubtedly include unit and nonunit employees. Acceptance of the Union's designation of competitive area would allow it to determine with whom nonunit employees would compete for retention rights in the event of a RIF and further allow it to prescribe the area in which the competition would take place. Since the Authority determined that under the Statute an agency has no duty to bargain with a union to establish the conditions of employment of nonbargaining unit employees, it held the proposed competitive area to be outside the Agency's obligation to bargain.

In its decision in ACT, in contrast, the Authority found the proposed competitive area to be within the Agency's duty to bargain. This finding was based upon circumstances viewed as being materially distinguishable from those present in the Local 32 case. The proposal in ACT essentially defined a competitive area for RIF limited to the bargaining unit. As previously mentioned, such a competitive area would not be consistent with the OPM regulations applicable in the Local 32 case. However, in the ACT case, as distinguished from Local 32, the bargaining unit consists of National Guard Technicians who are not subject to those OPM regulations. See 5 CFR 351.202(c)(5) (1986).

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[5] Depending on organizational and geographic circumstances, a given competitive area could include three general categories of "nonunit" employees: (1) those ineligible for inclusion in bargaining units, such as supervisors, management officials, and employees engaged in Federal personnel work in other than a purely clerical capacity; (2) those employees who are eligible but unrepresented and (3) those employees of the same agency who are in other bargaining units represented by the same or different unions.

The proposal in *ACT* for that reason would have directly determined or defined the competitive area only for bargaining unit positions and employees. It also undeniably would have affected or influenced in a limited, indirect way the potential scope of any competitive area for nonbargaining unit employees by excluding them from the area negotiated for the bargaining unit. However, the proposal would not otherwise limit or prescribe a competitive area for those nonunit employees. Hence, it did not define or directly determine a condition of their employment.

In summary, the proposals in both the *ACT* and *Local 32* cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in *ACT* only affected conditions of employment of nonunit employees indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in *Local 32*, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.

Consistent with this analysis, in all cases since *Local 32* dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

V. Conclusion

Because the proposal in *Local 32* would directly determine conditions of employment for employees outside the bargaining unit, it is nonnegotiable.

Issued, Washington, D.C., July 9, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[MOTION FOR RECONSIDERATION
OF 21 FLRA No. 47]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

and

Case No. 2-CA-40021
(21 FLRA No. 47)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1917, AFL-CIO

Charging Party

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

I. Statement of the Case

This matter is before the Authority based on the Respondent's Motion for Reconsideration in the above-cited case, filed in accordance with section 2429.17 of the Authority's Rules and Regulations.*/ The Respondent also requested a stay of the Authority's decision. An opposition to the motion was filed by the General Counsel.

II. Background

On April 21, 1986, the Authority issued its decision in Immigration and Naturalization Service, 21 FLRA No. 47, in which it was determined that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally discontinuing the issuance of blackjacks to detention officers without first notifying the Charging Party and affording it an opportunity to bargain over the procedures to be observed in implementing such change as well as on appropriate arrangements for employees adversely affected by such change. To remedy the unfair labor practice, the Authority ordered the Respondent, in part, to restore the practice of issuing blackjacks.

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*/ Section 2429.17 of the Authority's Rules and Regulations provides, in part, that a "party . . . who can establish . . . extraordinary circumstances . . . may move for reconsideration" of an Authority decision.

III. The Motion for Reconsideration

The Respondent bases its motion for reconsideration on four points: 1) the Authority relied on a fact which was not found by the Administrative Law Judge; 2) the failure of the Charging Party to submit impact and implementation proposals, as so requested by the Respondent following issuance of the Judge's remedial order has caused the Charging Party to forfeit a *status quo ante* remedy; 3) the Authority acted inconsistently in refusing to consider the propriety of issuing blackjacks to detention officers; and 4) the Authority improperly failed to consider the effect of a subsequently negotiated agreement on the *status quo ante* remedy.

The General Counsel argues that the Respondent's motion fails to establish extraordinary circumstances warranting reconsideration. As to the first point because the Authority's findings are well established by the record; as to the second point because it would have been premature for the Charging Party to have submitted proposals; and, as to the remaining points because they raise nothing not already considered by the Authority.

IV. Analysis on Reconsideration

In agreement with the General Counsel, the Authority finds that no extraordinary circumstances have been established which warrant reconsideration of the Authority's decision. More particularly with regard to the Respondent's assertion that the Authority relied on a fact not found by the Judge, the Authority, as a matter of course, relies on the entire record before it in exercising its statutory authority to resolve allegations of unfair labor practices. In this case, there was uncontroverted record testimony that detention officers retained possession of their previously issued blackjacks. It was upon such record evidence that the Authority relied in making its statement; we did not attribute that statement to the Judge, nor did we make any finding with regard to the continued *use* of blackjacks.

The Respondent next argues that the failure of the Charging Party to submit impact and implementation proposals after the Judge so ordered as a part of his recommended remedial order essentially constituted a waiver or forfeiture of any right to a status quo ante remedy. In its decision, the Authority found that the Respondent had failed to fulfill its statutory obligation of notifying the Charging Party and affording it an opportunity to bargain with respect to the change in the practice of issuing blackjacks. The status quo ante remedy was warranted based on this unlawful conduct. The Authority does not view the Respondent's solicitation of bargaining proposals after the Judge issued his decision, and while the Authority had exceptions to his decision before it, as a basis on which to conclude that a party has forfeited its right to a status quo ante remedy or that such a remedy is not warranted in this case. Rather, the Respondent is obligated to comply with the Authority's decision and its remedial order.

The Respondent in its third point asserts that the Authority's failure to address the propriety of the blackjack practice somehow should preclude it from granting a status quo ante remedy. On the contrary, the Authority was simply making the point that it would not pass judgment on or decide whether blackjacks should have been issued in the first place. However, the Authority did in fact consider the effect of such a remedy on the effectiveness and efficiency of the Respondent's operations. Thus, the Authority found that there was no evidence presented to indicate that reinstatement of the pre-existing practice would be disruptive of such operation. Additionally, the Respondent is now attempting to reintroduce the terms of a settlement agreement rendered in a separate proceeding. This matter, which the Respondent sought to introduce at an earlier stage of this unfair labor practice proceeding was not permitted in evidence by the Judge. Such ruling was not excepted to by the Respondent in accordance with the Authority's Rules and Regulations, and was affirmed by the Authority. The Respondent's present attempt to argue the applicability of the settlement agreement to the facts of this case is therefore not appropriate.

Finally, the Respondent asserts that the Authority should have considered the effect of a subsequently negotiated agreement on the status quo ante remedy. The Judge had rejected the Respondent's attempts to introduce evidence concerning such negotiations subsequent to the hearing in this matter. Again, no exception to that ruling, which was adopted by the Authority, was filed by the Respondent, and its attempt to attack that ruling by this motion is not appropriate.

V. Conclusion

After carefully considering the Respondent's Motion for Reconsideration and accompanying stay request, we find that no extraordinary circumstances have been established under section 2429.17 of the Authority's Rules and Regulations warranting a reconsideraion of the Authority's Decision and Order. Accordingly, we shall order that the motion be denied.

ORDER

IT IS ORDERED that the Motion for Reconsideration, including its accompanying request for a stay, of the Authority's Decision and Order in Immigration and Naturalization Service, 21 FLRA No. 47 (1986) be, and it hereby is, denied.

Issued, Washington, D.C., July 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
WASHINGTON, D.C. AND INTERNAL
REVENUE SERVICE, NEWARK
DISTRICT OFFICE

Respondent

and

Case No. 2-CA-50074

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 60

Charging Party

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority pursuant to the Respondent's request for reconsideration of the Authority's Order of April 24, 1986, adopting, without precedential significance, pursuant to section 2423.29(a) of the Authority's Rules and Regulations, as amended (5 CFR § 2423.29(a) (1985)), the findings, conclusions, and recommendations in the Decision and Order of the Administrative Law Judge. The Authority's Order was based on its finding that no exceptions to the Decision and Order of the Administrative Law Judge in the subject case were filed with the Authority within the time limit for such filings. Exceptions to the Judge's Decision were due on or before April 16, 1986. However, the Respondent's exceptions were not filed until April 17, 1986.

In its request for reconsideration, the Respondent has asked for a waiver of the expired time limit for filing exceptions. In support of its request for waiver, the Respondent contends that one of its secretaries was instructed to call the Authority to determine the last possible date in which exceptions could be postmarked and still be timely. The secretary inadvertently called the Office of the Administrative Law Judges, wherein she was told by an employee in that office that the document could be postmarked April 16, 1986, and still be considered timely. The Authority employee acknowledges such a communication, but states that the Respondent caller described having to file a document with the Administrative Law Judge. It is the practice of the Judges to explain on the record that the due date for briefs means that they must be postmarked by the due date.

Sections 2429.17 and 2429.23(b) of the Rules and Regulations provide that in "extraordinary circumstances" the Authority may grant a request for reconsideration or waive an expired time limit, respectively. However, the reasons given by the Respondent for the Authority to take such actions do not constitute "extraordinary circumstances" within the meaning of the Authority's rules of procedure.

As was noted in the April 24, 1986 Order, the Administrative Law Judge's "Notice of Transmittal of Decision" stated that:

> "Any such exceptions must be filed on or before April 16, 1986, and addressed to:
>
> Federal Labor Relations Authority
> 500 C Street, SW., Docket Room 213
> Washington, D.C. 20424"

Moreover, the meaning of the Judge's instruction that, "Any such exceptions must be filed on or before April 16, 1986," is explained by section 2429.21 of the Authority's Rules and Regulations, which provides in pertinent part:

> When this subchapter requires the filing of any paper, such document must be received by the Authority . . . before the close of business on the last day of the time limit, if any, for such filing . . . .

While the inadvertent communication mix-up is regrettable, based on all the facts and circumstances, noting particularly that the due date for filing the exceptions was clear from the Administrative Law Judge's "Notice of Transmittal of Decision", and from the controlling Rules and Regulations of the Authority, the Authority concludes that the Respondent has failed to establish the existence of "extraordinary circumstances" warranting reconsideration of the Authority's Order dated April 24, 1986. Accordingly, the Respondent's request for reconsideration is hereby denied.

Issued, Washington, D.C., July 9, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 9]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL GSA
COUNCIL

Union

and

Case No. O-NG-1202
21 FLRA No. 9

GENERAL SERVICES ADMINISTRATION

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

This case is before the Authority on a motion for reconsideration filed by the American Federation of Government Employees on March 6, 1986, seeking reconsideration of the Authority's Decision and Order of February 24, 1986, in the above-entitled matter. In that case, the Authority held that the Union's petition for review was untimely filed and dismissed the petition. A petition for review must be filed within 15 days from the date of service on the Union of an Agency allegation of nonnegotiability. Under established precedent, the Authority found that the parties' Memorandum of Understanding (MOU) of June 25, 1985, amounted to a written request by the Union for an allegation and a simultaneous written response by the Agency alleging the matter proposed to be nonnegotiable. Thus, under section 7117(c) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the Authority determined that the petition for review had to be filed no later than the close of business on July 10, 1985, fifteen days after the June 25, 1985 Memorandum of Understanding. It was not filed until October 28, 1985. Although the Union contended that its letter to the Agency of October 3, 1985, constituted a different request for a negotiability determination on a "modified" proposal which was presented during subsequent negotiations, such a contention, the Authority held, could not be sustained because the record clearly indicated that the proposal set forth in the October 3, 1985, request was merely a restatement of the original proposal which the Agency had declared nonnegotiable in the June 25, 1985, Memorandum of Understanding. In support of its motion for reconsideration, the Union argues that the Authority misinterpreted the parties' Memorandum of Understanding as a simultaneous Union request for an allegation and Agency response alleging the proposed matter nonnegotiable and that the proper course for the Authority was to have the matter submitted by the parties to arbitration for resolution.

Section 2429.17 of the Authority's Rules and Regulations provides, in part, that a party "who can establish . . . extraordinary circumstances . . . may move for reconsideration" of a decision of the Authority. The Authority concludes that the Union has not met this requirement. The arguments made in support of the motion for reconsideration simply state the Union's disagreement with the Authority's determination that the parties' MOU amounted to a written request by the Union for an allegation and a simultaneous written response by the Agency alleging the matter proposed to be nonnegotiable and that the petition was untimely because it was not filed within 15 days of the date of the MOU as required by the Authority's Rules and Regulations. Consequently, the Authority concludes that the Union has failed to establish the existence of extraordinary circumstances. Accordingly, IT IS ORDERED that the motion for reconsideration be, and it hereby is, denied.

Issued, Washington, D.C., July 9, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 75]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, ROSEBURG, OREGON

Activity

and

Case No. 0-AR-1133
(21 FLRA No. 75)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1042

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

The case is before the Authority on a request for reconsideration filed by the Union on May 13, 1986, seeking reconsideration of the Authority's Order of April 30, 1986, dismissing the Union's exceptions (21 FLRA No. 75 (1986)). For the reasons set forth below, the Union's request must be denied.

The Authority dismissed the Union's exceptions to the arbitrator's award on the basis that the exceptions were untimely. The Authority found that the arbitrator's award was dated March 18, 1986, and pursuant to section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions filed on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Authority's Rules and Regulations, which are also applicable to computation of time limit here involved, the exceptions had to be filed in the National Office of the Authority not later than the close of business on April 21, 1986. However, the exceptions were not filed with the Authority at its National Office until April 22, 1986. The Union had mailed the exceptions on April 14, 1986, to the Authority's San Francisco Regional Office. The San Francisco Regional Office received the exceptions on April 17, 1986, and forwarded them on April 18, 1986. However, they were not received by the Authority's National Office until April 22, 1986. Therefore, the exceptions were untimely filed.

---

[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

In its request for reconsideration, the Union contends that it spoke with two attorneys in the Authority's San Francisco Regional Office concerning the procedures for filing exceptions to an arbitration award and that during these conversations, the attorneys failed to inform the Union that it must file its exceptions with the National Office of the Authority. In addition, the Union argues that it "is totally unfair to dismiss this case on such a minor technicality."

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

The Union's argument does not demonstrate the existence of extraordinary circumstances within the meaning of section 2429.17 of the Authority's Rules and Regulations. Under sections 2429.21 and 2429.24 of the Rules and Regulations, when a document is required to be filed with the Authority, the document must be received in the National Office of the Authority before the close of business on the last day of the prescribed time limit. See Bremerton Metal Trades Council, United Association, Local 631 and Puget Sound Naval Shipyard, 9 FLRA 1094 (1982); request for reconsideration denied June 24, 1982. While the Union did mail the exceptions on April 14, 1986, presumably in sufficient time to be timely received if properly addressed, exceptions to an arbitrator's award cannot be filed at a Regional Office. Since the inception of the Authority in 1979, applicable regulations have required that exceptions to arbitration awards filed with the Authority be filed at the National Office. *See* *The Panama Canal Commission and Maritime Metal Trades Council, AFL-CIO*, 21 FLRA No. 38, n.5 (1986); *request for reconsideration* denied April 16, 1986.

Accordingly, since the Union has failed to establish the existence of extraordinary circumstances warranting reconsideration of the Authority's decision, the Union's Request is hereby denied.

For the Authority.

Issued, Washington, D.C., July 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, DALLAS, TEXAS

Activity

and

Case No. 0-AR-1140

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2427

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edmund W. Schedler, Jr. filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 9, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
FIELD ASSESSMENT OFFICE

Agency

and

Case No. 0-AR-1150

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert T. Simmelkjaer filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 9, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Authority

Washington, D.C. 20424

NUMBER 377 REPORT OF CASE DECISIONS July 23, 1986

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UNFAIR LABOR PRACTICE CASES

22 FLRA No. 53 (July 10, 1986)

Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. 5-CA-30334

22 FLRA No. 56 (July 11, 1986)

Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, Case No. 5-CA-30322

NEGOTIABILITY CASES

22 FLRA No. 50 (July 10, 1986)

National Labor Relations Board Union and National Labor Relations Board, The Board and the General Counsel, Case No. 0-NG-1119

22 FLRA No. 51 (July 10, 1986)

National Weather Service Employees Organization, MEBA, AFL-CIO and Department of Commerce, National Weather Service, Case No. 0-NG-1116

22 FLRA No. 52 (July 10, 1986)

American Federation of Government Employees, AFL-CIO, Meat Grading Council of Locals and Department of Agriculture, Meat Grading and Certification Branch, Case No. 0-NG-867

22 FLRA No. 54 (July 11, 1986)

National Federation of Federal Employees, Local 29 and Kansas City District, Corps of Engineers, Kansas City, Missouri, Case No. 0-NG-877

Y 3.F 31/21-3:

22 FLRA No. 55 (July 11, 1986)

National Labor Relations Board Union and National Labor Relations Board, Case No. 0-NG-1112

22 FLRA No. 57 (July 11, 1986)

National Federation of Federal Employees and Haskell Indian Junior College, Bureau of Indian Affairs, Department of the Interior, Lawrence, Kansas, Case No. 0-NG-1113

Federal
Labor Relations
Authority

22 FLRA No. 50

NLRBU and *NLRB, The Board and Office of the General Counsel*, Case No. 0-NG-1119
(Decided July 10, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
  Conditions for Review
    Inconsistent with Government-wide Rule or Regulation
      46 Comp. Gen. 21 (1966)
Travel Expense Act [5 U.S.C. §§ 5701 *et seq.*]

STATUTE

7103(a)(14)
7105(a)(2)(E)

DIGEST NOTES

A proposal concerning travel and per diem is nonnegotiable. However, the agency's argument that the proposal does not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986) *appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. Mar. 27, 1986). Nevertheless, as the union specified that this proposal presupposes the negotiability of travel and per diem expenses without regard to whether certain of the statutory and regulatory requirements for payment, discussed in *Customs Service*, have been met, the Authority found the proposal to be inconsistent with Federal law and Government-wide regulations. (Alternative 1)

A proposal concerning travel and per diem is within the duty to bargain as it is within the agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. The Authority noted the agency did not cite any legal or regulatory provision which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is in the primary interest of the Government. Thus, the Authority does not read the Comptroller General decision in 46 Comp. Gen. 21 (1966) as requiring that the primary interest determination can only be made on a case-by-case basis. Rather, an agency may -- in the context of collective bargaining -- determine in advance that certain representational activity is within the primary interest of the Government. (Alternative 2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 51

Federal Labor Relations Authority

National Weather Service Employees Organization, MEBA, AFL-CIO and Dept of Commerce, National Weather Service, Case No. 0-NG-1116 (Decided July 10, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Negotiability	
Conditions of Employment	7103(a)(14)
Travel and Per Diem	7105(a)(2)(E)

Conditions for Review
  Inconsistent with Government-wide Rule or Regulation
    46 Comp. Gen. 21 (1966)
Procedure
  Waiver
    Union Specifically Waived Right to File Response
      Agency's Interpretation of Proposal Was Controlling
Travel Expense Act [5 U.S.C. §§ 5701 et seq.]

DIGEST NOTES

A proposal concerning travel and per diem is nonnegotiable. However, the agency's argument that the proposal does not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986).

Although the union was given the normal opportunity under the Authority's Rules and Regulations to file a response to the contentions in the agency's statement of position, it specifically waived its right to do so. The union thereby failed to rebut the agency's interpretation that the proposal is not intended as a demand to negotiate the agency's determination of whether the payment of travel and per diem is in the primary interest of the government. Therefore, as the proposal thusly interpreted presupposes the negotiability of travel and per diem expenses without regard to whether the statutory and regulatory requirements for payment discussed in Customs Service have been met -- such as, 46 Comp. Gen. 21 (1966) -- the Authority found the proposal to be inconsistent with Federal law and Government-wide regulations.

If the union's intent is different than that established in this case, then it may later revise its proposal to more accurately reflect its intent to make the proposal negotiable.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

Federal Labor Relations Authority

22 FLRA No. 52

AFGE, AFL-CIO, Meat Grading Council of Locals and Dept of Agriculture, Meat Grading and Certification Branch, Case No. 0-NG-867
(Decided July 10, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Government-wide Rule or Regulation
      - 5 CFR Part 610
      - 5 CFR 610.121
  - Hours of Work
    - Administrative Workweek
    - Overtime
    - Time Off
  - Management Rights
    - Assign Employees [§7106(a)(2)(A)]
      - Hours of Work
    - Assign Work [§7106(a)(2)(B)]
      - Hours of Work
    - Determine Internal Security Practices [§7106(a)(1)]
      - Agency Rotation Policy
  - Procedure
    - Allegation of Nonnegotiability
      - Absent Union's Written Request, Agency's Allegation to FSIP Is Not Controlling as to Timeliness of Union's Petition
    - Contentions of Parties
      - Disposition of Proposals Renders Unnecessary Addressing Union's Contentions
    - Proposals Withdrawn and Not Considered
    - Timeliness
      - Union's Written Request for Agency Allegation Is Controlling
        - Agency's Allegation to FSIP Is Not Controlling
  - Subjects of Bargaining
    - Mandatory Subjects of Bargaining
      - Procedures [§7106(b)(2)]
        - Assignment of Employees
- 5 U.S.C. § 6101

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A) and (B)
7106(b)(2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A proposal concerning tours of duty is nonnegotiable. The proposal locks-in the established schedules for tours of duties and as a result precludes the agency from making any changes in the tours of duty for whatever reason. The Authority found the proposal to be inconsistent with an applicable Government-wide regulation -- 5 CFR 610.121. (proposal 1)

A proposal concerning overtime is negotiable. The Authority found the proposal concerns only which employee, among those in the bargaining unit to whom management has already assigned certain work, will be selected to peform such work in an overtime status when management determines that overtime is required. Thus, the proposal only concerns when such employees would perform the previously assigned duties of their positions. Moreover, contrary to the agency's argument, the Authority found 5 CFR 610.121 does not apply to this proposal because the proposal concerns the assignment of overtime and not the establishment of an employee's administrative workweek. (proposal 2)

Two proposals concerning the assignment of employees are negotiable. The Authority found the proposals do not mandate certain courses of action by the agency. The proposals only set forth a procedure under § 7106(b)(2) for the agency to consider employee requests for Saturday time off and for volunteering for temporary duty assignments related to the agency's exercise of its management rights under § 7106(a). Because of the discretionary nature of the proposals, the agency's argument that proposal 3 conflicts with 5 CFR Part 610 by establishing an employee's administrative workweek is not supported. (proposals 3 and 4)

The union made a general contention that all the proposals are within the duty to bargain pursuant to § 7106(b)(2) and (3). However, because proposal 1 is violative of 5 CFR 610.121, a Government-wide regulation, and as proposals 2-4 do not concern a violation of management rights, the Authority found it unnecessary to address the union's contention.

Absent the union's written request for the agency's allegation of nonnegotiability, the agency's allegation to the Federal Service Impasses Panel did not control calculating the timeliness of the union's petition for review before the Authority. The petition was timely from the date the agency responded to the union's written request for an allegation of nonnegotiability.

22 FLRA No. 53

Federal Labor Relations Authority

Dept of the Air Force, Hqs
Air Force Logistics Command,
Wright-Patterson AFB, Ohio
and AFGE Council 214, Case
No. 5-CA-30334 (Decided
July 10, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Collective Bargaining Agreement
    - No Waiver of Right in Agreement
      - To Bargain over Procedures
    - Waiver of Right in Agreement
      - To Bargain over Substance
  - Management Rights
    - Assign Work [§ 7106(a)(2)(B)]
      - Comply with OSHA Standards for Respirators -- Facial Hair
    - Direct Employees [§ 7106(a)(2)(A)]
      - Comply with OSHA Standards for Respirators -- Facial Hair
  - Procedure
    - Union Failed to Submit Rebuttal to Agency's Argument
      - Agency's Interpretation of Agreement Was Controlling
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Technology of Performing Work
        - Comply with OSHA Standards for Respirators -- Facial Hair
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate [§ 7116(a)(5)]
      - OSHA Standards for Respirators -- Facial Hair
        - Impact and Implementation (Procedures and Appropriate Arrangements)
    - Waiver of Bargaining Rights
  - Remedy
    - *Status Quo Ante*
      - Disruption of Agency's Operations
        - Conform with OSHA Standards
      - Violation Based on Agency's Failure to Negotiate
        - Impact and Implementation (Procedures and Appropriate Arrangements)
  - Waiver of Rights
    - Waiver of Right in Agreement to Bargain over Substance
      - OSHA Standards for Respirators -- Facial Hair
- AFOSH Std. 161-1, Respiratory Protection Program [Air Force Reg.]
- 29 CFR 1910.134(e)(5)(i)
- Executive Order 12196

STATUTE

7106(a)(2)(A) and (B)
7116(a)(1) and (5)
7118

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

In agreement with the Judge, the Authority found that the agency did not violate § 7116(a)(1) and (5) by instituting a new facial hair policy without bargaining over the substance of the change. The union clearly and unmistakably waived its right to so bargain by agreeing to the terms of the parties' Master Labor Agreement (MLA).

However, the union did not waive its rights to bargain over the procedures that the agency would observe in exercising its authority with regard to the change in its facial hair policy for employees required to wear respirators in their work, and concerning appropriate arrangements for employees adversely affected by such change. In this regard, the union submitted two negotiable proposals. Proposal 9 would merely require the agency to inform new employees hired into positions requiring the use of a respirator that they should not grow facial hair in the facepiece-to-face sealing surface area. Proposal 13 provides that management will not go beyond what it can legally do to require compliance; that is, the proposal simply provides that management cannot "harass" employees. Having found proposals 9 and 13 negotiable, the Authority concluded that the agency violated 7116(a)(1) and (5) by implementing its new facial hair policy while failing and refusing to negotiate with the union over such proposals. (proposals 9 and 13)

In agreement with the Judge, the Authority found that a _status quo ante_ remedy is not warranted after considering the various factors set forth in _Federal Correctional Institution_, 8 FLRA 604 (1982).

The Authority found all the remaining union proposals to be nonnegotiable.

Proposal 1 would delay the agency's implementation of the new facial hair policy until higher level management revised its regulations. However, the union waived its right in this respect when it agreed to the language in the MLA regarding compliance with OSHA standards. Specifically, the MLA requires compliance with Executive Order 12196, which directs agencies to assure prompt abatement of unsafe or unhealthy working conditions under the OSHA standards. Compliance in this regard is not preconditioned upon the promulgation of internal regulations by higher level management. (proposal 1)

Proposal 2, which seeks a National OSHA interpretation of 29 CFR 1910.134(e)(5)(i), and proposal 18, which states that the MLA would prevail if any conflict arose between "this agreement" and the MLA, do not relate to the impact or procedures for implementing the change. Also, proposals 3, 4, 5, and 6 dealing with the elimination of toxic chemicals, the use of other controls for a safe work environment and a limitation on the use of respirators, go beyond the impact or procedures for implementing the change in the facial hair policy. (proposals 2 through 6, and 18)

Proposals 7 and 8 set up a test that would leave to the employee's discretion rather than management's whether an employee could maintain facial hair. The proposals together would infringe on management's right to direct employees, assign work and determine the technology of performing work -- that is, the particular type of respirator which will be used -- and are otherwise inconsistent with the mandatory nature of the new policy that employees be clean shaven in the facepiece-to-face sealing area. (proposals 7 and 8)

Proposal 15 would reserve to the union the right to make additional proposals as more information became available regarding the use and safety of respirators. As the union did not submit a position rebutting the agency's argument, the Authority found the proposal conflicts with the MLA -- as interpreted by the agency without contradiction -- as to when proposals can be submitted with regard to proposed management changes. (proposal 15)

As to the remaining proposals, the Authority found they went to substance of the agency's new facial hair policy and, therefore, are not negotiable as the union waived its right to bargain on such substance by agreeing to the terms of the MLA. (proposals 10 through 12, 14, 16 and 17)

Federal Labor Relations Authority

22 FLRA No. 54

NFFE Local 29 and Kansas City District, Corps of Engineers, Kansas City, Mo.,
Case No. 0-NG-877 (Decided July 11, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Agency Regulation for which a Compelling Need Exists
      - Army Regulation 40-5
      - DOD Instruction 6055.5
    - Inconsistent with Federal Law
      - Occupational Safety and Health Act of 1970
        - 29 U.S.C. § 655
        - 29 U.S.C. § 668
    - Inconsistent with Government-wide Rule or Regulations
      - 29 CFR Part 1910
      - 29 CFR Part 1960
  - Compelling Need
    - Agency Regulation Mandated by Outside Authority
      - 29 CFR Part 1910
      - 29 U.S.C. § 668
  - Procedure
    - Moot
      - Issue Not Moot: Issue Different from That in ULP Proceeding
    - New Regulations Not Controlling
      - Not in Effect before: (1) Agreement Executed; or (2) Provision Disapproved
    - Responsibility of The Parties to Cite All Relevant Authorities
- 5 CFR Chapter I, Part 339, Subpart B - Medical Examinations
- Executive Order No. 12196, as amended
- 43 Fed. Reg. 52952, 52996 and 52973-4 (1978)

STATUTE

7105(a)(2)(D) and (E)
7114(c)

DIGEST NOTES

The Authority rejected the agency's argument that the union's petition for review is moot. It was found that the issue in a particular unfair labor practice case that had been before the Authority is different from the issue in the present case.

Certain agency employees are, in the course of their work, exposed to hazardous substances and must use respirators. These employees are subject to the medical surveillance or examination

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

requirements set forth in the regulations of OSHA. Provision 1 is intended to prevent the agency from requiring that employees participate in such medical examinations and provides that employee participation will be voluntary. Provision 2 seeks to prevent the agency from having access to the results of those medical examinations.

Provision 1 is within the duty to bargain as it does not conflict with the Occupational Safety and Health Act (the Act), OSHA regulations, or an agency regulation for which a compelling need exists. Accordingly, the agency head was ordered by the Authority to rescind his disapproval of the provision which was bargained on and agreed to by the parties at the local level. (provision 1)

Provision 2 is nonnegotiable. The Authority found that it interferes with the agency's obligation under the Act at 29 U.S.C. § 668 (a Federal law) and OSHA regulations at 29 CFR Part 910 (a Government-wide regulation) to maintain specified records. (provision 2)

As to certain specific regulations cited by the agency in support of its arguments, the Authority relied only on those particular regulations in making its determination. The Authority noting the voluminous standards or regulations that could be relevant to the case, stated that if other regulations are relevant to the circumstances of the case, then it is the responsibility of the parties to bring them to the Authority's attention.

As to new regulations that were in effect neither when the parties' agreement was executed, nor when the provisions were disapproved by the agency head, the Authority concluded that such new regulations could not be controlling in this case. The Authority determined that it would reserve judgment as to what, if any, relevance or impact the new regulations may have in cases arising after they went into effect.

22 FLRA No. 55

Federal
Labor Relations
Authority

NLRBU and NLRB,
Case No. 0-NG-1112
(Decided July 11, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Travel and Per Diem
  Conditions for Review
    Inconsistent with Government-wide Rule or Regulation
      46 Comp. Gen. 21 (1966)
Travel Expense Act [5 U.S.C. §§ 5701 *et seq.*]

STATUTE

7103(a)(14)
7105(a)(2)(E)

DIGEST NOTES

A proposal concerning travel and per diem is nonnegotiable. However, the agency's argument that the proposal does not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986) *appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. Mar. 27, 1986). Nevertheless, as the union specified that this proposal presupposes the negotiability of travel and per diem expenses without regard to whether certain of the statutory and regulatory requirements for payment, discussed in *Customs Service*, have been met, the Authority found the proposal to be inconsistent with Federal law and Government-wide regulations. (Alternative 1)

A proposal concerning travel and per diem is within the duty to bargain as it is within the agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. The Authority noted the agency did not cite any legal or regulatory provision which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is in the primary interest of the Government. Thus, the Authority does not read the Comptroller General decision in 46 Comp. Gen. 21 (1966) as requiring that the primary interest determination can only be made on a case-by-case basis. Rather, an agency may -- in the context of collective bargaining -- determine in advance that certain representational activity is within the primary interest of the Government. (Alternative 2)

Federal Labor Relations Authority

22 FLRA No. 56

Dept of the Air Force, Hqs Air Force Logistics Command, Wright-Patterson AFB, Ohio and AFGE Council 214, Case No. 5-CA-30322 (Decided July 11, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate [§ 7116(a)(5)]
      - Quota System for Rating Employees under Civilian Potential Appraisal System
        - Impact and Implementation (Procedures and Appropriate Arrangements)
  - Civilian Potential Appraisal System
    - Quota System for Rating Employees
- Procedure
  - Consolidation with Case before Authority
  - Hearing
    - Witness
      - Subpoena
        - "Reasonableness" Test Rejected for Determining Necessity of Employee's Participation in Authority Proceeding
  - Official Notice
    - Authority Denied Request That It Take Official Notice of Evidence in Another Case Before It

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The Authority adopted the Judge's findings and conclusions that the agency, by the conduct of certain supervisors, violated § 7116 (a)(1) and (5) by unilaterally implementing a quota system for rating employees under the Civilian Potential Appraisal System during the 1983 rating cycle, without giving the union notice of, and an opportunity to bargain over, procedures and appropriate arrangements for employees adversely affected by the change.

The agency's limited exceptions concerned the Judge's denial of its motion to revoke two subpoenas, requested by the General Counsel, requiring an employee to appear at the Oklahoma City, Oklahoma and Macon, Georgia sites of the hearing. The Authority affirmed the Judge's finding that the evidence presented at the hearing at the time of the Judge's ruling demonstrates that the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

employee was a necessary witness, and therefore the Judge did not abuse his discretion as alleged by the agency. The Authority rejected the agency's contention that a "reasonableness" test be applied to the Judge's determination, noting that it has considered but rejected the application of such a standard to a determination, by an appropriate Authority agent, that an employee's participation in a particular Authority proceeding is necessary.

In connection with its exceptions, the agency requested the Authority to take official notice of certain evidence contained in an unfair labor practice case currently pending before the Authority. Noting that the rulings and determination of the Judge were based upon the evidence presented in the proceeding before him, the Authority denied the request.

The Authority denied the agency's motion to consolidate the subject case with another unfair labor practice case currently pending before the Authority. In the Authority's view, there is no basis for concluding that, at this stage of the proceeding, the consolidation of the subject case with the other case, which arose from unfair labor practice charges based upon different circumstances, would result in any savings in time and money to the parties or the Authority, or that such consolidation would result in a quicker disposition of these cases.

22 FLRA No. 57

Federal Labor Relations Authority

NFFE and Haskell Indian Junior College, Bureau of Indian Affairs, Dept of the Interior, Lawrence, Kan., Case No. 0-NG-1113 (Decided July 11, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Work [$ 7106(a)(2)(B)]
      - Performance Appraisal Systems
        - Critical Elements
        - Performance Standards
      - Work, Nature of
        - Course Content for Teachers
        - Determination Whether Work Will Be Accomplished
        - Position Description
        - Work Related to Normal Position Duties
    - Direct Employees [$ 7106(a)(2)(A)]
      - Performance Appraisal Systems
        - Critical Elements
        - Performance Standards
      - Work, Nature of
        - Determination Whether Work Will Be Accomplished
        - Work Related to Normal Position Duties
  - Procedure
    - Moot
      - Allegation that Parties Reached Agreement on Proposal
  - Subjects of Bargaining
    - At Election of Agency [$ 7106(b)(1)]
      - Methods and Means of Performing Work
        - Placement Policy for Students
      - Numbers, Types, or Grades of Employees
        - Tour of Duty
    - Mandatory Subjects of Bargaining
      - Procedures [$ 7106(b)(2)]
        - Assistance to Employees Assigned Move-Related Duties
        - Forum for Discussions on Impact of New Hires
        - Protection to Employees Within Prescribed Areas

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A) and (B)
7106(b)(1) and (2)

DIGEST NOTES

A proposal concerning the agency's placement policy for students is nonnegotiable because it conflicts with the agency's election under $ 7106(b)(1) not to bargain over its determination of the method and means of performing work. (proposal 1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Two proposals that would effectively prohibit the agency from considering enrollment statistics as a factor in evaluating an instructor's performance are nonnegotiable as they would require the agency to negotiate concerning the identification of critical elements and content of performance standards in violation of management's rights under § 7106(a)(2)(A) and (B) to assign work and direct employees. (proposals 2 and 3)

A proposal that would delegate to employees the decision otherwise reserved to management whether a class section would be offered is nonnegotiable as it violates the agency's right under § 7106(a)(2)(B) to determine the particular duties and work to be assigned. (proposal 4)

A proposal is nonnegotiable that would expressly prohibit the agency from assigning duties to an instructor that are not related to the instructor's position. The proposal violates the agency's right under § 7106(a)(2)(B) to assign work. (proposal 5)

A proposal is a negotiable procedure under § 7106(b)(2) that merely requires the agency to provide a forum for discussing with employees the effect of hiring additional workers. The Authority found that discussions which have already taken place between the parties regarding the proposal have not rendered the proposal moot because the parties have not reached final agreement. (proposal 6)

A proposal is a negotiable procedure under § 7106(b)(2) that would not preclude management from assigning move-related duties to certain employees. The proposal merely would require that the agency provide any "necessary" assistance in the event of a move. The the agency retains the discretion to determine whether to move and what assistance, if any, is "necessary." The agency's contention that the proposal has been satisfied and is, therefore, moot, is not substantiated by the record. (proposal 7)

A proposal is negotiable that would require the agency to take "necessary" steps to protect employees and property within prescribed areas. The Authority found that the proposal leaves to the agency's sole discretion decisions as to what level of security satisfies the contractual standard "necessary." Thus, the proposal does not violate the agency's right under § 7106 (a)(1) to determine its internal security practices. (proposal 8)

Two proposals are nonnegotiable that would constitute an attempt to negotiate concerning the substance of the agency's decision whether and to what extent certain materials should be incorporated into the subject matter of each course and, consequently, into the corresponding position description. The Authority found the proposals would effectively require the agency to negotiate concerning the assignment of duties in violation of management's right under § 7106(a)(2)(B) to assign work. (proposals 9 and 10)

A proposal concerning tours of duty is nonnegotiable as it conflicts with the agency's election under § 7106(b)(1) not to bargain over its determination of the numbers, types, or grades of employees assigned to a tour of duty. While the language of the proposal did not explicitly relate to the numbers, types, and grades of employees, the proposal nevertheless was directly and integrally related to, so as to be determinative of, the numbers, types, or grades of employees assigned to tours of duty. (proposal 11)

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22 FLRA No. 50

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD
UNION

Union

and

Case No. 0-NG-1119

NATIONAL LABOR RELATIONS BOARD,
THE BOARD AND OFFICE OF THE
GENERAL COUNSEL

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of three alternative proposals presented by the Union involving the payment by the Agency of travel and per diem expenses to employees when engaged in representational activities.

II. Union Proposals

Alternative Proposal Number 1

During the term of the Agreements, the Agency will pay the travel and per diem expenses of NLRBU employee representatives participating on the Incentive Awards, EEO and Health and Safety Committees and in consultations and negotiations.

Alternative Proposal Number 2

(a) During the term of the Agreements, the participation of the NLRBU in the activities of the Incentive Awards, EEO and Health and Safety

Committees will be considered in the primary interest of the government by the Agency and the Agency will the pay the travel and per diem expenses of the NLRBU employee representatives serving on such committees.

(b) During the term of the Agreements, the payment of the travel and per diem expenses of the NLRBU employee representatives when they attend consultations or engage in negotiations will be considered in the primary interest of the government by the Agency and the Agency will pay such expenses.

Alternative Proposal Number 3

(a) During the term of the Agreements, when the Agency determines that the participation of the NLRBU in the scheduled activities of the Incentive Awards, EEO and Health and Safety Committees is in the primary interest of the government, the Agency will pay the travel and per diem expenses of NLRBU employee representatives serving on such committees.

(b) During the term of the Agreements, when the Agency determines that the payment of the travel and per diem expenses of NLRBU employee representatives participating in consultations or engaged in negotiations is in the primary interest of the government, the Agency will pay such expenses.

III. Positions of the Parties

As explained by the Union, Alternative Number 1 seeks to obligate the Agency to pay the travel and per diem expenses of Union employee representatives located at the Agency's Washington, D.C. headquarters who by law and agreement are entitled to official time for the meetings referred to in the proposal. In presenting this Alternative, the Union states that it presupposes the negotiability of travel and per diem expenses without regard to the "primary interest test".[1] The Union states further that Alternative Number

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[1] The "primary interest test" refers to the Comptroller General's decision, 46 Comp. Gen. 21 (1966), interpreting the provisions of the Travel Expense Act, 5 U.S.C. §§ 5701, et seq., that an agency is not precluded from making payment

(Continued)

2 is intended to apply only if Alternative Number 1 is determined to be nonnegotiable because a primary interest test must be made in order for travel and per diem expenses to be paid. Finally, Alternative Number 3 is intended to apply only if Alternative Numbers 1 and 2 are determined to be nonnegotiable because a primary interest test must be made and such a test is in the sole discretion of the Agency to make.

The Agency contends that all of the Alternatives are nonnegotiable because the reimbursement of Federal employees for travel expenses is a matter specifically provided for by statute and thus is not a condition of employment within the meaning of section 7103(a)(14) of the Statute. The Agency also contends that Alternative Number 1 is nonnegotiable because it disregards the primary interest test and thus conflicts with law and Government-wide rules and regulations, and that Alternative Number 2 is nonnegotiable because the determination of primary interest cannot be made bilaterally or in advance of actual situations.

IV. *Analysis*

A. "*Conditions of Employment*"

The Agency makes an essentially identical "conditions of employment" argument to that made by the agency in *U.S. Customs Service* (*see* fn. 1). The Authority rejected that argument in *U.S. Customs Service* and it is rejected here for the same reasons set forth in that case.

B. "*Primary Interest Test*"

It is well-established that a proposal which concerns a condition of employment is negotiable only where it does not

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(Continued)

of travel expenses and per diem allowances to union representatives upon a determination that it serves the convenience of the agency or is otherwise in the *primary interest* of the Government. For a complete discussion of the negotiability of the payment of travel and per diem expenses, *see* the Authority's lead decision, *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 21 FLRA No. 2 (1986), *petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA*, No. 86-1198 (D.C. Cir. March 27, 1986).

otherwise conflict with applicable statutory and regulatory provisions. In terms of the negotiability of travel and per diem expenses, the Authority has determined that conformance with the requirements specified by the Comptroller General in administering and interpreting the Travel Expense Act is a necessary condition for finding that a proposal involving the payment of travel expenses and per diem allowances is negotiable. See U.S. Customs Service. The Comptroller General has stated that an agency is not precluded from making payment of travel expenses and per diem allowances to union representatives upon a determination that it serves the convenience of the agency or is otherwise in the primary interest of the Government. 46 Comp. Gen. 21 (1966). However, insofar as the Union specifies that Alternative Number 1 presupposes the negotiability of travel and per diem expenses without regard to the "primary interest test," the Authority agrees with the Agency's contention that this formulation of the proposal conflicts with law and Government-wide regulation.

As to the Agency's contention that Alternative Number 2 is nonnegotiable because the determination of primary interest cannot be made bilaterally or in advance of actual situations, the Authority must disagree. In U.S. Customs Service the Authority specifically found that determinations concerning whether to make payments for otherwise proper travel expenses and per diem allowances are within the discretionary administrative authority of an agency. Moreover, it is well-established that insofar as an agency has discretion regarding a matter affecting conditions of employment, it is obligated under the Statute to exercise that discretion through negotiations unless precluded by regulatory or statutory provisions. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 759-60 (1980). In this case, the Agency has not cited any legal or regulatory provision which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is in the primary interest of the Government.2/

2/ We do not read the Comptroller General decision in 46 Comp. Gen. 21 (1966) as requiring that the primary interest determination can only be made on a case-by-case basis. Rather, an agency may in the context of collective bargaining determine in advance that certain representational activity is within the primary interest of the Government.

While the Authority found in U.S. Customs Service that the determination that such payments are in the primary interest of the Government is a necessary (and itself bargainable) condition for the negotiability of proposals requiring the payment of travel and per diem expenses, a primary interest determination is not the only condition for finding such proposals negotiable. As previously mentioned, such proposals must also be in conformance with all other applicable regulatory and statutory provisions. In this case the Agency does not contend that Alternative Number 2 would conflict with, for example, the requirements of the Federal Travel Regulations (FTRs) other than those relating to the determination of primary interest, or with any other applicable laws or regulations. The Authority notes that there is nothing in Alternative Number 2 or the submissions of the parties which indicates that its provisions are to be applied in any manner which is inconsistent with applicable legal and regulatory requirements. Alternative Number 2 would not require the Agency to use, for example, specific authorization procedures and practices relating to travel which conflicted with the FTRs. It would not foreclose individual determinations regarding the propriety under the FTRs of authorizing particular travel and expenses. Finally, to the extent that case-by-case determinations are required under law and regulation, this proposal would not be inconsistent with such procedures. See U.S. Customs Service.

The Union states that Alternative Number 3 is intended to apply only if Alternative Numbers 1 and 2 are determined to be nonnegotiable. Given the results of the foregoing analysis with respect to Alternative Number 2, the Authority finds it unnecessary to address further the negotiability of Alternative Number 3.

V. Conclusion

The Authority finds that all three alternative formulations of the Union proposal concern a condition of employment. Alternative Number 1 conflicts with law and Government-wide regulation, and, therefore, is outside the duty to bargain. Alternative Number 2 is within the Agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. Therefore, it is within the duty to bargain.[3]

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[3] In finding Alternative Number 2 within the duty to bargain the Authority makes no judgment as to its merits.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Alternative Proposal Number 2. Furthermore, IT IS ORDERED that the Union's petition for review as to Union Alternative Proposals 1 and 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 10, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 51

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Union

and

Case No. 0-NG-1116

DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the following Union proposal which arose during the course of negotiations on ground rules for a new collective bargaining agreement between the parties:

> Travel and per diem will be granted only to those bargaining unit employees identified in accordance with this agreement whose official duty station is outside the Washington, D.C. commuting area. On Thursday, Friday and Saturday of the previous week, team members will be granted official time for preparation if he/she would normally be in a duty status. No per diem will be paid for preparation time. (Only the underscored portion is in dispute.)

II. Positions of the Parties

The Agency essentially contends that the proposal is outside the scope of bargaining because it does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute. In support of this contention it argues that the subject of travel expenses is specifically provided for by the Travel Expense Act, 5 U.S.C. §§ 5701, et seq. In addition, the Agency contends that the disputed part of the proposal is inconsistent with certain Comptroller General decisions interpreting and applying the Travel Expense Act.

The Union states that the intent of the disputed portion of the proposal is to provide its negotiators, who are employed in the bargaining unit throughout the country, travel and per diem expenses when they come to Washington D.C. to negotiate over a new collective bargaining agreement. The Union waived its right to file a response to the Agency's statement of position.

III. Analysis

Subsequent to the filings in this case the Authority issued its decision in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir., March 27, 1986). There the Authority rejected the agency's contention that the proposal in that case, which required the payment of travel and per diem expenses for employees serving as union negotiators, involved a matter specifically provided for by Federal statute so as to be excepted from the definition of conditions of employment. For the reasons and cases cited in U.S. Customs Service at 7-8, the Authority also rejects this same contention with respect to the present case. In addition, as we explained more fully in that decision, the Comptroller General, who administers and interprets the Travel Expense Act, has ruled that an agency is not precluded from making payment of otherwise proper travel expenses and per diem allowances to union representatives upon a determination that it serves the convenience of the agency or is otherwise in the primary interest of the Government. See 46 Comp. Gen. 21 (1966). The Authority found that determinations concerning whether to make such payments are within the discretionary administrative authority of an agency and that existing Authority precedent obligates an agency to exercise that discretion through negotiation unless precluded by regulatory or statutory provisions.

In U.S. Customs Service we relied upon the union's explanation that its proposal sought agreement as to what categories of union activities shall be construed to be in the primary interest of the Government. The union specifically stated that once a determination is made that an activity is in the primary interest of the Government, "of course, all the specific Travel Regulations apply." U.S. Customs Service at 7. This factor was crucial in our decision that the proposal in that case was negotiable because it was clear that the proposal was to be implemented in a manner consistent with governing statutory and regulatory requirements. For example, the proposal was not intended to require the agency to authorize either specific travel or expenses which did not comport with the regulatory requirements and restrictions stated in the Federal Travel Regulations (FTRs). The proposal was not intended to, and could not, require the Agency to use specific authorization procedures and practices relating to actual travel which conflicted with the FTRs. It would not foreclose individual determinations regarding the propriety under the FTRs of authorizing particular travel and expenses. Moreover, to the extent that case-by-case determinations are required under law and regulation, the proposal would not be inconsistent with such procedures. On this basis, the Authority rejected the contention of the agency in that case that the proposal was inconsistent with Federal law and Government-wide regulations.

The language of the proposal in this case is similar to the one held negotiable in U.S. Customs Service. However, for the following reason the Authority must find this proposal outside the duty to bargain. In its statement of position, in addition to its other contentions, the Agency also states that the proposal cannot be read as a demand to negotiate its determination of whether the payment of travel and per diem is in the "primary interest" of the Government, the determination required by the Comptroller General in 46 Comp. Gen. 21 (1966). Although the Union was given the opportunities normally afforded parties in accordance with the Authority's Rules and Regulations, it specifically waived its right to file a response to the Agency's contentions. The Union thereby failed to rebut the Agency's interpretation that the proposal is not intended as a demand to negotiate the Agency's determination of whether the payment of travel and per diem is in the primary interest of the Government. Under these particular circumstances, the Authority is constrained to accept the Agency's interpretation as to the meaning of the proposal. If the Union's intent is different than established in the record of this case, then it may, of course, revise its proposal at an appropriate time to more accurately reflect its intent so as to render the proposal negotiable. See, for example, National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 21 FLRA No. 19 (1986), petition for review filed sub nom. Department of the Treasury, Internal Revenue Service v. FLRA, No. 86-1290 (D.C. Cir. May 19, 1986); American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986), petition for review filed sub nom. Department of Agriculture, Federal Grain Inspection Service v. FLRA, No. 86-1295 (D.C. Cir. May 21, 1986).

IV. Conclusion

Based on the reasons and cases cited in U.S. Customs Service, 21 FLRA No. 2 (1986), the Authority finds that the Union proposal concerns a condition of employment. However, based on the foregoing analysis, the Authority finds that the proposal is inconsistent with law and Government-wide regulations. Therefore, the proposal is outside the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 10, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, MEAT GRADING
COUNCIL OF LOCALS

Union

and

Case No. O-NG-867

DEPARTMENT OF AGRICULTURE,
MEAT GRADING AND CERTIFICATION
BRANCH

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] It raises issues concerning the negotiability of four Union Proposals.[2]

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[1] The Agency in its Response raises a question as to the timeliness of the Union's petition for review because it had already provided allegations of nonnegotiability to the Federal Service Impasses Panel prior to the Union's written request. In this case, however, in accordance with established precedent, the Authority finds that the Union's petition for review was timely from the date the Agency responded to the Union's written request for an allegation of nonnegotiability. International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982).

[2] With respect to additional Union Proposals 5, 6, and 7, the Union in its opposition withdrew those proposals from its appeal. They will not be considered further here.

II. Union Proposal 1

> Established schedules for tours of duty will remain in effect.

A. Positions of the Parties

The Agency's position is that the proposal seeking to maintain current tours of duty violates 5 CFR 610.121(b)(1) and (2), which requires the head of the Agency to "schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements" and to "reschedule the employee's regularly scheduled administrative workweek" when it is known in advance that the actual work requirements for the ensuing week differ from the specific days and/or hours of the current workweek.

The Union asserts that the regulation quoted by the Agency does not establish a unilateral mandate for the Agency to establish the workweek. It further argues that any interpretation of the regulation giving the Agency the right to establish the workweek without negotiations is contrary to statute i.e., 5 U.S.C. § 6101, which is the statutory basis for the regulation. Moreover, the Union argues that 5 U.S.C. § 6101 provides the Agency discretion to establish workweeks, and a discretionary matter is within the duty to bargain under the Statute.

B. Analysis and Conclusion

The proposal locks in the established schedules for tours of duties and as a result precludes the Agency from making any changes in the tours of duty for whatever reason. The disputed proposal is to the same effect as Provision 1 in American Federation of Government Employees, AFL-CIO, Local 2484 and U.S. Army Garrison, Fort Detrick, Maryland, 17 FLRA 769 (1985), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 2484 v. FLRA, No. 85-1405 (D.C. Cir. July 3, 1985), which would have prevented a change in tours of duty unless advance notice of such change had been provided, and which the Authority found to be inconsistent with an applicable Government-wide regulation, 5 CFR 610.121. Based on the reasoning in U.S. Army Garrison, Fort Detrick, the Authority concludes that this proposal is likewise outside the duty to bargain.

III. Union Proposal 2

> The grader regularly assigned to service an applicant requiring overtime will have the primary responsibility of performing the necessary service during the week and on weekends.

A. Positions of the Parties

The Agency asserts that the proposal conflicts with its right to assign employees and work under section 7106(a)(2)(A) and (B), and with 5 CFR 610.121. The Union maintains that the proposal is negotiable because it is essentially the same as Proposal 1 in American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals and Department of Agriculture, Food Safety and Quality Service, Washington, D.C., 9 FLRA 663 (1980).

B. Analysis and Conclusion

The Authority agrees with the Union's position. The proposal concerns only which employee among those in the bargaining unit to whom management has already assigned certain work will be selected to perform such work in an overtime status when management determines that overtime is required. As such, the proposal is essentially the same as the portion of Proposal 1 found negotiable in Food Safety and Quality Service, 9 FLRA 663 (1980). In that case, the Authority held a proposal that concerned which particular employee, among those in the bargaining unit to whom management in its discretion had already assigned certain work, will be selected to perform such work in an overtime status when management determines that overtime is required was negotiable. It reasoned that the proposal was concerned only with when such employees would perform the previously assigned duties of their positions. Moreover, contrary to the Agency's argument, 5 CFR 610.121 is inapplicable to the proposal in this case because the proposal concerns the assignment of overtime and not the establishment of an employee's administrative workweek. Therefore, for the reasons more fully set forth in Food Safety and Quality Service, 9 FLRA 663 (1980), the Authority concludes that Union Proposal 2 is within the duty to bargain under the Statute.

IV. Union Proposal 3

> Employees may be relieved for four (4) Saturdays per calendar year for any reason by requesting such relief in writing to the Main Station Supervisor at least ten (10) working days prior to the requested Saturday off.

Union Proposal 4

> Temporary duty assignments will be on a rotational basis. A list of the graders' names expected to be assigned to temporary duty assignments will be placed on the rotation schedule. When temporary duty assignments are needed, the assignments may also be exchanged with qualified volunteers. When there are no available volunteers to exchange TDY, the assigned grader will perform the assignment. Each GS-9, GS-7, and GS-5, when qualified must take his turn in relief assignments. A grader may not be relieved of his responsibility to take his turn at a relief assignment, except for compelling reasons of annual leave, medical reasons which preclude travel, or personal hardship and an exchange of assignment. [Only the underlined portion of the proposal is in dispute.]

A. Positions of the Parties

As to Union Proposal 3, the Agency contends that it requires the Agency to relieve employees from Saturday work on four occasions upon the employee's request and therefore conflicts with the right to assign work and employees under the Statute and with 5 CFR Part 610. In response, the Union asserts that the Agency is misreading Union Proposal 3, which does not require that employee requests be granted.

As to Union Proposal 4, the Agency maintains that its intent is to prevent the Agency from assigning any other meat grader to a location if a volunteer exists. The Agency therefore concludes that the proposal conflicts with management's right to assign employees under the Statute. The Agency also asserts that the proposal could result in an individual continually volunteering for the same plant assignment thus frustrating the Agency's rotation policy and resulting in possible conflicts of interests and conflicts in relationships with plant management. Therefore, the Agency asserts that the proposal conflicts with its right to determine its internal security practices pursuant to section 7106(a)(1) of the Statute. The Union, in response, states that the Agency has failed to comprehend the intent of the proposal. The Union asserts that the use of discretionary language, "assignments may be exchanged," does not interfere with and does not mandate the assignment of employees or work in violation of the Agency's rights under the Statute. The Union maintains that the proposal only provides for a procedure for the use of a pool of volunteers if the Agency chooses to use it.

B. Analysis and Conclusions

The language of Proposals 3 and 4 and the Union's stated intent establish that the proposals are discretionary and do not mandate certain courses of action by the Agency. Under this interpretation, the Agency could disapprove 1) all employee requests for Saturday time off and 2) all utilization of volunteers for temporary duty assignments. The proposals only provide a procedure under section 7106(b)(2) for the Agency to consider employee requests for Saturday time off and for volunteering for temporary duty assignments related to the Agency's exercise of its management rights under section 7106(a) of the Statute. Also, because of the discretionary nature of the proposals, the Agency's argument that Union Proposal 3 conflicts with 5 CFR Part 610 by establishing an employee's administrative workweek is not supported. Therefore, the Authority concludes that Union Proposals 3 and 4 are within the duty to bargain under the Statute.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 2-4.[3] IT IS

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[3] In finding Union Proposals 2-4 to be within the duty to bargain, the Authority makes no judgment as to their merits.

FURTHER ORDERED that the Union's petition for review as to Union Proposal 1 be, and it hereby is, dismissed.[4]

Issued, Washington, D.C., July 10, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

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[4] The Union makes a general contention that the proposals are within the duty to bargain pursuant to section 7106(b)(2) and (3). Since Proposal 1 is violative of 5 CFR 610.121, a Government-wide regulation, and since proposals 2-4 do not concern a violation of management rights, the Authority finds it unnecessary to address the Union's contention regarding section 7106(b)(2) and (3).

22 FLRA No. 53

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS
AIR FORCE LOGISTICS COMMAND
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

Case No. 5-CA-30334

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondent and by the General Counsel. The complaint alleged that the Respondent, Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (the Respondent or AFLC), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally implementing a new policy prohibiting those employees required to wear respirators from having facial hair while negotiations concerning the policy were being held and before impasse was reached in the negotiations.

II. Facts

The facts are not in dispute. The Respondent requested an interpretation of the Occupational Safety and Health Administration (OSHA) standard on respirator use and safety (29 C.F.R. 1910.134(e)(5)(i)) from the Dallas Regional Office of OSHA. The question was whether employees who are required to wear respirators in their work may have facial hair at the sealing surface. The OSHA Regional Office advised the Respondent that facial hair at the sealing surface of the respirator would constitute a violation of its standard. The Respondent then notified the American Federation of Government Employees, Council 214, AFL-CIO (Union) by letter dated April 25, 1983, that the following policy would apply throughout the Agency:

> Any observable facial hair in the facepiece-to-face sealing surface will cause a fit-test failure and the employee can be directed to shave in the sealing area. When the employee has shaven, he will be re-fit-tested to determine when a safe seal is achieved.

The old policy permitted employees who were required to use respirators in their work to have facial hair as long as it would not interfere with the respirator sealing surface as determined by the Respondent during a respirator fit test. The letter stated that the change was necessary because the Respondent was anticipating a change in an Air Force Regulation, AFOSH Std. 161-1, Respiratory Protection Program, and because of OSHA's interpretation of 29 CFR 1910.134. The letter announced the Respondent's intention to implement the policy as of May 27, 1983, and invited the Union to negotiate concerning the "impact/implementation" of this policy.

The Union submitted proposals regarding the change on May 10, 1983. (The proposals are set forth in the attached Appendix). On May 26, the Respondent sent the Union a letter which said, "We regret that you have chosen to submit proposals that are, taken as a whole, beyond the realm of reasonableness." It went on to say that due to the overriding exigency of a safe and healthful workplace, the policy would be implemented throughout AFLC on May 27, 1983.

Despite the May 26 letter, the parties met on May 27 to negotiate. After that date the parties did not meet again, and on July 8, 1983, the Respondent informed the Union that the Union's proposals submitted on May 10 were nonnegotiable because they were not "valid impact and implementation proposals," and that they either directly conflicted with the Respondent's new policy or did not relate to it. It is uncontested that the Respondent ordered implementation of the new facial hair policy at seven bases within AFLC on May 27, 1983. Time and method of implementation varied among the bases.

III. Administrative Law Judge's Decision

The Judge found that the Respondent was not obliged to negotiate over the substance of the change in the facial hair policy because the Union had waived its rights by agreeing in the parties' June 28, 1982 Master Labor Agreement (MLA) to language which required the Respondent to comply with Executive Order 12196 as implemented by the Department of Defense (DOD), which required agencies to follow OSHA standards unless the agency secured approval from the Secretary of Labor for the use of an alternative standard. In the instant situation, no alternative standard was sought or approved.

The Judge found further that the Respondent, even where privileged to make a change in working conditions, is still obliged to negotiate concerning the impact and procedures for implementing such change. He concluded that the Respondent here did not fulfill this obligation, finding that certain of the Union's proposals dealt with the impact on employees and the procedures for implementing the change. The Judge therefore concluded that the Respondent violated section 7116(a)(1) and (5) of the Statute and recommended that it be ordered to cease and desist from such conduct and to take certain affirmative action. The Judge did not order a _status quo ante_ remedy as requested by the General Counsel.

IV. Positions of the Parties

The Respondent excepted to the Judge's finding of a violation, asserting that its change in the established facial hair policy did not constitute a unilateral change in conditions of employment because the Union already had negotiated concerning this matter and because the Respondent was merely complying with the collective bargaining agreement. The Respondent contended that, by agreeing to the language in the MLA, the Union had agreed to the application of OSHA standards which included the imposition of the new standard. Further, the Respondent contended that the Union's proposals sought to make implementation of the new policy voluntary or otherwise constituted proposals unrelated to the impact and implementation of the change.

The General Counsel excepted to the Judge's conclusion that the Union had waived its right to bargain concerning the substance of the change in policy, and also excepted to the Judge's denial of a _status quo ante_ remedy for the impact and implementation violation.

V. Analysis

In agreement with the Judge, the Authority finds that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by instituting the new facial hair policy without bargaining over the substance of the change. Thus, as the Judge found, the Union clearly and unmistakably waived its right to do so by agreeing to the terms of the MLA. The Authority further finds, however, that there was no clear and unmistakable waiver of the Union's right to bargain over the procedures which the Respondent would observe in exercising its authority with regard to the change in its facial hair policy for employees required to wear respirators in their work and concerning appropriate arrangements for employees adversely affected by such change. See U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA No. 60 (1985). In this regard, the Authority finds that certain proposals submitted by the Union concerned the procedures which the Respondent would observe in exercising its authority with regard to changing its facial hair policy, and concerning appropriate arrangements for employees adversely affected by such change. Thus, we conclude that the Respondent violated the Statute when it implemented the change in its facial hair policy without negotiating with the Union concerning such procedures and appropriate arrangements.

Turning to the specific Union proposals, the Authority finds that proposals 9 and 13 are negotiable. Proposal 9 would merely require the Respondent to inform new employees hired into positions requiring the use of a respirator that they should not grow facial hair in the facepiece-to-face sealing surface area. The Respondent admitted that this is not in conflict with the MLA which already obligates it to train and advise new employees on the proper use of respirators. Proposal 13 states that "supervisors will not harass employees in any way in connection with facial hair in the facepiece-to-face sealing surface." The proposal does not infringe on management's right to direct or require employees to comply with the new facial hair policy. Nor does it prevent management from acting to enforce such policy. The proposal simply provides that management will not go beyond what it can legally do to require compliance, that is, the proposal simply provides that management cannot "harass" employees.

The Authority finds that Union proposal 1, which would delay the Respondent's implementation of the new facial hair policy until higher level management (the Air Force) revised its regulations, is not negotiable. On its face, such proposal appears to be a negotiable procedure. However, when it agreed to the language in the MLA regarding compliance with

OSHA standards, the Union waived its right in this respect. Specifically, the MLA requires compliance with Executive Order 12196 which directs agencies to assure prompt abatement of unsafe or unhealthy working conditions under the OSHA standards. Compliance in this regard is not preconditioned upon the promulgation of internal regulations by the Air Force. Accordingly, there was no duty to bargain over this proposal.

The Authority finds Union proposal 2 which seeks a National OSHA interpretation of 29 CFR 1910.134(e)(5)(i) and Union proposal 18 which states that the MLA would prevail if any conflict arose between this agreement and the MLA, are nonnegotiable because the intent of these proposals, as they relate to the change, is not evident on their face. Standing alone, they do not relate to the impact or procedures for implementing the change. The Authority finds also that Union proposals 3, 4, 5 and 6 dealing with the elimination of toxic chemicals, the use of other controls for a safe work environment and a limitation on the use of respirators, are nonnegotiable as they go beyond the impact or procedures for implementing the change in the facial hair policy.

The Authority finds that Union proposals 7 and 8 also are nonnegotiable. Union proposals 7 and 8 provide:

> 7. AFLC agrees to provide employees with facial hair an appropriate respirator which allows them to maintain facial hair of their preference.
>
> 8. AFLC agrees that if an employee with facial hair of his preference cannot be test-fitted with an appropriate respirator (including full mask, helmet, etc.), he will be reassigned to another suitable position of like pay, grade, and benefits so as not to discriminate against employees who elect to have facial hair.

It is concluded that they are nonnegotiable because they set up a test which would leave to the employee's discretion rather than management's whether an employee could maintain facial hair. If the employee decides to keep his facial hair, these proposals would require management to find an appropriate respirator so the employee could continue to work on his assigned job, or if an appropriate respirator cannot be found, the employee would be reassigned to another suitable position without the loss of any benefits or pay. Taken together, these proposals would infringe on management's right to direct employees, assign work and determine the technology of performing work, that is, the particular type of respirator which will be used, and are otherwise inconsistent with the mandatory nature of the new policy that employees be clean shaven in the facepiece-to-face sealing area. See National Federation of Federal Employees, Local 1624 and Air Force Contract Management Division, Hagerstown, Maryland, 3 FLRA 142 (1980) and National Federation of Federal Employees, Local 943 and Department of the Air Force, Headquarters Keesler Technical Training Center, Keesler Air Force Base, Mississippi, 19 FLRA No. 113 (1985) (Union Proposal 2).

Union proposal 15 would reserve to the Union the right to make additional proposals as more information became available regarding the use and safety of respirators. The Respondent argued that the proposal conflicts with the MLA as to when proposals can be submitted with regard to proposed management changes. The Union did not submit a position as to whether the Respondent's stated position was correct. Therefore, the Authority will find this proposal is nonnegotiable because it conflicts with the parties' MLA as interpreted by the Respondent without contradiction.

As to the remaining Union proposals, 10 through 12, 14, 16 and 17, the Authority finds these proposals, the collective intent of which clearly was to make the implementation of the new facial hair policy voluntary, are nonnegotiable as they are directed toward changing the policy. The Authority finds that these proposals go to the substance of the policy and, as previously noted, are not negotiable as the Union waived its right in this respect.

VI. Remedy

The Judge did not grant a status quo ante remedy as requested by the General Counsel. In agreement with the Judge, the Authority finds that such a remedy is not warranted. Thus, balancing the nature and circumstances of the bargaining violation against the degree of disruption in the efficiency and effectiveness of the Respondent's operations that would be caused by such a remedy, and taking into consideration the various factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982), the Authority concludes that such a remedy would not effectuate the purposes and policies of the Statute. Thus, the Authority notes that the Respondent gave the Union prior notice of its intent to implement the new facial hair policy and invited the Union to bargain concerning its impact and implementation; that the parties met to discuss the Union's proposals;

that the Respondent's conduct does not appear willful; and that the General Counsel has not demonstrated the nature and extent of the impact of the new policy on unit employees. Also, it appears that a return to the old policy would be disruptive to the efficiency and effectiveness of the Respondent's operation, as the Respondent implemented the new policy to conform with OSHA standards relating to the protection, safety and health of employees required to use respirators in their work. Under these circumstances, and where the Respondent acted to abate what it perceived as an unsafe and unhealthy situation for employees, the Authority finds that a return to the pre-existing policy would not promote an efficient and effective government.

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions, and recommended Order as modified by this decision.

Therefore, having found Union proposals 9 and 13 negotiable, the Authority concludes that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing its new facial hair policy while failing and refusing to negotiate over such proposals with the Union.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, shall:

1. Cease and desist from:

(a) Failing and refusing to meet and negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, over negotiable proposals with respect to the procedures which it will observe in exercising its authority with regard to changes in its facial hair policy for employees required to wear respirators in their work and concerning appropriate arrangements for employees adversely affected by such change.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, meet and negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, the employees' exclusive representative, concerning any proposal found negotiable herein, submitted in connection with the Respondent's change in its facial hair policy for employees required to wear respirators in their work.

(b) Post at all of its facilities where bargaining unit employees are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commanding Officer, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

IT IS FURTHER ORDERED that the allegation of the complaint in Case No. 5-CA-30334 relating to the Respondent's refusal to negotiate over those proposals found nonnegotiable be, and it hereby is, dismissed.

Issued, Washington, D.C., July 10, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 53]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to meet and negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, our employees' exclusive representative, over negotiable proposals with respect to the procedures which we will observe in exercising our authority with regard to changes in our facial hair policy for employees required to wear respirators in their work and concerning appropriate arrangements for employees adversely affected by such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, meet and negotiate with the American Federation of Government Employees, Council 214, AFL-CIO, our employees' exclusive representative, concerning any proposal found negotiable herein, submitted in connection with our change in the facial hair policy for employees required to wear respirators in their work.

____
(Activity)

Dated: ______________ By: ______________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Boulevard, Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

APPENDIX

Memorandum of Agreement on Facial Hair in the Facepiece-to-Face Sealing Surface

1. AFLC agrees to delay its proposal of 25 April 1983 concerning the above until after HQ USAF, AFMSC/SGPA has changed AFOSH Std 161-1 Respiratory Protection Program in accordance with the Statute.

2. AFLC agrees to jointly request with AFGE Council 214 the National OSHA position in regard to their interpretation of Title 29, Section 1910.134(e)(5)(i).

3. AFLC agrees to provide AFGE Council 214 a target date when it expects to eliminate, exhaust or enclose all toxic chemicals; thereby eliminating the need or requirement for respirators.

4. AFLC agrees that respirators will be used only when engineering, work practice, or administrative controls are not feasible and as a temporary control for the time it takes to put any other control(s) into use.

5. AFLC agrees to provide AFGE Council 214 with a copy of the report(s) derived from item 4 above as required under Section 1910.1000, Subsection e, page 632 of Title 29.

6. AFLC agrees that respirators will be used only for Respiratory Hazard Task/Area(s), and their use will be in accordance with appropriate directives.

7. AFLC agrees to provide employees with facial hair an appropriate respirator which allows them to maintain facial hair of their preference.

8. AFLC agrees that if an employee with facial hair of his preference cannot be test-fitted with an appropriate respirator (including full mask, helmet, etc.), he will be reassigned to another suitable position of like pay, grade, and benefits so as not to discriminate against employees who elect to have facial hair.

9. AFLC agrees that new employees hired into a position requiring the use of a respirator will be informed that if they decide to grow facial hair, it should not be in the facepiece-to-face sealing surface.

10. AFLC agrees that no employee will be directed to shave any observable facial hair in the facepiece-to-face sealing surface.

11. AFLC agrees that employees with observable facial hair in the facepiece-to-face sealing surface and voluntarily agree to shave will be allowed to do so on official time.

12. AFLC agrees to provide employees razor blades, shaving kits, soaps, water, etc. of their choice so they may voluntarily shave any observable facial hair in the facepiece-to-face sealing surface on official time.

13. AFLC agrees that supervisors will not harass employees in any way in connection with facial hair in the facepiece-to-face sealing surface.

14. AFLC agrees to provide adequate training and guidance to all employees required to wear respirators with observable facial hair in the facepiece-to-face sealing surface including the hazards of a fit-test failure.

15. AFGE Council 214 reserves the right to make additional proposals as more information becomes available and deemed appropriate.

16. AFLC agrees that in those areas where the report(s), item 5 above, indicate feasibility, limiting the exposure period to safe levels will be allowed to all employees with observable facial hair in the facepiece-to-face sealing area.

17. AFLC agrees that in those areas where the report(s), item 5 above, indicate feasibility, facial grease or vaseline will be allowed to all employees with observable facial hair in the facepiece-to-face sealing area.

18. It is understood and agreed that no rights the employees, Union, or Employer have under the Master Labor Agreement (MLA) or Statute are waived by this agreement. If any conflicts arise between the MLA and this agreement, the MLA will prevail and is enforceable.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 29

Union

and Case No. O-NG-877

KANSAS CITY DISTRICT, CORPS
OF ENGINEERS, KANSAS CITY, MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case is before the Authority because of an appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It presents issues concerning the negotiability of two provisions of a negotiated agreement which were disapproved by the Agency head pursuant to section 7114(c) of the Statute.

These provisions had been negotiated as a substitute for language which the parties had been ordered to adopt pursuant to a Decision and Order issued by the Federal Service Impasses Panel. Department of the Army, Kansas City District Corps of Engineers, Kansas City, Missouri and Local 29, National Federation of Federal Employees, 82 FSIP 145 (1983).

The provisions which were disapproved and are in dispute are as follows:

> Employees must be provided with the following notification when participating in the Occupational Health Program:

(Provision 1)

(1) Participation is strictly voluntary, (no official request to participate will be made);

(2) Completion of any questionnaire or of any particular question is entirely optional on the part of each individual employee;

(Provision 2)

(3) The collecting, processing and final disposition of medical specimens and information will be safeguarded to insure that only the employee and the employee's physician are apprised of the results via professional medical channels, and that no individual employee medical findings resulting from such services will be made available to agency personnel, management or supervisory officials.

[Only the underlined portions were disapproved and, hence, are in dispute.]

II. Background

The dispute in this case relates to medical examinations which agencies must make available to employees in health hazardous occupations under the Occupational Safety and Health Act of 1970 (the Act), Executive Order No. 12196 (1980)1/ as amended by E.O. 1223 (1980) and Occupational Safety and Health Administration (OSHA) regulations. The Act essentially authorizes the Secretary of Labor to issue occupational safety and health standards which, among other things, prescribe the type and frequency of medical examinations which employers are to make available to employees occupationally exposed to health hazards. 29 U.S.C. § 655. Those standards are set forth at 29 CFR Part 1910 (1985). Certain Agency employees are, in the course of

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1/ Executive Order No. 12196, Occupational Safety and Health Programs for Federal Employees, implements many of the provisions of 29 U.S.C. § 668, a portion of the Act which specifically applies to the Federal sector. As to how the provisions of the Act and the OSHA regulations apply to the Federal sector, see 29 U.S.C. § 668, Executive Order No. 12196 and 29 CFR Part 1960 (1985).

their work, exposed to hazardous substances and must use respirators. These employees are subject to the medical surveillance or examination requirements set forth in the OSHA standards.

Provision 1 is intended to prevent the Agency from requiring that employees participate in such medical examinations and provides that employee participation will be voluntary. Provision 2 seeks to prevent the Agency from having access to the results of those medical examinations. In resolving issues raised as to the negotiability of these provisions, the Authority sought an advisory opinion from the Department of Labor on its interpretation of OSHA regulations relevant to the parties' dispute. The Authority's decision here is consistent with that opinion which is attached to this decision as an Appendix. The parties were given an opportunity to present comments on the Department of Labor response; however neither did so.

III. Positions of the Parties

The Agency makes the same arguments regarding both provisions. Briefly, they are as follows:

1) The petition is moot;

2) the provisions conflict with Federal statute, specifically, the Act;

3) the provisions conflict with Government-wide rule or regulations, specifically, the OSHA Standards issued by the Secretary of Labor; and

4) the provisions conflict with agency regulations for which a compelling need exists, specifically, Department of Defense Instruction 6055.5 and Army Regulation 40-5.

The Union contends that its petition is not moot. As to the provisions themselves, the Union contends that they are consistent with law and regulations. In response to the Agency's compelling need argument, the Union asserts that the regulations cited by the Agency do not meet the Authority's compelling need criteria.

IV. Analysis

A. Question of Mootness

The Agency contends that the Union's petition for review in this case is moot because the issues involved have also been raised in an unfair labor practice (ULP) charge. A decision has been issued in that case. U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 456 (1984). The Authority finds that the issue addressed in that decision is different from the issue presented in this case. In the ULP case, the issue was limited to the availability of medical examinations to all employees except for those engaged in health hazardous occupations. In this case the parties have made clear that the dispute about the negotiability of these two provisions is limited to medical examinations provided to employees in health hazardous occupations. In view of the fact that Corps of Engineers, Kansas City did not address the issue presented in this case, the Agency's argument that the petition in this case is moot is rejected.

B. Conflict with Government-wide Rule or Regulation

The Agency contends that OSHA regulations require that employees participate in the medical examinations provided and that under the regulations the Agency is entitled to access to the results of the examinations.

As the Agency has noted, the standards or regulations which OSHA has promulgated are voluminous. In making its determination as to this Agency contention, the Authority has relied on only those portions of the OSHA regulations which relate to those hazards and matters which the Agency has specifically cited as relevant to its circumstances; that is, exposure to lead and asbestos and use of respirators. If other portions of the OSHA regulations are relevant to the circumstances present in the Agency, it is the responsibility of the parties to bring them to the Authority's attention. National Federation of Federal Employees Local 1167 v. FLRA, 681 F.2d 886 at 891 (D.C. Cir. 1982), affirming National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981).

Where employees are exposed to specified levels of asbestos and lead in the course of their duties, all that is required by the OSHA regulations is that the Agency provide or make available at its cost medical examinations to those employees. 29 CFR 1910.1001(j) (asbestos) and 29 CFR 1910.1025(j) (lead). In issuing the lead standard,[2] OSHA specifically rejected making participation in the medical surveillance program mandatory for employees.[3] OSHA cited, among other things, "substantial personal privacy and religious concerns involved in health care matters" as a consideration in rejecting mandatory employee participation in medical surveillance. 43 Fed. Reg. 52952, 52973-4 (1978). See United Steelworkers of America v. Marshall, 647 F.2d 1189, 1237-8 (D.C. Cir. 1980), cert. denied sub nom. Lead Industries Assn., Inc. v. Donovan, Secretary of Labor, 453 U.S. 913 (1981). The Authority, therefore, concludes that OSHA regulations involving exposure to lead and asbestos which require an employer (or agency) to provide or make available medical examinations do not mandate that employees be compelled to participate in these examinations. See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 485 n.45 (D.C. Cir. 1974) where the court, in addressing the legality of an OSHA asbestos standard, noted that employee participation in medical examinations is entirely voluntary.

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[2] 29 CFR 1910.1025.

Moreover, neither do the OSHA regulations which govern respirator use mandate employee participation in medical examinations. The OSHA regulations which generally deal with respirator use do not specifically require employees to participate in medical examinations. 29 CFR 1910.134. The standards relating to exposure to specific hazardous substances also contain provisions regarding the use of respirators. The language in both the asbestos and lead standards which address respirator use reflects the overall approach in those standards that participation in medical surveillance programs is voluntary on the part of the employees. 29 CFR 1910.1001(d) and 1910.1025(f). See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 485 (D.C. Cir. 1974) where the court noted that results of employee physical examinations were a consideration in assigning employees to jobs requiring the use of respirators but that the examinations were entirely voluntary insofar as employees were concerned.

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[3] The explanatory material accompanying the issuance of that standard states:

> Upon completion of initial air monitoring, the employer must begin the medical surveillance program for all covered employees. The standard does not make participation in the medical surveillance program mandatory for the employee. The employer's obligation is to "provide" and "make available" the medical tests and procedures as required. Where employee confidence in the medical program exists, refusal to participate should be minimal. (See discussion of mandatory medical examinations in the M[edical] R[emoval] P[rotection] Attachment.)

43 Fed. Reg. 52952, 52996 (1978).

Based on the foregoing, the Agency's argument that Provision 1 conflicts with OSHA regulations cannot be sustained.

As to Provision 2, a different conclusion is in order. In agreement with the Agency, the Authority finds that Provision 2 does conflict with the OSHA standards or regulations. Those regulations are set forth in 29 CFR Part 1910.4/ They apply to Federal employees and agencies in general and, therefore, are Government-wide regulations. See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980). Those regulations generally require employers (or agencies in the case of the Federal government) to maintain records for employees subject to medical surveillance for a specified period of time. See, for example, 29 CFR 1910.1001(j)(6) and 29 CFR 1910.1025(n)(2). By denying the Agency access to medical records flowing from the medical surveillance program, Provision 2 would prevent the Agency from fulfilling its obligations under those regulations to maintain the required records.5/

C. Conflict with Federal Statute

By allowing employees to decline to undergo medical examinations, the Agency argues that Provision 1 would prevent it from fulfilling its obligation under the Act to

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4/ Although 29 CFR 1960.17 permits adoption by agencies of alternate standards, this adoption is subject to the approval of the Secretary of Labor. There is no indication here that any alternate standards have been adopted.

5/ In ruling on the validity of the OSHA standard for exposure to asbestos, the court in Industrial Union Department, AFL-CIO v. Hodgson, supra, has upheld the requirement in that standard that employers have access to the records of medical examinations conducted on employees.

keep adequate records of occupational accidents and illnesses. Consequently, it asserts that Provision 1 conflicts with the Act itself. No provision of the Act requires employees to undergo medical examinations. Moreover, as discussed earlier, the Secretary of Labor, who is responsible for setting the OSHA standards and for overseeing the administration of the Act in the Federal sector, has not construed the Act to require employees to participate in medical examinations. Therefore, the Agency's contention that Provision 1 conflicts with the Act is rejected.[6/]

However, as to Provision 2, we have concluded above that preventing Agency access to the records of medical examinations effectively interferes with the Agency's ability to maintain records of its required medical surveillance program. These record keeping requirements flow from the Act itself as well as the regulations. 29 U.S.C. § 668. Because of this, the Authority concludes that Provision 2 conflicts with 29 U.S.C. § 668 -- a Federal statute.

6/ We note that subsequent to the Agency head's disapproval of provision 1 in this case, the Office of Personnel Management amended the medical examination provision at 5 C.F.R. Chapter 1, Part 329, by promulgating 5 C.F.R. Chapter I, Part 339, Subpart B - Medical Examinations. Section 339.301(a) provides that:

> An agency may require an individual who has applied for or occupies a position which has physical/medical standards for selection or retention, or which is part of an established program of medical surveillance related to occupations or environmental exposure or demands, to report for a medical evaluation.

Since these regulations were not in effect when the agreement in question was executed, nor when the provision at issue was disapproved, they could not be controlling in this case. We therefore expressly reserve judgment as to what, if any, relevance or impact these regulations may have in cases arising after they went into effect.

D. Conflict with an Agency Regulation for which a Compelling Need Exists

As to Provision 1, the Agency asserts that the requirement in its Agency regulations for mandatory participation by employees in medical examinations is necessary to its achievement of a safe and healthful work environment. It concludes that this objective is essential to the accomplishment of its mission, and therefore its regulations meet the illustrative standard for determining compelling need set forth at section 2424.11(a) of the Authority's Rules.

In the Authority's view, however, the Agency has not demonstrated that mandatory (as opposed to voluntary) employee participation in medical examinations is essential (as opposed to helpful or desirable) to the accomplishment of its responsibility to provide employees with a safe and healthful working environment. The Agency has not shown that voluntary participation by employees in medical examinations coupled with the implementation of the various other monitoring, control, and protective requirements set forth in the OSHA standards is not sufficient to allow it to fulfill its obligations with respect to assuring a safe and healthful work environment. See 29 CFR 1910.1001 and 1910.1025. Thus, the Agency has not shown that its regulations meet the "essential" standard set forth in section 2424.11(a) of the Authority's Rules and Regulations. See, for example, American Federation of Government Employees, AFL-CIO, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441 (1981) (Union Proposal 4).

With respect to the criterion found at section 2424.11(c), the Agency asserts that the DoD and Army regulations constitute a nondiscretionary implementation of a mandate of binding Government-wide regulations, that is, the OSHA regulations. However, the OSHA regulations do not require employees to participate in medical examinations. Therefore, the Agency's contention that Provision 1 conflicts with regulations which meet the compelling need standard set forth in section 2424.11(c) is rejected.

The Agency makes the same arguments as to its need for its regulatory provisions which allow it access to the results of the medical examinations conducted on employees. Because the OSHA regulations and the Act do require Agency access, it follows that the Agency's regulations reflecting this requirement are essential to the accomplishment of its mission and function and also implement, in a nondiscretionary manner, a mandate to the Agency under law. Therefore, we conclude that Provision 2 conflicts with an agency regulation for which a compelling need exists.

V. Conclusion

The Authority finds that the petition is not moot. We further find that Provision 1 does not conflict with the Occupational Safety and Health Act, the Occupational Safety and Health Administration regulations, or an agency regulation for which a compelling need exists. It is within the duty to bargain. Provision 2 interferes with the Agency's obligation under the Occupational Safety and Health Act and the Occupational Safety and Health Administration regulations to maintain specified records. It, therefore, conflicts with a Federal law and a Government-wide rule or regulation. Additionally, it conflicts with agency regulations for which a compelling need exists. It is not within the duty to bargain.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency head shall rescind his disapproval of Provision 1 which was bargained on and agreed to by the parties at the local level.[7] IT IS FURTHER ORDERED that the Union's petition for review insofar as it relates to Provision 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 11, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

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[7] In reaching this conclusion, the Authority makes no judgment as to the merits of this provision.

22 FLRA No. 55

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD
UNION

Union

and Case No. O-NG-1112

NATIONAL LABOR RELATIONS BOARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of three alternative proposals presented by the Union involving the payment by the Agency of travel and per diem expenses to employees when engaged in representational activities.

II. Union Proposals

Alternative Proposal Number 1

> During the term of the Agreements, the Agency will pay the travel and per diem expenses of NLRBU employee representatives participating: (1) on the Incentive Awards, EEO and Health and Safety Committees; (2) in consultations at the National Level; (3) in negotiations at the Local level; and (4) in mutually agreed upon meetings and visits to resolve disputes under Article 28, Section 3(a), paragraphs 1 and 2.

Alternative Proposal Number 2

> (a) During the term of the Agreements, the participation of the NLRBU in the activities of the Incentive Awards, EEO and Health and Safety

Committees will be considered to be in the primary interest of the government by the Agency and the Agency will pay the travel and per diem expenses of NLRBU employee representatives serving on such committees.

(b) During the term of the Agreements, the payment of the travel and per diem expenses of the NLRBU employee representatives when they attend consultations (at the National level), engage in negotiations at the Local level, or in mutually agreed upon meetings and visits to resolve disputes under Article 28, Section 3(a), paragraphs 1 and 2, will be considered to be in the primary interest of the government by the Agency and the Agency will pay such expenses.

Alternative Proposal Number 3

(a) During the term of the Agreements, when the Agency determines that the participation of the NLRBU in the scheduled activities of the Incentive Awards, EEO and Health and Safety Committees is in the primary interest of the government, the Agency will pay the travel and per diem expenses of NLRBU employee representatives serving on such committees.

(b) During the term of the Agreements, when the Agency determines that the payment of the travel and per diem expenses of NLRBU employee representatives participating in consultations (at the National level), engaged in negotiations at the Local level, or in mutually agreed upon meetings and visits to resolve disputes under Article 28, Section 3(a), paragraphs 1 and 2, is in the primary interest of the government, the Agency will pay such expenses.

III. Positions of the Parties

As explained by the Union, Alternative Number 1 seeks to obligate the Agency to pay the travel and per diem expenses of field office Union employee representatives who by law and agreement are entitled to official time under the circumstances described in the proposal. In presenting this Alternative, the Union states that it presupposes the negotiability of travel and per diem expenses without regard to the "primary interest test."[1/] The Union states further that Alternative Number 2 is intended to apply only if Alternative Number 1 is determined to be nonnegotiable because a "primary interest test" must be made in order for travel and per diem expenses to be paid. Finally, Alternative Number 3 is intended to apply only if Alternative Numbers 1 and 2 are determined to be nonnegotiable because a primary interest test must be made and such a test is in the sole discretion of the Agency to make.

The Agency contends that all of the Alternatives are nonnegotiable because the reimbursement of Federal employees for travel expenses is a matter specifically provided for by statute and thus is not a condition of employment within the meaning of section 7103(a)(14) of the Statute. The Agency also contends that Alternative Number 1 is nonnegotiable because it disregards the primary interest test and thus conflicts with law and Government-wide rules and regulations, and that Alternative Number 2 is nonnegotiable because the determination of primary interest cannot be made bilaterally or in advance of actual situations.

IV. Analysis

The Union's Alternative Proposals and the positions of the parties in this case are identical in effect to those at issue in National Labor Relations Board Union and National Labor Relations Board, The Board and Office of the General Counsel, 22 FLRA No. 50 (1986), also issued this day. There the Authority determined that all three Alternative Proposals concern a condition of employment based on the reasons set forth in U.S. Customs Service (see fn. 1).

[1/] The "primary interest test" refers to the Comptroller General's decision, 46 Comp. Gen. 21 (1966), interpreting the provisions of the Travel Expense Act, 5 U.S.C. §§ 5701, et seq., that an agency is not precluded from making payment of travel expenses and per diem allowances to union representatives upon a determination that it serves the convenience of the agency or is otherwise in the primary interest of the Government. For a complete discussion of the issue of the negotiability of the payment of travel and per diem expenses, see the Authority's lead decision, National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986).

We also found that conformance with the requirements specified by the Comptroller General in administering and interpreting the Travel Expense Act is a necessary condition for finding that a proposal involving the payment of travel expenses and per diem allowances is negotiable. See U.S. Customs Service. The Comptroller General has stated that an agency is not precluded from making payment of travel expenses and per diem allowances to union representatives upon a determination that it serves the convenience of the agency or is otherwise in the primary interest of the Government. 46 Comp. Gen. 21 (1966). However, insofar as the Union specifies that Alternative Number 1 presupposes the negotiability of travel and per diem expenses without regard to the "primary interest test," the Authority agrees with the Agency's contention that this formulation of the proposal conflicts with law and Government-wide regulation.

As to the Agency's contention that Alternative Number 2 is nonnegotiable because the determination of primary interest cannot be made bilaterally or in advance of actual situations, the Authority must disagree. In U.S. Customs Service the Authority specifically found that determinations concerning whether to make payments for otherwise proper travel expenses and per diem allowances are within the discretionary administrative authority of an agency. Moreover, it is well-established that insofar as an agency has discretion regarding a matter affecting conditions of employment, it is obligated under the Statute to exercise that discretion through negotiations unless precluded by regulatory or statutory provisions. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 759-60 (1980). In this case, the Agency has not cited any legal or regulatory provision which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is in the primary interest of the Government.[2]

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[2] We do not read the Comptroller General decision in 46 Comp. Gen. 21 (1966) as requiring that the primary interest determination can only be made on a case-by-case basis. Rather, an agency may in the context of collective bargaining determine in advance that certain representational activity is within the primary interest of the Government.

While the Authority found in U.S. Customs Service that the determination that such payments are in the primary interest of the Government is a necessary (and itself bargainable) condition for the negotiability of proposals requiring the payment of travel and per diem expenses, a primary interest determination is not the only condition for finding such proposals negotiable. As previously mentioned, such proposals must also be in conformance with all other applicable regulatory and statutory provisions. In this case the Agency does not contend that Alternative Number 2 would conflict with, for example, the requirements of the Federal Travel Regulations (FTRs) other than those relating to the determination of primary interest, or with any other applicable laws or regulations. The Authority notes that there is nothing in Alternative Number 2 or the submissions of the parties which indicates that its provisions are to be applied in any manner which is inconsistent with applicable legal and regulatory requirements. Alternative Number 2 would not require the Agency to use, for example, specific authorization procedures and practices relating to travel which conflicted with the FTRs. It would not foreclose individual determinations regarding the propriety under the FTRs of authorizing particular travel and expenses. Finally, to the extent that case-by-case determinations are required under law and regulation, this proposal would not be inconsistent with such procedures. See U.S. Customs Service.

V. Conclusion

The Authority finds that all three alternative formulations of the Union proposal concern a condition of employment. Alternative Number 1 conflicts with law and Government-wide regulation, and, therefore, is outside the duty to bargain. Alternative Number 2 is within the Agency's administrative discretion, and is not inconsistent with law or Government-wide regulation.3/ Therefore, it is within the duty to bargain.4/

3/ Here, as in National Labor Relations Board, The Board and Office of the General Counsel, the Authority finds it unnecessary to address further the negotiability of Alternative Number 3 given the result that Alternative Number 2 is negotiable.

4/ In finding Alternative Number 2 within the duty to bargain the Authority makes no judgment as to its merits.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Alternative Proposal Number 2. Furthermore, IT IS ORDERED that the Union's petition for review as to Union Alternative Proposals 1 and 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 11, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR
FORCE BASE, OHIO

Respondent

and

Case No. 5-CA-30322

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of limited exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. No exceptions were filed to the Decision and recommended Order of the Judge and they are not in dispute. The sole issue raised is whether the Judge's denial of the Respondent's motion to revoke two subpoenas, requested by the General Counsel, requiring the appearance of an employee at certain phases of the hearing in this case should be affirmed. The Respondent also filed a motion to consolidate this case with another which is currently pending before the Authority.

II. Background and Judge's Conclusion

Due to the geographical location of a large number of witnesses, the hearing in this case was held at three sites: Dayton, Ohio; Oklahoma City, Oklahoma; and Macon, Georgia, respectively. An employee, Paul Palacio, was subpoenaed, at the request of the General Counsel, to appear at each site. At all relevant times, Palacio was President of the Charging Party and assigned to the Wright-Patterson Air Force Base, Dayton, Ohio. At the opening of the Dayton phase of the hearing, the Respondent moved that the Judge revoke Palacio's subpoenas for the Oklahoma City and Macon phases of the hearing on the ground that the employee's testimony was not relevant to the proceeding at these locations. The Judge questioned the General Counsel and Palacio concerning the necessity for the employee's testimony at these sites and considered the Respondent's response. After hearing the arguments, the Judge denied the Respondent's motion to revoke, stating:

> I recognize . . . that in deciding whether a witness is necessary, I am not to superimpose my judgment for that of counsel trying a case. That counsel may have another witness that may or may not serve the same purpose. I don't think if the witness requested is reasonably related that I can say, no, I'm going to make you use someone else. I don't think my authority goes that far. I am not going to revoke the subpoena, but I will permit the subpoena to stand, because I think that Mr. Palacio is -- may reasonably be expected to have relevant information that can be admissible with respect to what happened at these other bases (Dayton Tr. 20-21).

With respect to the allegations of the complaint, the Judge concluded that the Respondent, by the conduct of certain supervisors, violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally implementing a quota system for rating employees under the Civilian Potential Appraisal System (CPAS) during the 1983 rating cycle, without giving the Charging Party notice of, and an opportunity to bargain over, procedures and appropriate arrangements for employees adversely affected by the change.

III. Positions of the Parties

In its exceptions, the Respondent only takes issue with the Judge's denial of its motion to revoke two subpoenas, requested by the General Counsel, requiring Paul Palacio, an employee, to appear at the Oklahoma City, Oklahoma and Macon, Georgia sites of the hearing. More particularly, the Respondent argues that the Judge's determination that Palacio was a necessary witness constituted an abuse of his discretion. In support of such contention the Respondent essentially asserts that: (1) the General Counsel's basis for subpoenaing Palacio was vague; (2) the employee possessed only hearsay knowledge of the allegations litigated at the two sites; (3) local union officers were available and suitable as witnesses for the General Counsel; and (4) Palacio testified concerning his first-hand knowledge of the case during the Dayton phase of the hearing. Furthermore, the Respondent argues that the Judge's determination that Palacio was a necessary witness should have been subjected to a "reasonableness" test. The Respondent also moved to consolidate this case with Case No. 5-CA-40259.

In opposing the Respondent's exceptions, the General Counsel contends that the Respondent's brief misrepresented certain facts, and that the Judge's ruling must be affirmed because it is clearly supported by the Authority's Rules and Regulations as well as Authority precedent. The General Counsel also opposed the Respondent's motion to consolidate.

IV. Analysis

A. Motion to Consolidate

In its motion to consolidate this case with Case No. 5-CA-40259, which is currently pending before the Authority, the Respondent essentially contends that: consolidation would save time and money; the cases involve the same parties; and the exceptions in each case are based upon the same set of circumstances. The General Counsel, in opposing the consolidation of cases, argues there is no evidence or reasonable expectation that the consolidation of these cases, at this stage of the proceeding, would result in a "cheaper and quicker" disposition of the cases, especially when separate hearings have already been held, different Judges' decisions rendered, and exceptions filed with the Authority. Further, the General Counsel asserts that the unfair labor practice charges in the two cases are based on different circumstances which involve different and unrelated violations of the Statute.

The Authority denies the Respondent's motion to consolidate. In the Authority's view, there is no basis for concluding that, at this stage of the proceeding, the consolidation of Case No. 5-CA-30322 and Case No. 5-CA-40259, which arose from unfair labor practice charges based upon different circumstances, would result in any savings in time and money to the parties or the Authority, or that such consolidation would result in a quicker disposition of these cases.

B. Exceptions[1]

With respect to the Judge's ruling at issue, in Norfolk Naval Shipyard, Portsmouth, Virginia, 5 FLRA 788 (1981), the Authority held that "once an unfair labor practice hearing has convened and before the close of the hearing, . . . the [Judge] has the power under the Authority's Rules and Regulations to determine, subject to review by the Authority, whether the participation of any employee in any phase of any proceeding before the Authority is necessary . . . . "[2] Upon reviewing the record, the Authority notes, among other things, that a large number of individuals were tentatively scheduled to be called as witnesses by the Respondent; that the Judge ascertained from the General Counsel that given the large number of witnesses and the uncertainty of their testimony, Palacio was needed as someone who "might be able to rebut their testimony;" and

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[1] In connection with its exceptions, the Respondent requests the Authority to take official notice of certain evidence contained in Case No. 5-CA-40259 mentioned above. The Authority, noting that the rulings and determination of the Judge were based upon the evidence presented in the proceeding before him, denies such request.

[2] Section 2429.13 of the Authority's Rules and Regulations provides, in pertinent part, as follows:

> § 2429.13 Official time
>
> If the participation of any employee in any phase of any proceeding before the Authority, including the investigation of unfair labor practice charges and representation petitions and the participation in hearings and representation elections, is deemed necessary by the Authority, the General Counsel, any Administrative Law Judge, Regional Director, Hearing Officer, or other agent of the Authority designated by the Authority, such employee shall be granted official time for such participation. . . .

See also section 2429.7 of the Authority's Rules and Regulations which provides, in pertinent part, as follows:

(Continued)

that the Judge further ascertained from Palacio that he had been the individual who had dealt with management generally on the CPAS problem and was the individual who received complaints from the Charging Party's various regional and field representatives.[3] In view of these facts, the Authority finds that the evidence presented at the hearing, at the time of the Judge's ruling, demonstrates that the employee, as deemed by the Judge, was a necessary witness, and therefore the Judge did not abuse his discretion as alleged by the Respondent. Accordingly, the Judge's ruling in this regard is affirmed.

In rejecting the Respondent's contention that a "reasonableness" test be applied to the Judge's determination, the Authority notes that it has previously considered but rejected the application of a "reasonableness" standard to a determination, by an appropriate Authority agent, that an employee's participation in a particular Authority proceeding is necessary. See Department of the Treasury, Internal Revenue Service, Department of the Treasury, Internal Revenue Service, Jacksonville District, 15 FLRA 506 (1984); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 13 FLRA 558 (1983); and Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA 510 (1982).

(Continued)

> § 2429.7 Subpenas.
>
> (d) [T]he . . . Administrative Law Judge . . . shall grant the request upon the determination that the testimony or documents appear to be necessary to the matters under investigation[.]
>
> (e) [T]he . . . Administrative Law Judge . . . shall revoke the subpena if the evidence the production of which is required does not relate to any matter under investigation or in question in the proceedings[.]

[3] The record reveals that the General Counsel later informed the Judge that Palacio would not appear at the Macon phase of the hearing.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. Specifically, the Authority affirms the Judge's ruling denying the Respondent's motion to revoke two subpoenas requiring the appearance of employee Paul Palacio at the Oklahoma City, Oklahoma, and Macon, Georgia phases of the hearing as the record supports the Judge's conclusion that the employee was a necessary witness. Further, upon consideration of the Judge's Decision and the entire record, and noting particularly that no exceptions were filed to the Judge's Decision or his recommended remedy, the Authority adopts the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority orders that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio shall:

1. Cease and desist from:

(a) Changing the working conditions of employees exclusively represented by Council 214, American Federation of Government Employees, AFL-CIO, by using a numeric quota system for rating bargaining unit employees under the Civilian Potential Appraisal System, without first notifying the exclusive collective bargaining representative and bargaining, upon request, concerning procedures to be observed in implementing the system and appropriate arrangements for employees adversely affected.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Bargain in good faith, upon request, with Council 214, American Federation of Government Employees, AFL-CIO, concerning procedures to be observed in implementing any system for the use of quotas in appraising employees in competitive action appraisal programs, and concerning appropriate arrangements for employees adversely affected by such a system.

(b) Require that the following supervisors reaccomplish any 1983 CPAS ratings for all employees who were adversely affected by the use of a quota system, and certify that the CPAS no longer reflects any such adverse effect:

> At Wright-Patterson AFB, Ohio, Col. James Havey, Jr., Lt. Col. Reginald P. Gibson, Captain Helen Brinerd, Joanne Wells, and Captain Joseph Zelasco; at Hill AFB, Utah, Allen W. Meyer, Secundino Martinez, Neil Peterson, Russell Lawrence, Robert Parks, M.C. Hurd and James P. Kretzmann; at Warner Robins AFB, Georgia, Gordon H. Brantley; at McClellan AFB, California, Bernard T. Sakamoto, Jackson W. Lytal, Richard Steele, Lt. Col. John Peterson, John W. Huston, Beverly Woodward, Charles Richins, Gary C. Crowder, LaVelle Hopper, Horace Holmes and Robert Calvert; and at Tinker AFB, Oklahoma, Clayton Branton, Billie Coughran, James Dyer, and Donald Basinger.

(c) Post at its facilities at Wright-Patterson AFB, Ohio, Hill AFB, Utah, Warner Robins AFB, Georgia, McClellan AFB, California, and Tinker AFB, Oklahoma, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Air Force Logistics Command, or a designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C., July 11, 1986.

J. C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change the working conditions of employees exclusively represented by Council 214, American Federation of Government Employees, AFL-CIO, by using a numeric quota system for rating bargaining unit employees under the Civilian Potential Appraisal System without first notifying the exclusive collective bargaining representative and bargaining, upon request, concerning procedures to be observed in implementing the system and appropriate arrangements for employees adversely affected.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL bargain in good faith, upon request, with Council 214, American Federation of Government Employees, AFL-CIO, concerning procedures to be observed in implementing any system for the use of quotas in appraising employees in competitive action appraisal programs, and concerning appropriate arrangements for employees adversely affected by it.

WE WILL require that the following supervisors reaccomplish any 1983 CPAS ratings for all employees who were adversely affected by the use of a quota system, and certify that the CPAS no longer reflects any such adverse effects:

At Wright-Patterson AFB, Ohio, Col. James Havey, Jr., Lt. Col. Reginald P. Gibson, Captain Helen Brainerd, Joanne Wells, and Captain Joseph Zelasco; at Hill AFB, Utah, Allen W. Meyer, Secundino Martinez, Neil Peterson, Russell Lawrence, Robert Parks, M.C. Hurd and James P. Kretzmann; at Warner Robins AFB, Georgia, Gordon H. Brantley; at McClellan AFB, California, Bernard T. Sakamoto, Jackson W. Lytal, Richard Steele, Lt. Col. John Peterson, John W. Huston, Beverly Woodward, Charles Richins, Gary C. Crowder, LaVelle Hopper, Horace Holmes and Robert Calvert; and at Tinker AFB, Oklahoma, Clayton Branton, Billie Coughran, James Dyer, and Donald Basinger.

____
(Agency or Activity)

Dated:______________________ By:____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306 or FTS 886-3468.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Union

and

Case No. 0-NG-1113

HASKELL INDIAN JUNIOR COLLEGE,
BUREAU OF INDIAN AFFAIRS,
DEPARTMENT OF THE INTERIOR,
LAWRENCE, KANSAS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of eleven Union proposals.[1] The proposals cover the impact of the Agency's institution of a pre-college program, assignment of work space, introduction of Indian-related materials into class instruction, and changing of work schedules.

II. Union Proposal 1

> ACT scores as well as placement tests shall be used to initially place students in the pre-college program.

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[1] The Agency agreed to negotiate concerning one additional Union proposal. After filing its appeal, the Union agreed that another proposal was nonnegotiable. Consequently, these two proposals are no longer before the Authority.

A. Position of the Parties

The Agency contends that Union Proposal 1 would require it to negotiate concerning the educational policy of Haskell Indian Junior College in violation of its right under section 7106(b)(1) of the Statute to determine the means and manner by which its mission will be carried out. The Agency also contends that the proposal exceeds the scope of its obligation to negotiate over the impact and implementation of a change in conditions of employment and does not concern a condition of employment of unit employees.

The Union states that the intent of the proposal is to more accurately place students in the appropriate level of course work. Since, according to the Union, the improper placement of students increases an instructor's workload, the Union contends that the Agency's placement policy has an adverse impact on bargaining unit employees and that the Agency is therefore required to negotiate concerning the impact of its policy.

B. Analysis and Conclusions

Section 7106(b)(1) of the Statute provides that, unless the agency elects to do so, an agency's duty to bargain with a labor organization over conditions of employment does not extend to those matters which involve the technology, methods, and means of performing work. National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California, 2 FLRA 254, 258-59 (1979). The Authority has consistently held that those matters which directly and integrally relate to the accomplishment of the mission of the agency fall within the meaning of performing work under section 7106(b)(1). Panama Canal Federation of Teachers, Local 29 and Department of Defense Dependents Schools, Panama Region, 19 FLRA No. 99, slip op. at 2-3 (1985); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603 (1980) (Union Proposals VIII and IX), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945(1982).

The Union's proposal would require the Agency to use ACT scores in addition to the current method of using placement tests to place students in the pre-college program. The record in this case indicates that the mission of Haskell Indian Junior College is the education of its students. This mission necessarily requires the Agency to determine the appropriate level of course work in which to place students in order to best educate them. The Agency has determined that the establishment of a pre-college program to address the deficiencies of developmental students would help it to better accomplish its mission. Agency's Statement of Position at 1-5. The criteria used to place students in the pre-college program thus directly and integrally relate to the accomplishment of the Agency's mission, and, therefore, constitute methods and means of performing the Agency's work under section 7106(b)(1). Since the Union's proposal would require the Agency to negotiate concerning its placement policy, the Authority concludes that Union Proposal 1 is contrary to the Agency's right under section 7106(b)(1) to determine the methods and means of performing work.

The Union contends that the proposal is intended to place students more accurately. The Union has not presented any evidence that the Agency's current placement policy results in students being improperly placed; therefore, it has not demonstrated that the policy adversely impacts upon bargaining unit employees. Accordingly, the Authority concludes that Union Proposal 1 is outside the duty to bargain. In view of our decision that the proposal violates management's rights, it is unnecessary to determine whether the proposal is also outside the duty to bargain because it does not concern a condition of employment.

III. Union Proposals 2 and 3

Proposal 2

Enrollment statistics should not be used to evaluate instructional positions.

Proposal 3

Enrollment statistics should not be used negatively against employees in the performance appraisal process.

A. Position of the Parties

The Agency treats these proposals separately. It argues that Proposal 2 addresses the assignment of instructors to courses and design of curriculum. It maintains that such a proposal preempts its right to determine the means and methods by which the mission will be accomplished. The Agency also states that the proposal would affect the number of employees assigned to a shift or tour of duty or a project.

The Agency contends that Proposal 3 requires negotiation over performance elements and standards in violation of management's rights.

The Union's contentions on both proposals concentrate on the use of statistics in the performance context. The Union maintains that course enrollment tends to be a matter beyond an instructor's control. It states declines in enrollment should not be used against employees in the appraisal process. It argues that the proposals do not violate management's rights.

B. Analysis and Conclusions

The Authority has held that proposals which would have prohibited an agency from considering backlogs as a factor in rating and evaluating employee performance were outside the duty to bargain since they would eliminate a specific element from the performance appraisal process in violation of management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. American Federation of Government Employees, National Council of Social Security Payment Center Locals and Social Security Administration, Office of Program Service Centers, Baltimore, Maryland, 7 FLRA 818, 820-21 (1982) (Union Proposals 6 and 7), citing the reasoning set forth in National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 768 (1980), aff'd sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982). Proposals 2 and 3 would effectively prohibit the Agency from considering enrollment statistics as a factor in evaluating an instructor's performance.

The Union contends that the proposal can be distinguished from the proposals in SSA, Office of Program Service Centers because the word "should" in the present proposals vests the Agency with discretion on whether and how the provisions should be applied. However, the proposals would still violate management's rights under section 7106(a)(2)(A) and (B) to identify critical elements and establish performance standards by imposing a substantive limitation on the Agency's exercise of those rights. In American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446, 450-52 (1983), the Authority rejected the union's contention that the phrase "to the extent practicable" removes the substantive limitation that the proposal would have placed on agency's right to identify critical elements. Similarly, the Authority rejected a union contention that the phrase "to the maximum extent possible" leaves the agency with discretion to exercise its right to assign work "without inhibition." American Federation of Government Employees, AFL-CIO, National Border Patrol Council and Department of Justice, Immigration and Naturalization Service, 16 FLRA 251, 252 (1984).

The Union also contends that the duty to bargain extends to the proposals because course enrollment tends to be a matter beyond the control of the individual instructor and should, therefore, not be used to evaluate performance. The Authority has held in American Federation of Government Employees, AFL-CIO, Local 2849 and Office of Personnel Management, New York Regional Office, 7 FLRA 571, 575-76 (1982) (Union Proposal 3) and American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 223-25 (1981) (Union Proposal 2) that proposals requiring performance standards to make allowances for factors beyond the control of employees are within the duty to bargain. However, the Authority also found that the language of the proposals in those cases would have provided a general, nonquantitative standard by which the application of performance standards established by management could be evaluated in a subsequent grievance. OPM, New York Regional Office, 7 FLRA at 576; FDIC, Chicago Region, 7 FLRA at 224. In terms of this case, rather than establishing such a "general nonquantitative standard," Union Proposals 2 and 3 would require the Agency to negotiate concerning a specific element of its performance standards--whether enrollment statistics should be a factor. Since the proposal would prohibit the Agency from considering course enrollment statistics in appraising an instructor's performance whether or not enrollment is a relevant factor, the Union's proposals are materially different from the proposals found negotiable in OPM, New York Regional Office and FDIC, Chicago Region.

Union Proposals 2 and 3 are outside the duty to bargain in that they would require the Agency to negotiate concerning the identification of critical elements and content of performance standards in violation of management's rights to assign work and direct employees under section 7106(a)(2)(A) and (B) of the Statute. Again, because of our findings, it is unnecessary to address the Agency's remaining arguments.

IV. Union Proposals 4 and 5

Proposal 4

If a class has five students or less in enrollment, then the instructor shall have the option of closing that section of the course with the approval of their supervisor.

Proposal 5

If instructors end up with lower than their normal teaching assignment due to low enrollment, then any assignment or additional duties shall be related to their position and shall be made as fairly as possible.

A. Position of the Parties

The Agency contends that proposals 4 and 5 interfere with management's right to assign work and determine the means and methods by which its mission will be carried out.

The Union maintains that the proposals assure equitable assignments. It also states that the "fairly as possible" language mirrors language in the furlough section of the Master Agreement.

B. Analysis and Conclusions

In National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 768, 775 (1980), aff'd sub nom. National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), the Authority stated that management's right under section 7106(a) of the Statute to assign work encompasses duties and work to be assigned as well as the particular employees to whom or positions to which the work will be assigned. Union Proposal 4 would delegate to the instructor the discretion otherwise vested in the Agency to initiate the process of deciding whether a particular class should be offered and, consequently, what duties and work will be assigned to that employee. The Authority has held that proposals which would involve an exclusive representative in the deliberative process by which management makes decisions on matters within the discretion of the agency themselves violates management's rights. A proposal involving the exclusive representative in the deliberative process on contracting out determinations was rejected in National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574, 579-80 (1981), aff'd sub nom. National Federation of Federal Employees, Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982). In National Association of Government Employees, Local R14-89 and Department of the Army, Headquarters, U.S. Army Defense Center and Fort Bliss, Texas, 15 FLRA 14, 15 (1984), the Authority rejected a proposal permitting union participation in the process of determining when additional work will be assigned as a violation of the agency's rights to direct employees and assign work. Proposal 4 would delegate to employees the decisions otherwise reserved to management on whether a class section would be offered. This violates the Agency's right under section 7106(a) to determine the particular duties and work to be assigned and is outside the duty to bargain.

Union Proposal 5 would require the Agency to ensure that duties beyond an instructor's normal teaching assignment be related to the instructor's position. In National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 FLRA 578, 580-81 (1984), the Authority held that a proposal which would have prevented the agency from assigning "additional or incidental duties to employees which are inappropriate to their positions or qualifications" violated management's right to assign work in that the agency would be prohibited from requiring employees to perform certain duties.

The addition of the "as fairly as possible" language to Proposal 5 does not alter the conclusion that the proposal is outside the duty to bargain. A proposal requiring that the assignment of additional duties be made "fairly" would include a general, nonquantitative standard by which an agency's exercise of its reserved authority to assign work could be evaluated in a subsequent grievance. See National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588, 597-99 (1981) (Union Proposal VII). Union Proposal 5, however, is not limited to such a "general nonquantitative standard," but would also expressly prohibit the Agency from assigning duties to an instructor which are not related to the instructor's position in violation of the Agency's right under section 7106(a) of the Statute to assign work.

V. Union Proposal 6

The addition of staff in the Skills Center has resulted in a lack of adequate working space for those employees involved. These Skills Center employees should be involved in discussions regarding options on how to alleviate their problems.

A. Positions of the Parties

The Agency asserts it has no obligation to negotiate over this matter because it does not agree that space is inadequate. Even so, the Agency maintains the issue is moot since ongoing discussions have taken place with the union and employees.

The Union argues that the addition of staff has resulted in a change in a condition of employment which is negotiable.

B. Analysis and Conclusion

Union Proposal 6 neither obligates the Agency to agree that a workspace problem exists nor requires it to remedy any problem should there be one. Instead, the Union's proposal merely requires the Agency to provide a forum for discussing with employees the effect of the hiring of additional workers. See, e.g., American Federation of Government Employees, Local 12, AFL-CIO and Department of Labor, 17 FLRA 674, 676-77 (1985) (Union Proposal 3), petition for review filed sub nom. Local 12, American Federation of Government Employees v. FLRA, No. 85-1371 (D.C. Cir. June 19, 1985).

In an analogous situation, the Authority held that a union proposal to establish a joint labor-management committee to develop the agency's training program was a negotiable procedure under section 7106(b)(2) of the Statute. American Federation of Government Employees, AFL-CIO, Local 2761 and U.S. Department of the Army, U.S. Army Adjutant General, Publication Center, St. Louis, Missouri, 14 FLRA 438 (1984). The Authority found that the committee would serve as a forum through which the union could express its views regarding the agency's training programs but would not require the agency to negotiate concerning the content of those programs.

The discussions which have already taken place with respect to conditions at the Skills Center do not render the proposal moot. The Union contends and the Agency does not dispute that the parties have not reached agreement with respect to continuing discussions concerning the Skills Center. Thus, the Authority concludes that Union Proposal 6 constitutes a negotiable procedure under section 7106(b)(2) of the Statute and falls within the Agency's duty to bargain.

VI. Union Proposal 7

> If physical moves are necessary with regard to the Skills Center as determined by management, then management will provide the necessary manpower to assist in moving heavier items.

A. Position of the Parties

The Agency contends that Union Proposal 7 would prohibit the Agency from assigning employees at the Skills Center to any duties in connection with potential moves in violation of management's right under section 7106(a)(2)(B) of the Statute to assign employees and assign work. It also contends that the proposal is moot since the Agency is committed to helping affected employees.

The Union states that the proposal would secure assistance for employees on moving bulky items.

B. Analysis and Conclusions

The language of the proposal as well as the Union's statement of intent with regard to Union Proposal 7[2] indicate that the proposal does not preclude management from assigning move-related duties to Skills Center employees, but merely would require that the Agency provide any necessary assistance in the event of such a move. Therefore, the proposal does not interfere with the Agency's exercise of its discretion with respect to its rights under section 7106 of the Statute. Rather, the Agency has the discretion to determine whether to move and, if so, what assistance, if any, is "necessary." Union Proposal 7 constitutes a procedure to be observed by Agency officials in exercising the aforementioned rights, and is, therefore, negotiable under section 7106(b)(2) of the Statute. See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 152, 154 (1979), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982).

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[2] Attachment 5 to Union's Petition for Review at 2.

The Agency's contention that the proposal has been satisfied and is, therefore, moot, is not substantiated by the record. There is no evidence of agreement between the parties on the proposal or of assistance having been rendered in any moves which may have taken place.

VII. Union Proposal 8

> If management determines that the Skills Center or other areas of campus are to remain open for extended periods of time, then management should take necessary steps to provide for protection of employees and for property located within these areas.

A. Position of the Parties

The Agency asserts that the proposal concerns internal security practices which are the sole concern of the Agency under section 7106(a)(1) of the Statute.

The Union maintains that better steps should be developed to avoid loss of Government property and employee belongings although management would retain the final decision on what the steps would be.

B. Analysis and Conclusion

In American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 14 FLRA 6, 8-9 (1984) (Union Proposal 2), enforced sub nom. FLRA v. Office of Personnel Management, 778 F.2d 844 (D.C. Cir. 1985), the Authority held that a proposal which would require management to provide "adequate security to all employees" was not inconsistent with management's right under section 7106(a)(1) of the Statute to determine the internal security practices of the agency. In that case, the Authority found that the proposal concerned the health and safety of its employees rather than the internal security of the agency. Additionally, the Authority found that, even if the proposal in Office of Personnel Management did concern "internal security," the proposal would vest discretion in the agency to determine what level of security was "adequate" and, therefore, still would not be inconsistent with the agency's right to determine its internal security practices.

Similarly, Union Proposal 8 would require the Agency to take "necessary" steps to protect employees and property within the prescribed areas. Like the proposal in Office of Personnel Management, the Union's proposal leaves to the Agency's sole discretion decisions as to what level of security satisfies the contractual standard "necessary." Consequently, the Authority finds that Union Proposal 8 does not violate the Agency's right under section 7106(a)(1) of the Statute to determine its internal security practices and is within the duty to bargain.

VIII. Union Proposals 9 and 10

Proposal 9

Any addition of Indian materials into class instruction in position descriptions should be made on an individual basis, recognizing that such emphasis may be more appropriate in some areas than in others.

Proposal 10

Any use of the addition of Indian materials in position descriptions in the performance appraisal process shall be in accordance with the Master Labor-Management Agreement.

A. Positions of the Parties

The Agency contends that these proposals interfere with the educational policy of the college. It also asserts that the proposals exceed the scope of bargaining. Finally, it states that the Master Agreement prohibits negotiations at the local level on position descriptions.

The Union argues that these proposals will draw attention to the performance appraisal process. Also, it suggests that the degree of incorporation of Indian-related materials should be determined on a case-by-case basis.

B. Analysis and Conclusions

The clear language of the proposals considered together with the submissions of the parties demonstrates that the Union's proposals constitute an attempt to negotiate concerning the substance of the Agency's decision to require the use of Indian-related materials in its courses.[3] The determination of what duties and responsibilities are assigned to a particular position falls within management's right to assign work under section 7106(a) of the Statute. See National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, above, 3 FLRA at 775. Whether and to what extent Indian-related materials should be incorporated into the subject matter of each course and, consequently, into the corresponding position description constitutes the assignment of particular duties and responsibilities over which the Agency has discretion.

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[3] See Attachment 5 to Union's Petition for Review at 2. See also Agency's Statement of Position at 15-16.

To the extent that the Union's proposals deal with the content of position descriptions, the Authority has consistently held that a position description does not constitute an assignment of duties but merely reflects the duties which have been assigned to a position or an employee. However, a position description must also accurately reflect the duties and responsibilities assigned to the position. See, e.g., National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado, 9 FLRA 151, 152 (1982)(Union Proposal 1) and cases cited therein.

Since Union Proposals 9 and 10 would effectively require the Agency to negotiate concerning the assignment of duties in violation of management's right under section 7106(a) of the Statute to assign work, the Union's proposals are outside the duty to bargain.

IX. Union Proposal 11

> Any changes in the tours of duties of unit employees shall be made through the use of volunteers. If there are not enough volunteers to fill the needed changes, then assignment shall be made based on reverse seniority with temporaries being assigned before permanent furloughs.

A. Position of the Parties

The Agency maintains that this proposal would interfere with its rights under section 7106(a)(2)(B) to assign work and to determine the numbers, types, and grades of employees assigned to a tour of duty. The Agency asserts that the proposal affects the utilization of dormitory counselors.

The Union maintains that Article 26 of the Master Agreement renders these matters negotiable:

> Section 1 Hours. The basic workweek shall consist of forty (40) hours spread over five consecutive eight (8) hour days. The workweek will be the period for which an employee is paid a straight-time pay rate. Management recognizes the right of the Local to impact bargain changes in the hours of work, shifts, or tours of duty.

The Union cites National Treasury Employees Union v. Department of Treasury, Internal Revenue Service, 6 FLRA 508 (1981) to support its point.

B. Analysis and Conclusions

In American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota, 2 FLRA 640 (1980), the Authority found that a proposal which would have guaranteed nurses every other weekend off would have interfered with the agency's ability to schedule nurses on the basis of their professional skills and specializations as needed "to ensure quality medical care and treatment of patients" and, consequently, would have forced the agency "to hire additional nurses with the necessary qualifications in order to [both] accomplish its mission and comply with such an agreement." Id. at 644. Accordingly, the Authority held that, while the language of the proposal did not explicitly relate to the numbers, types, and grades of employees, the proposal nevertheless was directly and integrally related to, so as to be determinative of, the numbers, types or grades of employees assigned to a work project or tour of duty. It was, therefore, negotiable at the election of the agency under section 7106(b)(1) of the Statute.

The Agency contends that Union Proposal 11 would require it to hire additional dormitory counselors. The Agency asserts that it currently has five counselors, each assigned to one particular dormitory so that the counselor can develop a rapport with the students in that dormitory. It further contends that the ability to develop a rapport with the students is essential to the provision of effective counseling. Although the regular tour of duty for these counselors is 8 a.m. to 5 p.m., the Agency determined that the students would be better served by having counseling available for extended hours, and instituted an evening and weekend tour of duty to be staffed by each of the five counselors on a rotating basis. The rotation system would require each counselor to be available for students not assigned to that counselor's respective dormitory only every fifth evening or weekend, but would allow the counselors to spend the majority of their time with the students in their respective dormitories.

The Union does not dispute the Agency's claim that Union Proposal 11 would require the Agency to place the full-time counselor with the least seniority on the evening tour of duty without consideration of the particular qualifications required for that shift, and would leave the students in that counselor's dormitory without a regular full-time counselor. The Agency contends that it would be required to hire additional counselors in order to provide effective counseling for the students of that dormitory and place a qualified counselor on the evening tour of duty. Consequently, the Agency contends that the proposal is integrally related to the numbers of employees assigned to a tour of duty so as to be determinative of the numbers of employees assigned to that tour. The Authority agrees. In light of the above, and for the reasons set forth in Veterans Administration Medical Center, Minneapolis, the Authority concludes that Union Proposal 11 is integrally related to, and consequently determinative of, the numbers, types or grades of employees assigned to a tour of duty and, accordingly, negotiable at the election of the Agency under section 7106(b)(1) of the Statute. Since the Agency has elected not to bargain, the Authority finds that Union Proposal 11 is outside the duty to bargain.

In view of the Authority's conclusion that this proposal is outside the duty to bargain under section 7106(b)(1) of the Statute, we find it unnecessary to address the Agency's additional contention that the proposal also interferes with its right to assign work.

X. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Union Proposals 1-5 and 9-11 is dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 6-8.[4]

Issued, Washington, D.C., July 11, 1986.

Jerry L. Calhoun
Jerry L. Calhoun Chairman

Henry B. Frazier III
Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In deciding that these proposals are within the duty to bargain, the Authority makes no judgement as to their merits.

9/case No. 377/errata

Federal Labor Relations Authority

Washington, D.C. 20424

ERRATA August 22, 1986

Report of Case Decisions Number 377 (July 23, 1986) 1/

Pages 521a and 521b 1. Insert attached pages

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Attachment

1/ The appendix to 22 FLRA No. 54 was inadvertently omitted when the decision issued to the parties.

Y3.F31/21-3:

9/[illegible] 87-2837/[illegible]

Federal
Labor Relations
Authority

Appendix

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

December 31, 1985

Mr. Harold D. Kessler
Managing Director for Case
  Processing
Federal Labor Relations Authority
Room 236
500 C Street, S.W.
Washington, D.C. 20424

Dear Mr. Kessler:

Thank you for your letter of December 6, in which you requested an interpretation of standards issued by the Occupational Safety and Health Administration (OSHA) as they relate to Federal agency safety and health programs.

Your first question asks whether employee participation in medical examinations or surveillance, required under OSHA regulations is, on the part of the employees, mandatory or voluntary.

As a matter of policy, and under the present OSHA regulations, it has been OSHA's position that such participation by employees is voluntary. However, participation in medical examinations and surveillance may be a qualifying factor for employment or continued employment. OSHA also encourages such participation in the interest of enhancing workplace health and safety.

Your second question relates to whether the agency required to make such medical examinations or surveillance must be given access to the findings and results.

To the extent that the information gathered affects the provisions for workplace health and safety and compliance with OSHA standards, then it is necessary for those agency personnel who are responsible for making decisions related to these matters to have access to findings and results.

It is our understanding that the Office of Personnel Management has drafted proposed instructions to all agencies related to access to medical examinations and surveillance. You may be interested in contacting them for information on these instructions.

I hope this satisfactorily addresses your concerns of the OSHA program as it relates to Federal employees. If we may be of further assistance, please have a member of your staff contact Mr. John E. Plummer, Director of OSHA's Office of Federal Agency Programs, at 523-9329.

Very truly yours,

WILLIAM E. BROCK

WEB:ejm

9/case 378

Federal Labor Relations Authority

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Washington, D.C. 20424

NUMBER 378 REPORT OF CASE DECISIONS July 24, 1986

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 59 (July 15, 1986)

Department of Defense, Department of the Army and the Air Force, Army and Air Force Exchange Service, Altus Air Force Base Exchange, Altus, Oklahoma and American Federation of Government Employees, AFL-CIO, Local 2586, Case No. 6-CA-40232

22 FLRA No. 64 (July 15, 1986)

U.S. Department of Agriculture, Food Safety and Inspection Service and National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO, Case No. 3-CA-30722

NEGOTIABILITY CASES

22 FLRA No. 58 (July 15, 1986)

National Treasury Employees Union, NTEU Chapter 202 and Department of the Treasury, Bureau of Government Financial Operations, Case No. 0-NG-680

22 FLRA No. 60 (July 15, 1986)

American Federation of Government Employees, AFL-CIO, Local 1603 and U.S. Naval Hospital, Patuxent River, Maryland, Case No. 0-NG-1217

22 FLRA No. 61 (July 15, 1986)

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, Case No. 0-NG-985

22 FLRA No. 62 (July 15, 1986)

American Federation of Government Employees, Local 1799 and Department of the Army, Aberdeen Proving Ground, Maryland, Case No. 0-NG-988

Y 3.F 31/21-3:

22 FLRA No. 63 (July 15, 1986)

National Treasury Employees Union and Department of Health and Human Services, Region VI, Dallas Texas, Case No. 0-NG-582

ARBITRATION CASE

22 FLRA No. 65 (July 15, 1986)

Department of Defense, Dependents Schools (DoDDS), Pacific Region and Overseas Education Association (OEA) (Oestreich, Arbitrator), Case No. 0-AR-985

Federal Labor Relations Authority

22 FLRA No. 58

NTEU, NTEU Chapter 202
and Dept of the Treasury,
Bureau of Government
Financial Operations,
Case No. 0-NG-680
(Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Government-wide Rule or Regulation
      - 5 CFR Part 351
      - 5 CFR 351.604(b)
  - Management Right
    - Assign Employees [§ 7106(a)(2)(A)]
      - Reduction-in-Force
        - Filling Vacancies
  - Procedure
    - Allegation of Nonnegotiability
      - Union Has Option to Appeal Unrequested Allegation
    - Statement of Proposal's Intent
      - Sufficiency of Statement
  - Reduction-in-Force
    - Filling Vacancies
    - Furlough
  - Subjects of Bargaining
    - Mandatory Subjects of Bargaining
      - Conditions of Employment of Non-bargaining Unit Employees
        - Proposal Has Only a Limited or Indirect Effect
      - Appropriate Arrangements [§ 7106(b)(3)]
        - Does Not Apply When Proposal Inconsistent with Government-wide Rule or Regulation

5 CFR 351.201(b), .601, .603, .607 - .608, and .701
5 CFR Part 351, Subpart E
51 Fed. Reg. 318-326 (1986)

STATUTE

7105(a)(2)(E)
7106(a)(2)(A)
7106(b)(3)
7117(a)(1)

DIGEST NOTES

A proposal regarding the filling of vacancies with employees facing displacement from their position in a RIF is nonnegotiable because it conflicts with a Government-wide rule or regulation. The Authority found that while the proposal provides for the observance of "bumping" rights, no allowance is made for observance of "retreating" rights. Thus, the proposal would require the agency to consider taking an action that ignores the requirements of OPM's RIF regulations, 5 CFR Part 351. Contrary to the

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agency's argument, the proposal would not interfere with its right to determine the number of employees assigned to an organizational unit. Thus, the proposal would apply only after the agency has decided to fill vacancies with employees facing displacement from their position in a RIF. Further, the Authority concluded that the proposal could not be found outside the duty to bargain simply because of its potential effect on nonunit employees. Thus, the proposal does not rise to the level of directly determining conditions of employment of nonunit employees; rather, its application to the filling of bargaining unit positions at most would potentially have an indirect effect on nonunit employees by limiting their access to vacant unit positions by requiring that preferential consideration be given to a unit employee. Finally, because the proposal is nonnegotiable based on its inconsistency with a Government-wide rule or regulation, § 7106(b)(3) does not apply, and, therefore, the union's argument that the proposal is an appropriate arrangement under that section was rejected by the Authority. (proposal 1)

A proposal concerning the use of furloughs as an alternative to separation in a RIF is nonnegotiable because it conflicts with 5 CFR Part 351, a Government-wide rule or regulation. The effect of the proposal would be to require an exception to the prohibition under 5 CFR 351.604(b) that an agency may not separate an employee while an employee with lower retention standing in the same competitive level is on furlough. Finally, because the proposal is nonnegotiable based on its inconsistency with a Government-wide rule or regulation, § 7106(b)(3) does not apply, and, therefore, the union's argument that the proposal is an appropriate arrangement under that section was rejected by the Authority. (proposal 2)

The Authority denied the agency's request that the union's appeal be dismissed as procedurally defective. First, the agency argued that before filing its petition, the union neither requested nor received from the agency a written statement that its proposals were nonnegotiable. The record shows that the union enclosed with its petition a written statement from the agency's negotiations spokesperson that the proposals were "illegal and therefore nonnegotiable." In view of this written statement of nonnegotiability, the Authority found that the union's petition was properly filed as it has held that unions have the option to appeal an unrequested allegation of nonnegotiability. Finally, the agency argued that the union did not support its petition with adequate explanation of the meaning and intent of the proposals. The Authority rejected the agency's argument finding that: (1) the union did file a statement as to the meaning of its proposals; (2) the agency was not prevented from developing a position on the negotiability of the proposals; and (3) the Authority was able to reach a decision based on the record in the case.

22 FLRA No. 59

Federal Labor Relations Authority

DOD, Depts of the Army and the Air Force, Army and Air Force Exchange Service, Altus AFB Exchange, Altus, Oklahoma and AFGE Local 2586, Case No. 6-CA-40232 (Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violation
    Refuse to Comply with Statute
      § 7121(a)(1)
  Grievance Procedure
    Exclusivity of Negotiated Procedure under § 7121(a)(1)
  Procedure
    Stipulation of Facts

STATUTE

7116(a)(1) and (8)
7118
7121(a)(1)
7121(d) and (e)

DIGEST NOTES

On a stipulation of facts by the parties, the Authority concluded that the agency failed to comply with § 7121 in violation of of § 7116(a)(1) and (8) when it informed a bargaining unit employee that she had the option of appealing a letter of reprimand through either the agency grievance procedure or the negotiated grievance procedure.

The Authority noted the plain language of § 7121(a)(1) provides that "the . . . [negotiated] . . . procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." Further, the Authority has held that proposals which would have provided optional appeal rights beyond the § 7121 (d) and (e) exceptions to the exclusivity of the negotiated grievance procedure are inconsistent with § 7121(a)(1).

The Authority granted that: (1) the agency rightly pointed out that its bargaining unit employees, as non-appropriated fund employees, are not under the statutory appeal procedures noted in § 7121(d) and (e); and (2) § 7121(e)(1) provides that "[s]imilar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both . . . ." Nevertheless, the Authority found the matter giving rise to the grievance in this case to be a reprimand, which is not a "similar matter" to those matters specifically covered under § 7121 (d) and (e).

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[illegible]

Discussion

[illegible]

[illegible] provides that the ". . . [negotiated] . . . procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." [illegible] (d) and (e) [illegible]

[illegible] § 7121(d) and (e) [illegible] an aggrieved employee [illegible] under [illegible] grievance procedure, but not both. [illegible]

Federal Labor Relations Authority

22 FLRA No. 60

AFGE Local 1603 and U.S. Naval Hospital, Patuxent River, Md., Case No. 0-NG-1217 (Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Work [§ 7106(a)(2)(B)]
      - Performance Standards
    - Direct Employees [§ 7106(a)(2)(A)]
      - Performance Standards
  - Performance Standards
    - Arbitral Review
      - Application of Standards
      - Fair Standards (Contents)
- 5 U.S.C. § 4302

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7114(c)

DIGEST NOTES

A proposal is nonnegotiable that would not only give employees the right to raise before an arbitrator the issue of whether management applied performance standards fairly and reasonably and in a manner otherwise consistent with the provisions of 5 U.S.C. § 4302, but also by its clear language would require an arbitrator to determine whether performance standards themselves are fair and reasonable by reviewing the criteria used by management in such standards to evaluate job performance. Thus, the proposal violates management's rights to assign work and direct employees under § 7106(a)(2)(A) and (B), because the proposal's clear language is not limited to subjecting the application of performance standards to grievance and arbitral review, but would also provide a basis for arbitral review of the content of performance standards and would permit arbitrators to substitute their judgments as to the proper content of performance standards for that of the agency.

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22 FLRA No. 61

Federal Labor Relations Authority

AFGE Local 32 and OPM,
Case No. 0-NG-985
(Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Federal Law
      - The Privacy Act [5 U.S.C. § 552a]
      - 5 U.S.C. § 1302
    - Inconsistent with Government-Wide Rule or Regulation
      - 5 CFR Part 293
      - 5 CFR Part 294
      - FPM Supplement 293-31
  - Conditions of Employment [§ 7103(a)(14)]
    - Position Description, Accuracy of
  - Position Description
    - Addendum in Official Personnel File (OPF)
- Executive Order 12107
- FPM Supp 293-31, Subchap S5-5(7), S5-6(1), and S5-6(2)
- Freedom of Information Act [5 U.S.C. § 552]
- 5 U.S.C. § 552a(e)(1)
- 5 CFR § 293.103(a)
- 5 CFR § 293.311

STATUTE

7103(a)(14)
7105(a)(2)(E)
7117(c)

DIGEST NOTES

A proposal is negotiable that would require the agency to note a change in assigned work in a letter to be included in the employee's Official Personnel Folder (OPF). The Authority found that such a letter would constitute, in effect, an addendum in order to more accurately describe the duties actually assigned. Because the validity of the classification of an employee's position and, derivatively, the employee's rate of pay are dependent on the accuracy of the employee's position description, proposals concerning the accuracy of such position descriptions have long been held to be within the duty to bargain.

The agency did not establish that inclusion in an employee's OPF of an addendum to the employee's position description is inconsistent with law or Government-wide regulation. FPM Supplement 293-31, promulgated to implement the laws and executive orders relevant to the content of an OPF, indicates that agencies have

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

discretion to determine what records of a temporary nature may be filed in an OPF. In fact, subchapter S5-6(2) of the Supplement expressly notes that a position description is an example of a temporary record. Similarly, the agency did not establish that the proposal is inconsistent with any portion of the Privacy Act, 5 U.S.C. § 552a, or with the implementing regulations in 5 CFR Part 293. In fact, 5 CFR § 293.311 expressly provides that a position description is among the information maintained by an agency in an OPF that may be disclosed to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Finally, while the agency also relied on 5 CFR Part 294, this part concerns the procedures for obtaining information under the FOIA and not what information will be maintained.

Federal Labor Relations Authority

22 FLRA No. 62

AFGE Local 1799 and Dept of the Army, Aberdeen Proving Ground, Md., Case No. 0-NG-988 (Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with The FSLMR Statute
      - § 7121(a)(1)
        - Exclusivity of Negotiated Grievance Procedure
  - Grievance Procedure
    - Exclusivity of Negotiated Procedure under § 7121(a)(1)
  - Management Rights
    - Assign Work [§ 7106(a)(2)(B)]
      - Training Assignments
  - Mandatory Subjects of Bargaining
    - Appropriate Arrangements [§ 7106(b)(3)]
      - Amelioration of Adverse Effects on Employees
        - May Not Preclude Exercise of a Management Right
    - Procedures [§ 7106(b)(2)]
      - May Not Preclude Exercise of a Management Right
  - Procedure
    - Moot
      - Agency Withdrew Its Allegation of Nonnegotiability
  - Training
    - Performance Improving Training Assignments
- 5 U.S.C. § 2105(c)
- 5 U.S.C. § 4303
- 5 U.S.C. § 7701

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(2) and (3)
7114(c)
7117(a)(1)
7121(a)(1), (d), & (e)

DIGEST NOTES

A proposal is nonnegotiable that would provide an option for non-appropriated fund (NAF) employees to contest performance based separations for cause through either the Agency's internal regulatory appeals procedure or through the negotiated grievance procedure that covers such matters. The proposal is inconsistent with § 7121(a)(1), which states that with § 7121(d) and (e) as exceptions, the negotiated procedure is the exclusive procedure for resolving grievances that fall within its coverage. The Authority found that § 7121(d) was not a relevant exception. As to § 7121(e), it was found the agency's internal administrative appeals system is not an "appellate procedure" within the meaning of § 7121(e)(1) as there was nothing in the record to indicate that it was established by or pursuant to law. (proposal 1)

A proposal is nonnegotiable that would limit agency selections for performance improving training assignments to qualified volunteers. The proposal is not a negotiable "procedure" under § 7106(b)(2) because as an express limitation on the agency's discretion to pick a particular employee to whom specified training will be assigned -- such as to a non-volunteer -- the proposal violates the agency's right to assign work under § 7106(a)(2)(B). Also, the proposal is not a negotiable "appropriate arrangement" under § 7106(b)(2). The proposal would benefit a qualified volunteer for a performance improving training assignment by ameliorating the adverse effect of not being selected because the training was assigned to a non-volunteer instead. However, the proposal violates the agency's right to assign work under § 7106 (a)(2)(B) because the proposed amelioration would totally preclude the agency from assigning performance improving training to a non-volunteer notwithstanding any determination on the part of the agency that such non-volunteer would benefit from the training. (proposal 2)

Federal Labor Relations Authority

22 FLRA No. 63

NTEU and Dept of Health
and Human Services,
Region VI, Dallas, Tex.,
Case No. 0-NG-582
(Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Agency Regulation for which a Compelling Need Exists
      - HHS Personnel Manual Instruction 351-1-40
      - HHS Personnel Manual Instruction 351-1-50A3
    - Inconsistent with Government-wide Rule or Regulation
      - 5 CFR 351.402(b), 51 Fed. Reg. 318 at 321 (1986)
      - 5 CFR 351.402 and 351.701(a)
  - Procedure
    - Contentions of Parties
      - Disposition of Proposal Renders Unnecessary Addressing Agency's Argument

STATUTE

7105(a)(2)(D) and (E)

5 CFR 351.403, .501, .607, .608, .701(a)(4), .702(a), .702(a)(4)
5 CFR 351.705(a)(1) and (b)(1)
48 Fed. Reg. 32304 at 32305 (1983)
51 Fed. Reg. 318 at 324-5 (1986)
FPM Letter 351-20 at 19

DIGEST NOTES

A proposal defining competitive area for RIF is outside the duty to bargain. The proposal is inconsistent with a Government-wide regulation: OPM's regulations regarding RIFs at 5 CFR 351.402(b), 51 Fed. Reg. 318 at 321 (1986). The regulation requires competitive areas to be defined solely in terms of an agency's organizational unit(s) and geographical location, and to include all employees within the area so defined. The proposal does not meet this standard because it would in part define a competitive area in terms of positions in particular bargaining units. However, the agency's argument that the proposal conflicts with an agency regulation for which a compelling need exists was summarily rejected by the Authority for the reasons set forth in National Treasury Employees Union and Department of Health and Human Services, Region IV, 11 FLRA 254 (1983) (Union Proposal 1). (proposal 1)

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A proposal is negotiable that would expand employee displacement rights beyond those required by OPM regulations. The proposal would allow employees to displace others in the same subgroup in different competitive levels. Although the agency's regulations do not allow the type of reassignment proposed, the Authority found that the agency failed to meet its burden of demonstrating a compelling need for its regulation. Thus, there was no demonstration that the regulation is essential, as opposed to helpful or desirable, to the accomplishment of the agency's mission and functions. Further, there was no allegation that the proposal would directly determine conditions of employment for employees outside of the bargaining unit, and for that reason was nonnegotiable. The Authority noted that the responsibility for creating a record on which it could resolve negotiability issues rested with the parties and that where applicability of a proposal to nonunit employees was not raised by the parties, the Authority would not consider it. (proposal 2)

A proposal that would allow assignments across competitive areas for RIF is nonnegotiable as it is inconsistent with a Government-wide regulation: OPM's regulations regarding RIFs at 5 CFR 351.402 and 351.701(a). Thus, employees in a competitive area are permitted to compete only with each other, not with employees in another competitive area. In view of the Authority's conclusion and because the agency's compelling need argument was based in part on OPM regulations that subsequently have been revised, it was unnecessary to address the argument. (proposal 3)

Federal
Labor Relations
Authority

22 FLRA No. 64

Dept of Agriculture and Nat'l Joint Council of Food Inspection Locals, AFGE, Case No. 3-CA-30722 (Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Subjects of Bargaining
    - At Election of Union
      - Management Proposal that Settlement Discussions Delay Filing of ULP Charge
  - Union Rights, Responsibilities and Representation
    - Subjects of Bargaining
      - At Election of Union
        - Management Proposal that Settlement Discussions Delay Filing of ULP Charge
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate [§ 7116(a)(5)]
      - Impasse
        - Subjects of Bargaining
          - At Election of Union
            - Management Proposal that Settlement Discussions Delay Filing of ULP Charge
  - Procedure
    - Stipulation of Facts
  - Waiver of Rights
    - Subjects of Bargaining
      - At Election of Union
        - Management Proposal that Settlement Discussions Delay Filing of ULP Charge

STATUTE

7106(a) and (b)(2)
7116(a)(1) and (5)
7118
7119

DIGEST NOTES

On a stipulation of facts by the parties, the Authority concluded that the agency violated § 7116(a)(1) and (5) by insisting on bargaining to impasse concerning a proposal which was outside the union's duty to bargain. The agency's proposal conflicted with the union's rights under § 7118 because, in requiring that the filing of charges would be delayed pending time spent on informal settlement efforts, the union would be prevented from filing as soon as an event had occurred or had been discovered. The Authority noted that in certain situations, without fault by

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either party, delaying the filing of a charge could mean that the charge would be filed more than six months after the occurrence, with the consequence that the General Counsel would not be able to act on the charge. Thus, the procedures proposed by the agency are permissive subjects of bargaining for the union because the procedures would require the union to waive certain of its statutory rights.

Federal Labor Relations Authority

22 FLRA No. 65

DOD Dependents Schools (DODDS), Pacific Region
and Overseas Education Association (OEA)
(Oestreich, Arbitrator),
Case No. 0-AR-985
(Decided July 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Procedure
    - Forums
      - Authority Lacks Jurisdiction
        - § 7121(f) (Matter Arose Under Another Personnel System)
        - 5 U.S.C. § 7512 Matters (Covered under or Similar to)
    - Statements of Position Requested by Authority
- Defense Department Overseas Teachers Pay and Personnel Practices Act, Pub. L. No. 86-91, 73 Stat. 214 (1959), 20 U.S.C. §§ 901-907
- S. Rep. No. 141, 86th Cong., 1st Sess. 1 and 2 (1959)
- S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978)
- 5 U.S.C. §§ 4303 and 7701
- 20 U.S.C. § 902(a)
- 38 U.S.C. Chap. 73
- 38 U.S.C. §§ 4101-4119
- 38 U.S.C. § 4106(a) and (b), and § 4107

STATUTE

7121(e) and (f)
7122(a)

DIGEST NOTES

The arbitrator denied the grievance finding that management had proved by a preponderance of the evidence that the removal of the grievant -- a teacher in the DOD Overseas Dependents Schools System, and who apparently is not a preference eligible -- was for just cause.

The Authority determined that it was without jurisdiction to review the union's exceptions. The Authority has jurisdiction under § 7122(a) to review exceptions to arbitrator's awards, excluding awards relating to a matter described in § 7121(f). The Authority concluded that the arbitrator's award in this case relates to a matter described in § 7121(f): (1) the subject of the award, a removal, is a matter similar to those covered under 5 U.S.C. § 7512; and (2) because the sources of the "employment and safety practices" applicable to overseas teachers are the Defense Department Overseas Teachers Pay and Personnel Practices Act (the Act), Pub. L. No. 86-91, 73 Stat. 214 (1959), 20 U.S.C. §§ 901-907 and the regulations of the Secretary of Defense -- prescribed by and issued pursuant to the Act -- and not civil

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

service laws and regulations generally, the Authority found the "system of personnel administration" for overseas teachers, S. Rep. No. 141, 86th Cong., 1st Sess. 1 (1959), to be "[an]other personnel syste[m]" within the meaning of § 7121(f).

22 FLRA No. 58

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, NTEU CHAPTER 202

Union

and

Case No. O-NG-680

DEPARTMENT OF THE TREASURY,
BUREAU OF GOVERNMENT
FINANCIAL OPERATIONS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of two Union proposals which concern treatment of union representatives in a reduction-in-force.

II. Procedural Issues

The Agency has requested that the Union's petition be dismissed because of what it contends are "fatal procedural defects." In support of its motion it makes two arguments:

(1) Prior to filing the petition, the Union neither requested nor received from the Agency a written statement that its proposals were nonnegotiable.

(2) The Union did not support its petition with an adequate explanation of the meaning and intent of the proposals.

The Union disputes these contentions. As to the first, it received a written statement from the Agency negotiations spokesperson that its proposals were "illegal and therefore nonnegotiable." A copy of this statement accompanied the Union's petition. In view of this written statement of nonnegotiability, the Authority finds that the Union's petition is properly filed. International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982). As to the Agency's second contention, the Union notes that it did file a statement as to the meaning of its proposals as required by the Authority's Rules. We find that the Agency was not prevented from developing a position on the negotiability of the proposals. Moreover, we are able to reach a decision based on the record in this case. The Agency's request that the petition be dismissed based on procedural matters is denied.

III. Union Proposal 1

> Existing Vacancies - If such a position exists and a union representative is qualified, the Employer will consider the union representative in advance of other qualified employees for this vacant position. If there is no union representative affected by the RIF, the affected employee will be considered for that vacant position.

A. Positions of the Parties

As explained by the Union, the proposal applies once the Agency has decided to reassign employees facing separation in a reduction-in-force (RIF) to vacant positions. Once this decision has been made by the Agency, the proposal requires that first consideration for the reassignment go to any qualified union representatives who are affected by the RIF. The Union states, however, that the proposal does not require that preferential consideration be given to a union representative over another qualified employee who is in a tenure group or subgroup which is superior to that of the union representatives.[1] It is also not intended to apply to positions outside the bargaining unit. The Union argues that this proposal amounts to an appropriate arrangement for employees who are adversely affected by the exercise of the Agency's right to conduct a RIF.

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[1] Employees are placed in "tenure groups" according to the nature of their appointment; i.e., career, career-conditional, indefinite, etc. "Subgroup" placement is based on veterans status. 5 CFR 351.501.

The Agency argues that the proposal violates a Government-wide rule or regulation--the Office of Personnel Management (OPM) regulations governing RIFs. In support of this, it contends that the proposal would require it to place union representatives in vacant positions despite the fact that under those regulations another employee might have a right to the position. It also asserts that the proposal is nonnegotiable because it would affect the rights of nonunit employees. Finally, the Agency alleges that the proposal would require it to fill vacancies and consequently interferes with its management right to determine the number of employees assigned to an organizational unit.

B. Analysis and Conclusions

1. Conflict with Government-wide Rules or Regulations

OPM has issued new regulations concerning RIFs at 5 CFR Part 351, effective February 3, 1986. 51 Fed. Reg. 318-326 (1986). The Authority has found that the OPM regulations concerning RIFs are Government-wide rules or regulations within the meaning of section 7117(a)(1) of the Statute. American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 18 FLRA No. 18 (1985). Although that case applied to previous OPM regulations, the revised RIF regulations similarly apply generally to civilian employees of the Federal government and are likewise Government-wide rules or regulations.

Under these regulations an agency may in its discretion choose to fill a vacancy with an employee facing separation, furlough or reassignment in a RIF. When it elects to do so it must follow the provisions of the RIF regulations. 5 CFR 351.201(b). See also Klegman v. Department of Health and Human Services, 16 M.S.P.R. 454 (1983). This includes recognizing whatever claim employees may have to the particular position as a consequence of their "bumping" or "retreating" rights.[2] Baker v. Department of Commerce,

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[2] "Bumping" is the right of one employee to displace another employee in a position on the basis of subgroup superiority. "Retreating" is the right to displace another employee in a position which is one from which or through which the employee was promoted and which is occupied by an employee with lower "retention standing." 5 CFR 351.701. "Retention standing" is an employee's ranking relative to other employees based on group, subgroup, length of service and performance ratings. 5 CFR Part 351, Subpart E.

Economic Development Administration, 19 M.S.P.R. 432 (1984). Based on the Union's explanation, Proposal 1 is intended to provide for observance of "bumping" rights. However, no allowance is made for observance of "retreating" rights which may give employees other than the union representatives claim to the position involved. Thus, the proposal requires the Agency to consider taking an action which ignores some of the requirements of 5 CFR Part 351. Because of this circumstance, the Authority finds that Union Proposal 1 conflicts with a Government-wide rule or regulation, and is not within the obligation to bargain.

2. Interference with Management Right

Based on the language of the proposal and the Union's explanation, the Authority interprets the proposal as applying only after the Agency has decided to fill vacancies with employees facing displacement from their position in a RIF. Given this, the Agency's argument that the proposal would require it to fill vacancies is not supported. Therefore its conclusion, based on this argument, that the proposal interferes with its right to determine the number of employees assigned to an organizational unit must be rejected.

3. Effect on Nonunit Employees

Based on the Union's explanation, which is compatible with the proposal itself, the Authority interprets the proposal as applying only to vacant positions within the bargaining unit. The proposal as it applies to the filling of bargaining unit positions, if otherwise negotiable, would potentially have an effect on nonunit employees. However, that effect would only be an indirect one, potentially limiting nonunit employees' access to vacant unit positions by requiring that preferential consideration be given to a unit employee. The proposal does not rise to the level of directly determining conditions of employment of nonunit employees. See American Federation of Government Employees, Local 32 and Office of Personnel Management, 22 FLRA No. 49 (1986) in which the Authority discussed the circumstances under which the effect of a proposal on nonunit employees would remove a proposal from the duty to bargain. Consequently, the Authority does not find that this proposal would be nonnegotiable simply because of its potential effect on nonunit employees. Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38, 39 (1984).

4. Appropriate Arrangement

Because the proposal is nonnegotiable based on its inconsistency with a Government-wide rule or regulation, section 7106(b)(3) of the Statute does not apply. American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California, 19 FLRA 1016, 1019 (1985), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, No. 85-1689 (D.C. Cir. Oct. 21, 1985). Therefore, the Union's argument that Union Proposal 1 is negotiable because it is an appropriate arrangement under section 7106(b)(3) is rejected.

IV. Union Proposal 2

> Retention/Reassignment - When there is a shortage of funds for a Division or Branch and a union representative occupies a position within the Division or Branch, the Bureau will consider a furlough of that representative for the shortest possible period exceeding 30 days.

A. Positions of the Parties

As explained by the Union, this proposal would require that the Agency consider furloughing a union representative as an alternative to separating him/her in a RIF. The Agency contends that this proposal conflicts with the OPM RIF regulations. The Union counters that under those OPM regulations agencies have the discretion to make exceptions to the normal order of release of employees in RIFs and that this proposal involves an action which fits within that discretion. Like Union Proposal 1, the Union characterizes this proposal as an appropriate arrangement for employees adversely affected by management's exercise of its statutory authority.

B. Analysis and Conclusions

Under OPM regulations, employees are grouped in competitive levels by the similarity of their positions and grades. Positions placed in the same competitive level are supposed to be interchangeable. The OPM regulations basically require that employees be "released" from their competitive levels in inverse order of their retention standing. 5 CFR 351.601. Once released an employee is separated, furloughed or reassigned. The regulations specifically provide that an agency may not separate an employee while an employee with lower retention standing in the same competitive level is on furlough. 5 CFR 351.604(b). The effect of the Union's proposal would be to require an exception to this prohibition. That is, under the proposal an agency could be required to consider separating an employee while a union representative with lower retention standing in the same competitive level is on furlough. Contrary to the Union's argument, the Authority finds that OPM regulations do not permit an exception to this particular provision. The exceptions allowed by OPM regulations to which the Union refers in its arguments go to other provisions of the RIF regulations.3/ There is no mention in the regulations of any exceptions which an agency could make to the prohibition set forth in 5 CFR 351.604(b). The Authority concludes therefore that Union Proposal 2 is inconsistent with 5 CFR 351.604(b). As found earlier, 5 CFR Part 351 is a Government-wide regulation. Because Union Proposal 2 conflicts with a Government-wide rule or regulation, it is not within the duty to bargain.4/

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 15, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ 5 CFR 351.607 and 351.608 allow exceptions to 5 CFR 351.601 and 351.603.

4/ For the reasons given in section III(B)(4) of this decision, section 7106(b)(3) of the Statute does not apply.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE ARMY AND THE AIR FORCE
ARMY AND AIR FORCE EXCHANGE SERVICE
ALTUS AIR FORCE BASE EXCHANGE
ALTUS, OKLAHOMA

Respondent

and Case No. 6-CA-40232

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2586

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before, the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and by the General Counsel.

The complaint alleges that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by informing a bargaining unit employee that she had the option of appealing a letter of reprimand through either the agency grievance procedure or the negotiated grievance procedure. Such conduct is alleged to constitute a failure and refusal to comply with section 7121(a)(1) of the Statute.

II. Facts

On March 7, 1984, the Respondent's agent, Altus Air Force Base Exchange Manager Javier Villalobos, issued a written reprimand to Mary Bailey, a bargaining unit employee, for misuse of sick leave. The letter stated specifically that Bailey had the "right to file within 21 calendar days following receipt of the written reprimand, a grievance through the undersigned . . . pursuant to the provisions of . . . [Army and Air Force Exchange Service Regulations] . . . or the negotiated procedure contained in the current labor agreement, but not both." After consulting with the Union president, Bailey pursued her appeal of the reprimand through the negotiated procedure.

III. Positions of the Parties

The General Counsel takes the position that the Respondent, by offering the bargaining unit employee a choice of appeal routes, violated the exclusivity of the parties' negotiated grievance procedure as provided under section 7121(a)(1) of the Statute.[1/] The General Counsel contends further that the only exceptions to this provision are those appeal procedures set out specifically under section 7121(d) and (e) of the Statute, and that the written reprimand issued to Bailey is clearly not subject to an appeal procedure under either exception. In this latter regard, the General Counsel cites to the Authority's decision in American Federation of Government Employees, AFL-CIO, Local 2955 and National Guard Bureau, Office of the Adjutant General, Des Moines, Iowa, 5 FLRA 617, 620 (1981), in which the Authority concluded with respect to a proposal that would grant bargaining unit employees the option to choose either the negotiated grievance procedure or a statutory procedure concerning "any matter" covered by the grievance procedure:

[1/] Section 7121(a)(1) provides:

> § 7121. Grievance procedures
>
> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

> This is clearly inconsistent with section 7121(a)(1) of the Statute which permits such option only in very limited circumstances: that is, where the grievance falls within the coverage of either section 7121(d) or (e) of the Statute. In all other situations, notwithstanding the possible existence of an otherwise applicable statutory procedure, the negotiated procedure must be the exclusive procedure for resolving grievances which fall within its coverage. (Emphasis in original).

Thus, the General Counsel argues that the Respondent has granted a bargaining unit employee an option which is inconsistent with the Statute.

On the other hand, the Respondent takes the position that its bargaining unit employees have a right under the collective bargaining agreement and by operation of law to use either the negotiated procedure or the agency procedure. The Respondent argues that the parties' agreement provides no prohibition against an employee's pursuit of a grievance through the appeals channels provided under Army and Air Force Exchange Service (AAFES) Regulations. The Respondent further argues that the nonappropriated fund employees in the bargaining unit should be treated differently inasmuch as they have no statutory appeal procedures like those provided to most Federal employees as referenced in section 7121(d) and (e) of the Statute,[2] and that the adverse action appeal rights granted to the nonappropriated fund employees under AAFES Regulations should be equated to adverse action appeal rights under section 7121(d) and (e). Therefore, the Respondent argues that its bargaining unit employees should have the same right as appropriated fund employees to choose the negotiated grievance procedure or an agency appeal procedure. Finally, the Respondent contends that inasmuch as the bargaining unit employee chose the negotiated procedure, at worst it has committed a technical violation of the Statute that was de minimis in nature.

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[2] Section 7121(d) and (e) provide in pertinent part:

. . . . . .

> (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. . . .

(Continued)

IV. Analysis

The plain language of section 7121(a)(1) of the Statute provides that "the . . . [negotiated] . . . procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." (Emphasis added). The only exceptions to this provision involve those matters which are covered by a negotiated grievance procedure but also may be resolved pursuant to the statutory appeal procedures

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(Continued)

> (e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. . . .
>
> (2) In matters covered under section 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

referred to in section 7121(d) and (e) of the Statute. The appeal procedure which the Respondent offered as an option to the bargaining unit employee in this case clearly does not fall within either of these two exceptions. Respondent correctly points out that its bargaining unit employees are not covered by the statutory appeal procedures noted in section 7121 (d) and (e) of the Statute which do not apply to nonappropriated fund employees. While section 7121(e)(1) of the Statute provides that "[s]imilar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both . . . ," the matter giving rise to the grievance in this case is a reprimand, which is not a similar matter to those matters specifically covered under section 7121(d) and (e) of the Statute.

As previously noted by the General Counsel, the Authority, in American Federation of Government Employees, AFL-CIO, Local 2955 and National Guard Bureau, Office of the Adjutant General, Des Moines, Iowa, 5 FLRA 617 (1981), concluded, with respect to a proposal which would have provided optional appeal rights beyond the section 7121(d) and (e) exceptions to the exclusivity of the negotiated grievance procedure, that such a proposal is inconsistent with the Statute.[3/] Similarly here, the Authority concludes that for the Respondent to offer a bargaining unit employee such an option is inconsistent with the plain language of section 7121(a)(1) of the Statute and therefore constitutes a failure to comply with section 7121(a)(1) in violation of section 7116(a)(1) and (8).

[3/] See also American Federation of Government Employees, AFL-CIO, Local 2904 and Marine Corps Finance Center, Kansas City, Missouri, 7 FLRA 188 (1981) and National Treasury Employees Union and U.S. Customs Service, Washington, D.C., 8 FLRA 3 (1982), wherein similar proposals were also held to be inconsistent with the Statute.

While we agree with the Respondent that the bargaining unit employee involved in this case chose the negotiated grievance procedure, and therefore neither she nor her exclusive representative was deprived of protected rights under the Statute in this instance, the fact remains that the Respondent failed to comply with a specific statutory requirement by offering the employee a choice of procedures. Moreover, there is no basis in the stipulated record before us to support a conclusion that the Respondent will refrain from offering this option to unit employees in the future. Accordingly, the Authority rejects the Respondent's argument that its conduct constituted no more than a technical violation and orders that the Respondent's violative conduct be remedied as set forth below.

V. Conclusion

The Authority has considered all of the facts and circumstances of this case, including the positions of the parties, and concludes that the Respondent failed to comply with section 7121 of the Statute in violation of section 7116(a)(1) and (8) of the Statute when it informed a bargaining unit employee that she had the option of appealing a letter of reprimand through either the agency grievance procedure or the negotiated grievance procedure.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Defense, Department of the Army and the Air Force, Army and Air Force Exchange Service, Altus Air Force Base Exchange, Altus, Oklahoma, shall:

1. Cease and desist from:

(a) Advising bargaining unit employees that they may choose an appeal procedure, as an alternative to the grievance procedure negotiated with the American Federation of Government Employees, AFL-CIO, Local 2586, the exclusive representative of its employees, to resolve any matter covered by the negotiated agreement, unless such matter is subject to resolution pursuant to statutory appeal procedures referred to in section 7121(d) and (e) of the Statute.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its Altus Air Force Base Exchange facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Exchange Manager, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 15, 1986.

J. Calhoun

Jerry L. Calhoun Chairman

Henry B. Frazier III

Henry B. Frazier, III Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT advise bargaining unit employees that they may choose an appeal procedure as an alternative to the grievance procedure negotiated with the American Federation of Government Employees, AFL-CIO, Local 2586, the exclusive representative of our employees, to resolve any matter covered by the negotiated agreement, unless such matter is subject to resolution pursuant to statutory appeal procedures referred to in section 7121(d) and (e) of the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
(Agency or Activity)

Dated:________________ By:________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1603

Union

and

Case No. 0-NG-1217

U.S. NAVAL HOSPITAL,
PATUXENT RIVER, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following provision of an agreement disapproved by the Agency head under section 7114(c) of the Statute.

> Article IX, Section 5
>
> An employee who believes that he/she has been adversely affected by application of a performance standard may raise the issue of whether the performance standard, as applied to the employee, is fair and reasonable in any grievance proceeding or arbitration on the matter. In interpreting whether a performance standard is fair and reasonable, an arbitrator shall bear in mind that 5 USC 4302 states that the Employer must establish performance standards which will, to the maximum extent feasible, permit the accurate evaluation of Job Performance on the basis of objective criteria related to the job in question.

II. Positions of the Parties

The Agency contends that, to the extent that it requires the performance standards themselves to be fair and reasonable, as well as to be fairly and reasonably applied, the disputed provision violates management's rights to assign work and direct employees under section 7106(a)(2)(A) and (B) of the Statute. The Union did not file a Reply Brief in this case, but explains, in its petition for review, that the intent of the provision is to give employees the right to raise before an arbitrator the issue of whether the employer applied performance standards fairly and reasonably and in a manner otherwise consistent with the provisions of 5 U.S.C. § 4302.

III. Analysis and Conclusion

Contrary to the Union's explanation, the clear language of the disputed provision is not limited to subjecting the application of performance standards to grievance and arbitral review. It also, by the language contained in the second sentence as to "whether a performance standard is fair and reasonable," would require an arbitrator to determine whether performance standards themselves are fair and reasonable by reviewing the criteria used by management in such standards to evaluate job performance. As such it would provide the basis for arbitral review of the content of performance standards and would permit arbitrators to substitute their judgments as to the proper content of performance standards for that of the Agency. Thus, the disputed provision in this case is to the same effect as a disputed portion of a proposal found to be outside the duty to bargain in American Federation of Government Employees, Local 32 and Office of Personnel Management, Washington, D.C., 16 FLRA 948 (1984) (Proposal 3). In that decision the Authority held that the disputed portion of a proposal which provided that "performance standards . . . must be fair and equitable" violated management's rights to assign work and direct employees under section 7106(a)(2)(A) and (B) of the Statute. Based on Office of Personnel Management and the cases cited therein, this provision, to the extent that it requires an arbitrator to determine whether performance standards themselves are fair and reasonable, is also outside the duty to bargain. See also American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 17 FLRA 790 (1985) (Proposal 3).

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 61

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 32, AFL-CIO

Union

and

Case No. 0-NG-985

OFFICE OF PERSONNEL MANAGEMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal.1/

> Employees will receive a letter stating that they performed work in specially referred correspondence from the OPM Director, Compensation Director and Retirement Program Director's Offices on a priority basis for the OPF's.

II. Positions of the Parties

The Agency contends that there has not been a substantial change in working conditions which would require bargaining on impact and implementation. The Agency also alleges, in essence, that sole and exclusive control over the content of an Official Personnel Folder (OPF) is vested in the Office of Personnel Management (OPM) and individual Federal agencies by law, namely 5 U.S.C. § 1302, Executive

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1/ The Union withdrew a second proposal.

Order 12107, and the Privacy Act, 5 U.S.C. § 552a. Thus, since this proposal requires bargaining on the content of an OPF, it is inconsistent with these authorities and the implementing Government-wide regulations set out in Title 5 of the Code of Federal Regulations and the Federal Personnel Manual and does not constitute a condition of employment within the meaning of section 7103(a)(14) of the Statute. The regulations cited by the Agency are 5 CFR Parts 293 and 294 and FPM Supplement 293-31.

The Union contends that it is entitled to bargain over matters affecting working conditions whether or not the Agency has acted to change those working conditions. It also argues that none of the Government-wide laws or regulations cited by the Agency prohibit placing records related to work assignments in an employee's OPF or prevent bargaining regarding the exercise of agency discretion in maintaining the OPF's of its employees.

III. Analysis

A. Duty to Bargain

When a Union files a negotiability appeal under section 7105(a)(2)(E) of the Statute, section 7117(c) entitles it to a decision on the negotiability issues in the appeal. To the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of a case, such issues should be raised in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984). Hence, the Agency's contention that under the circumstances it has no duty to bargain on the disputed proposal is not relevant in this negotiability dispute.

B. Law and Government-wide Regulations

Employees in the priority correspondence unit previously responded to correspondence from Members of Congress and the President, among others. Due to a change in assigned work, these employees now also respond to correspondence referred to them from the offices of the OPM Director, Associate Director for Compensation, and the Assistant Director for Retirement Programs. This proposal would require the Agency to note this change in assigned work in a letter to be included in the employee's OPF. Such a letter, in our opinion, would constitute in effect an addendum to the employee's position description in order to more accurately describe the duties actually assigned to these employees.

It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion. That is, unless such matters are inconsistent with Federal law, including the Statute, or Government-wide rule or regulation or agency regulation for which a compelling need exists, they are within the duty to bargain. See, for example, National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769, 771 (1980), aff'd sub nom. National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982).

Because the validity of the classification of an employee's position and, derivatively, the employee's rate of pay are dependent on the accuracy of the employee's position description, proposals concerning the accuracy of such position descriptions have long been held to be within the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 153, 160 (1979), aff'd as to other matters sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. American Federation of Government Employees v. Federal Labor Relations Authority, 455 U.S. 945 (1982). Thus, unless this proposal is inconsistent with Federal law or Government-wide regulation, as claimed by OPM, it would be within the duty to bargain.

OPM has not established that inclusion of an addendum in an employee's OPF is inconsistent with law or Government-wide regulation. Specifically, although OPM claims that it has sole and exclusive authority under law and executive order to determine the content of an OPF, FPM Supplement 293-31, promulgated to implement such laws and executive orders, indicates that agencies have discretion to determine what records of a temporary nature may be filed in an OPF. That is, the Supplement establishes in subchapter S5-5(7) that permanent records, designated by OPM in subchapter S5-6(1), are to be filed on the right side of the OPF and records of a temporary nature are to be filed on the left side. Position descriptions are not designated as permanent records in subchapter S5-6(1). Rather, subchapter S5-6(2) indicates that "[b]ecause [temporary] records vary widely from agency to agency, no list of them is included" and expressly notes that a position description is an example of a temporary record.

Similarly, OPM has not established that this proposal is inconsistent with any portion of the Privacy Act, 5 U.S.C. § 552a, or with the implementing regulations set out in 5 CFR Part 293. Certainly, an accurate description of the duties assigned to an employee meets the requirement stated in 5 U.S.C. § 552a(e)(1) and restated in 5 CFR § 293.103(a) that records maintained on an employee be relevant and necessary to accomplish a Federal personnel management purpose. In fact, 5 CFR § 293.311 expressly provides that a position description is among the information maintained by an agency in an OPF which may be disclosed to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Finally, while OPM also relies on 5 CFR Part 294, this part concerns the procedures for obtaining information under the FOIA and not what information will be maintained.

IV. Conclusion

Based on the foregoing analysis, the Authority finds that the proposal concerns a condition of employment and is not inconsistent with Federal law or Government-wide regulation. Therefore, the proposal is within the duty to bargain under section 7117 of the Statute.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union proposal.2/

Issued, Washington, D.C. July 15, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In finding the proposal is within the duty to bargain, the Authority makes no judgment as to its merits.

22 FLRA No. 62

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1799

Union

and

Case No. O-NG-988

DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND,
MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (The Statute) and concerns the negotiability of the underlined portions of two provisions of a negotiated agreement which were disapproved by the Agency head pursuant to section 7114(c) of the Statute.[1]

II. Union Provision 1

> Section 17.07. The employee may contest the merits or procedures used in effecting a non-disciplinary adverse action of separation for cause by using the appeal procedures specified in AR-230-2 or by using the grievance procedures contained in Article 18, but not both. An employee shall be deemed to

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[1] The Agency withdrew its allegation of nonnegotiability with regard to two additional provisions included in the Union's appeal. Consequently, the appeal as to those matters is moot and the petition for review as it relates to those two provisions is dismissed.

> have exercised this option for one of the procedures described above at such time as he timely files under either procedure whichever comes first.

A. Positions of the Parties

The Agency asserts that Union Provision 1 is nonnegotiable because it is inconsistent with section 7121(a)(1) of the Statute. The Union argues that the provision is consistent with section 7121(e)(1) of the Statute.

B. Analysis

The two sections of the Statute relied upon by the parties, namely, section 7121(a)(1) and section 7121(e)(1), provide in relevant part, as follows:

> § 7121. Grievance procedures
>
> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> . . . . . .
>
> (e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. . . .

Section 7121(a) establishes that, except for those limited matters set out in section 7121(d) and (e), the negotiated grievance procedure shall be the exclusive procedure for resolving all matters which fall within its coverage.2/ The limited exceptions to the exclusivity requirement, which are set out in section 7121(e)(1), permit employees covered by title 5 the option of challenging certain actions, including performance based non-disciplinary separations, through their negotiated grievance procedure or to the Merit Systems Protections Board (MSPB) through the appellate procedures of 5 U.S.C. § 7701. Section 7121(e)(1) also permits employees not covered by title 5 to challenge similar actions through their negotiated grievance procedure or through the applicable "appellate procedures" which may exist under their non-title 5 personnel system.

The record in this case indicates that the employees referred to in the provision are non-appropriated fund (NAF) employees. These NAF employees are not covered by 5 U.S.C. § 4303 relating to performance based adverse actions and thus, cannot appeal a non-disciplinary separation for cause to MSPB under 5 U.S.C. § 7701. See 5 U.S.C. § 2105(c). In addition, according to the parties, NAF employees do not have access to any other statutory appeals procedure in which to contest such non-disciplinary separations for cause. Rather, the Agency has created, by regulation, an internal administrative appeals system in which such matters may be contested. Further, the record indicates that the Agency regulation specifically excludes from coverage of the administrative appeals system any matter that is also covered by a negotiated grievance procedure. Provision 1 simply would grant NAF employees the option to appeal non-disciplinary separations for cause through either the negotiated grievance procedure or through the administrative procedures contained in the Agency regulation.

Thus, the question presented by the disputed portion of Provision 1 concerns whether the Agency's internal administrative appeals system is an "appellate procedure" within the meaning of section 7121(e)(1) of the Statute.

Although the term appellate procedure is not expressly defined in the Statute, the legislative history of section 7121 supports a conclusion that Congress intended that term

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2/ While section 7121(a) also refers to matters set out in section 7121(d), such matters relate to discrimination complaints and are not relevant in the instant case.

to include "any applicable appeals procedure established by or pursuant to law." H. REP. NO. 1403, 95th Cong., 2d Sess. 55 (1978). See also S. REP. NO. 969, 95th Cong., 2d Sess. 109-110 (1978).

The Union in this case does not provide any support for its claim that the Agency's internal administrative appeals system constitutes an appellate procedure within the meaning of section 7121(e)(1). Specifically, there is nothing in the record to indicate that the Agency's internal administrative appeals system was established by or pursuant to law. Thus, the Agency's internal appeals system is not an "appellate procedure" within the meaning of section 7121(e)(1) of the Statute. As a result, challenges to performance based separations for cause of NAF employees are required by section 7121(a)(1) of the Statute to be processed exclusively through the negotiated grievance procedure which covers such matters.

C. Conclusion

Consequently, by attempting to provide NAF employees with an option to contest performance based separations for cause through either the Agency's internal regulatory appeals procedure or through the negotiated grievance procedure which covers such matters, the disputed portion of Union Provision 1 is inconsistent with the mandate of section 7121(a)(1). Therefore, Provision 1 is outside the duty to bargain under section 7117(a)(1) of the Statute.

III. Provision 2

> Section 26.07. The parties agree that fair and equitable consideration shall be afforded unit employees in respect to training which will improve their on-the-job performance. In this connection, the selection of candidates for such training shall be made from interested qualified employees in the area concerned.

A. Positions of the Parties

The Agency contends that because this provision would require management to restrict its assignment of certain training to certain specified employees, it directly interferes with management's right, under section 7106(a)(2)(B) of the Statute, to assign work. The Union argues that the undisputed first sentence read in conjunction with the disputed second sentence, does not interfere with management's right to assign work. Further, the Union asserts that, under applicable Authority precedent, this proposal is within the duty to bargain because it contains general non-quantitative language which provides, at most, a procedure or an arrangement by which a management right is exercised.

B. Analysis

In our opinion, if this proposal were revised to more precisely implement the Union's stated intent of providing bargaining unit employees with fair and equitable consideration in selection for performance improving training assignments, it would be within the duty to bargain. See Association of Civilian Technicians, New York State Council and State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Union Proposal 1). However, the Union's stated intent is at odds with the plain meaning of the entire proposal. Specifically, the first sentence, which is not in dispute, merely provides that bargaining unit employees will be provided with fair and equitable consideration for training assignments. The second sentence, on the other hand, expressly provides that selections for such training assignments "shall be made" from "interested qualified" employees, in other words from qualified volunteers. Since there is nothing in the record which persuades us that the disputed second sentence was intended to merely establish a nondispositive preference for qualified volunteers, we conclude that this sentence simply would preclude the Agency, for example, from assigning training to a non-volunteer.

It is well settled that an express limitation on an agency's discretion to pick the particular employee to whom specified training will be assigned violates the agency's right to assign work under section 7106(a)(2)(B) of the Statute. See National Association of Air Traffic Specialists and department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Union Proposals I through III). Thus, the disputed second sentence would substantively interfere with management's right and does not constitute a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982).

We turn now to the question of whether the disputed second sentence constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. Here, we may assume that the disputed sentence was intended to ameliorate an adverse effect perceived by a qualified volunteer for a performance improving training assignment who was not selected because the training was assigned to a non-volunteer instead. In this circumstance, however, the proposed amelioration would totally preclude the Agency from assigning the training to the non-volunteer notwithstanding any determination on the part of the Agency that such non-volunteer would benefit from the performance improving training. Such a proposed amelioration, which totally abrogates the exercise of a management right, clearly does not constitute an appropriate arrangement within the meaning of section 7106(b)(3). *See American Federation of Government Employees, Local 2782 v. Federal Labor Relations Authority*, 702 F.2d 1183, 1188 (D.C. Cir. 1983), *reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 7 FLRA 91 (1981).

C. Conclusion

Based on the foregoing analysis, the disputed sentence violates management's right, under section 7106(a)(2)(B), to assign work and does not constitute a negotiable procedure under section 7106(b)(2) or an appropriate arrangement under section 7106(b)(3) of the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier, III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION
Union

and Case No. 0-NG-582

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, REGION VI,
DALLAS, TEXAS
Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of three Union proposals. The proposals concern a reduction-in-force (RIF) within an operating division (Public Health Service) of the Agency.

II. Union Proposal 1

> "Competitive Area" is defined as all those positions under the authority of the Principal Regional Official of HHS - Dallas within the commuting area of Dallas, Texas except those which have been determined by the FLRA to be in "bargaining units" other than that represented by Chapter 219, NTEU.

A. Positions of the Parties

The Agency argues that the proposal conflicts with an Agency regulation for which a compelling need exists. The Union asserts that the Agency has failed to demonstrate that a compelling need exists for the regulation with which the proposal conflicts.

B. Analysis and Conclusions

The positions of the parties here are substantially identical to those which they took concerning a similar proposal which was before the Authority in National Treasury Employees Union and Department of Health and Human Services, Region IV, 11 FLRA 254 (1983) (Union Proposal 1). For the reasons expressed in DHHS, Region IV,[1] the Authority rejects the Agency's argument here that a compelling need exists for the regulation[2] on which it relies.

However, we find that this proposal is nonnegotiable for a reason other than that raised by the Agency. OPM has recently prescribed revised regulations regarding RIFs which are Government-wide regulations within the meaning of section 7117 of the Statute. National Treasury Employees Union and Department of the Treasury, Bureau of Government Financial Operations, 22 FLRA No. 58 (1986). Among other things, those regulations set forth criteria for defining competitive areas. They require that a competitive area "be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined." [Emphasis supplied.] 5 CFR 351.402(b), 51 Fed. Reg. 318 at 321 (1986). The proposal does not meet this standard. It would in part define a competitive area in terms of positions in particular bargaining units rather than solely in terms of organizational units and geographical location. Hence, it is inconsistent with a Government-wide rule or regulation and it is not within the duty to bargain.

III. Union Proposal 2

> Displacement within subgroups will be permitted between competitive levels to the same extent

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[1] In DHHS, Region IV the Authority relied in part on an Office of Personnel Management (OPM) regulation found at 5 CFR 351.701(a)(4). The OPM regulations have since been revised. However, an identical provision continues to appear at 5 CFR 351.702(a)(4). 51 Fed. Reg. 318 at 324-5 (1986).

[2] The same regulation, HHS Personnel Manual Instruction 351-1-40, was at issue in that case as well as this one.

OPM regulations permit displacement between subgroups I-A and I-B.

A. Positions of the Parties

The Agency argues that this proposal conflicts with an Agency regulation for which a compelling need exists (HHS Personnel Manual Instruction 351-1-50A3). That regulation sets forth the Agency's policy on types of reassignments of employees during a RIF which are within an agency's discretion to allow under OPM regulations. The Agency's policy specifically does not allow the type of reassignment proposed, that is, employees displacing others in the same subgroup in different competitive levels.[3] The Agency argues that its regulation is essential to preventing the serious disruption of its programs which it contends would result from expanding employee displacement rights beyond those required by OPM regulations. Because of this, it claims, its regulation meets the criterion for compelling need which appears at section 2424.11(a) of the Authority's Rules and Regulations.

Noting that OPM regulations prohibit an unqualified employee from displacing another employee in a RIF, the Union asserts that the Agency's arguments that its regulation is essential to the accomplishment of its mission is without merit.

B. Analysis and Conclusions

Under OPM regulations an agency may in its discretion permit employees who are competing for retention to displace other employees in the same subgroup. 5 CFR 351.705(a)(1). In support of its argument that there is a compelling need for its regulation the Agency asserts only that an increased number of employees would be affected by a RIF if expanded displacement were permitted. In the Authority's view this alone does not demonstrate that the regulation is essential, as opposed to helpful or desirable, to the accomplishment of the Agency's mission and functions. In fact, the OPM regulations contain safeguards which would permit the Agency to protect its ability to accomplish its mission and functions even in the face of increased displacement actions. OPM regulations require that provisions allowing for expanded displacement be implemented in a manner consistent with the regulations as a whole. 5 CFR 351.705(b)(1). The regulations specifically require that an employee must be qualified for any position to which assigned in a RIF action. 5 CFR 351.702(a). Additionally, the regulations permit agencies to make temporary and continuing exceptions to the normal order of RIF actions where it is necessary to retain an employee on duties which cannot be taken over by another employee without undue interruption to a particular activity. 5 CFR 351.607 and 5 CFR 351.608. Particularly in view of these regulatory provisions which allow agencies to minimize the interruption of their activities which may result from RIFs, the Authority finds that the Agency has not met its burden of demonstrating a compelling need for its regulation. See American Federation of Government Employees, AFL-CIO, Local 2670 and Army and Air Force Exchange Service, Keesler Air Force Base Exchange, Mississippi, 10 FLRA 71 (1982). Therefore, the Authority finds Union Proposal 2 is within the duty to bargain.

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[3] Employees are placed in "tenure groups" according to the nature of their appointment; i.e., career, career-conditional, indefinite, etc. "Subgroup" placement is based on veteran status. 5 CFR 351.501. Employees are grouped in "competitive levels" by the similarity of their positions and grades. Positions placed in the same competitive level are supposed to be interchangeable. 5 CFR 351.403.

The Authority addressed a similar proposal in International Federation of Professional and Technical Engineers, AFL-CIO, NASA Headquarters Professional Association and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 8 FLRA 212 (1982). In that case the Authority found that proposal nonnegotiable. The difference between that case and this is that in the NASA case the agency alleged and demonstrated in the record that the proposal would directly determine conditions of employment for employees outside of the bargaining unit and for that reason was nonnegotiable. In this case the Agency has made no similar allegation. Thus the different conclusions reached in the two cases are a consequence of the different circumstances present. See American Federation of Government Employees, Local 32, AFL-CIO, and Office of Personnel Management, 14 FLRA 754 (1984), remanded sub nom. Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985). In that decision the Authority noted that the responsibility for creating a record on which it could resolve negotiability issues rested with the parties and that where applicability of a proposal to nonunit employees was not raised by the parties, the Authority would not consider it.

IV. Union Proposal 3

> The Employer will provide for assignments across competitive areas to positions from which any Group I or Group II employee was promoted or an essentially identical position.

A. Positions of the Parties

The Agency argues that this proposal conflicts with an Agency regulation which meets all of the Authority's illustrative criteria for determining compelling need. Section 2424.11(a), (b) and (c) of the Authority's Rules and Regulations. The Union contends that the Agency regulation does not meet the compelling need criteria.

B. Analysis and Conclusions

The Authority finds that this proposal is nonnegotiable for a reason other than that raised by the Agency. While OPM regulations previously allowed assignments across competitive areas to be made at agency discretion, the revised OPM regulations do not. See 48 Fed. Reg. 32304 at 32305 (1983). Under current OPM regulations, employees in a competitive area compete only with each other, not with employees in another competitive area. 5 CFR 351.402 and 351.701(a).[4] As noted in section II(B) of this decision, those OPM regulations are Government-wide rules or regulations. Since Union Proposal 3 conflicts with those regulations, it is not within the duty to bargain. In view of this conclusion and the fact that the Agency's compelling need argument was based in part on OPM regulations which have subsequently been revised, it is unnecessary to address that argument.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 2.[5] IT IS

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[4] See also Personnel Manual Letter 351-20 at 19.

[5] In finding this proposal within the duty to bargain, the Authority makes no judgment as to its merits.

FURTHER ORDERED that the Union's petition for review insofar as it relates to Union Proposals 1 and 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., July 15, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 64

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE

Respondent

and Case No. 3-CA-30722

NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority under section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by which the parties have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent, the General Counsel and the Charging Party (the Union).

The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by insisting on bargaining to impasse with the Union on a matter which was outside the Union's duty to bargain.

II. Background

The Union represents a nationwide unit of permanent full-time food inspectors in the field service of the Respondent's Meat and Poultry Inspection Program. In July 1983 the parties initiated negotiations. They reached impasse on about 26 proposed agreement articles in September 1983. One of the articles, "Article 34," was at impasse because the Union opposed proposals by the Respondent which would require the parties to attempt to resolve potential unfair labor practices informally before an unfair labor practice charge could be filed with the Authority.[1]

In December 1983 the Respondent requested the assistance of the Federal Service Impasses Panel (the Panel) to resolve the impasse. The Respondent continued to press its position for Article 34 in the mediation phase of the Panel's proceedings and in a Panel arbitration hearing, and the Union continued its opposition. On March 23, 1984, the day following the Panel's arbitration hearing, the Respondent withdrew its proposals for Article 34 and agreed to the provisions for Article 34 which had been proposed by the Union.

III. Positions of the Parties

The General Counsel and the Union argue that the Respondent's Article 34 proposal, on "pre-charge" procedures, was outside the Union's duty to bargain because it would require the Union to waive its statutory right to file unfair labor practice charges in the manner provided by section 7118 of the Statute. They assert that the Respondent's insistence on bargaining concerning a subject which was outside the Union's duty to bargain (that is, on a "permissive" subject of bargaining) should be found to be a violation of the Respondent's statutory duty to bargain in good faith.

The Respondent argues that it did not fail to bargain in good faith, because its proposed "pre-charge" procedure would not unlawfully interfere with the Union's rights and was within the Union's duty to bargain.

IV. Analysis

A. Insisting on proposals which are outside the duty to bargain

In Federal Deposit Insurance Corporation, Headquarters, 18 FLRA No. 92 (1985), a case which presented an issue directly analogous to this case, the Authority found that agency management had insisted on bargaining to impasse, to and including Panel proceedings under section 7119 of the Statute, concerning a proposal which was outside the union's duty to bargain. In that decision the Authority first considered whether this practice amounted to a failure to bargain in good faith and decided in the affirmative, stating in part:

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[1] The text of the Respondent's proposal is set forth in Appendix 1.

> [P]arties cannot insist on bargaining to impasse with respect to . . . matters [which are outside the duty to bargain] . . . . Where a matter falls outside the required scope of bargaining . . . there is no mutual obligation to bargain at all.

Finding that one of the proposals on which management had insisted was outside the union's duty to bargain, the Authority concluded that such conduct constituted a failure to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute.

In this case it is stipulated that the Respondent insisted on bargaining to impasse, up to and including Panel proceedings, concerning proposals which were opposed by the Union. As indicated in Federal Deposit Insurance Corporation, the resolution of this case depends on whether the Respondent's proposal was outside the Union's duty to bargain.

B. Whether the proposal was outside the Union's duty to bargain

1. The proposal: Respondent's Article 34 proposal would require either party to notify the other of a dispute and to follow certain procedures in an attempt to resolve the dispute before the complaining party could file an unfair labor practice charge with the Authority.[2] The Union objected to the proposal because in its view the

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[2] We deny the Respondent's motion to strike portions of the General Counsel's brief which are alleged to be an inaccurate description of the disputed proposal because we find that the General Counsel's description of the proposal is consistent with the record.

proposal would prevent the Union from exercising its right to file an unfair labor practice charge under section 7118 of the Statute.[3]

2. Application of section 7118: Section 7118 provides that an unfair labor practice charge may be filed at any time within six months from the date of the event complained of, or within six months of its discovery if discovery of the event has been prevented or concealed. If the charge is not filed within six months, the General Counsel is precluded from issuing a complaint. The person filing a charge may do so as soon as the events or actions complained of have occurred or have been discovered. Alternatively, such person has at least six months to discover the occurrence, consider available options, and choose a position before filing the charge. See United States Department of Labor, 20 FLRA No. 34 (1985), petition for review filed, No. 85-1770 (D.C. Cir. Nov. 22, 1985) (the General Counsel may not issue a complaint on a charge filed more than six months from the date of the occurrence unless the respondent has prevented discovery of the occurrence).

The Respondent's proposal conflicts with section 7118 because, in requiring that the filing of charges would be delayed pending time spent on informal settlement efforts, the Union would be prevented from filing as soon as an event has occurred or been discovered.

Notwithstanding this result, which conflicts with the Union's rights under section 7118, the Respondent argues that its proposed procedures are analogous to the procedures determined to be within the duty to bargain in American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 153, 153-58 (1979) (hereinafter Dix-McGuire), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). In Dix-McGuire it was decided that procedures which would merely delay the exercise of statutory rights were within the duty to bargain. However, as indicated by the Authority in its decision and by the D.C. Circuit in affirming the Authority's decision, the question presented in that case concerned the reconciliation of two apparently conflicting statutory rights, i.e., the right of management in exercising rights reserved to management as provided under section 7106(a) of the Statute and the right of labor organizations in negotiating procedures bearing on the exercise of these management rights as provided under section 7106(b)(2) of the Statute.

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[3] The applicable provisions of section 7118 are set forth in Appendix 2.

Unlike the question presented in Dix-McGuire, the right of a party to file an unfair labor practice charge under section 7118 does not involve the exercise of a management right to which section 7106(b)(2) is applicable. Additionally, the right to file a charge is not subject to any competing statutory right of an opposing party to be free from being subject to a charge. Hence, there is no analogy between the issue in Dix-McGuire and the issue raised by the Respondent.

The Respondent also cites Headquarters, Fort Sam Houston, Department of the Army and American Federation of Government Employees, AFL-CIO, Local 2154, 8 FLRA 394 (1982), in support of its position. In that case the agency excepted to an arbitrator's award to the effect that a contractual pre-charge procedure, i.e., a procedure which had been negotiated by the parties, was unenforceable. In granting the exception and in setting the award aside, the Authority concluded that the arbitrator had erred in denying the grievance on the basis that the negotiated pre-charge procedure was unenforceable, stating that the Statute did not prohibit the union from agreeing to submit potential charges to management before it filed charges with the Authority. Thus, the Respondent is correct in arguing that Fort Sam Houston held that these procedures are "negotiable," but only to the extent that "negotiable" is understood to mean "not illegal." It does not also mean, as the Respondent has argued, that a party may be compelled to bargain on the subject if it chooses not to do so.[4]

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[4] See American Federation of Government Employees, AFL-CIO and Equal Employment Opportunity Commission, 15 FLRA 283, 284 (1984), in which the Authority explained that while an agency cannot be required to negotiate procedures for the selection of candidates for supervisory positions, once negotiated, such procedures are enforceable.

Contrary to the Respondent's assertions, this conclusion is not contradicted, but is supported by the report to Congress on these matters by the General Accounting Office in 1982. Steps Can Be Taken To Improve Federal Labor-Management Relations and Reduce The Number and Costs of Unfair Labor Practice Charges, GAO/FPCD-83-5 (Nov. 5, 1982). Recognizing that statutory rights were involved, the GAO did not conclude that pre-charge procedures should be required. It recommended that settlement discussions take place after a charge is filed and that investigations be delayed for such purpose. In this regard, section 2423.2(c) of the Authority's Rules and Regulations now provides that investigations will normally not commence until parties have been afforded a reasonable time, not to exceed 15 days, for such purpose.

We acknowledge the Respondent's references to the Authority's comments in Fort Sam Houston on the need to encourage informal settlements. We strongly encourage parties engaged in Federal labor-management relations to take the initiative in settling unfair labor practice disputes at any stage. When settlement efforts are postponed, until charges are filed or the General Counsel decides whether a complaint should issue, timely solutions to the problem which gave rise to the dispute may be lost. Recognizing this, parties often lose the incentive to seek their own solutions and concentrate their efforts on litigation. A failure by the parties to attempt at every stage to resolve disputes voluntarily undermines the bilateralism which the Statute and the Authority are committed to fostering.

Far too many disputes are taken to litigation because the parties do not talk with each other and seek mutually satifactory resolutions of their differences. The best resolutions of differences are the resolutions the parties work out themselves. Many unfair labor practice disputes appear to be susceptible to resolution by the parties themselves if they would initiate contact with each other in an attempt to resolve the dispute and approach such discussions with the thought that their differences can and should be resolved.

We support the objective of Respondent's proposal and see no problem with the proposal insofar as it encourages the informal settlement of disputes. The difficulty lies in the proposal's requirement that settlement discussions must delay the filing of a charge. We interpret section 7118 of the Statute to establish certain rights regarding the filing of charges which a party may rely upon and withhold from bargaining if it so chooses. As in Fort Sam Houston, a party may decide to waive these rights if it decides that there are benefits to that. However, also consistent with Fort Sam Houston, a party can decide to stand on its statutory right and refuse to bargain the issue.

Based on this reasoning we decide that the procedures proposed by the Respondent are permissive subjects of bargaining for the Union because the procedures would require the Union to waive certain of its statutory rights. In certain situations, without fault by either party, delaying the filing of a charge could mean that the charge would be filed more than six months after the occurrence. The General Counsel would not be able to act on the charge. This we feel is not consistent with section 7118 of the Statute. We are not persuaded by the Respondent's reasoning that its proposals should be found to be within the duty to bargain insofar as they would only delay filings. The Statute provides that a party may file as soon as it wants to, and neither the language of the Statute nor the legislative history suggests that this right should be qualified.

V. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties, and concludes that the Respondent did violate section 7116(a)(1) and (5) of the Statute, as alleged in the complaint, by insisting on bargaining to impasse concerning a proposal which was outside the Union's duty to bargain.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the U.S. Department of Agriculture, Food Safety and Inspection Service shall:

1. Cease and desist from:

(a) Insisting to impasse on a matter which is outside the required scope of bargaining with the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the U.S. Department of Agriculture, Food Safety and Inspection Service, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., July 15, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 64]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT insist to impasse on a matter which is outside the required scope of bargaining with the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
(Activity)

Dated: _______________ By: _______________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW. 7th Floor (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

Appendix 1

As pertinent herein, the procedures proposed by the Respondent, which led to the submission of the parties' impasse to the Panel, were as follows:

Article XXXIV Unfair Labor Practice Charges

Section A--Informal Resolution

It is the intent of the Service and the Union that labor-management conflicts arising during the life of this Agreement be resolved promptly and equitably using bilateral resolution procedures.

Section B--Procedures

It is understood . . . that nothing in this section shall preclude either the Service or the Union from exercising rights under section 7116 of the . . . Statute. However, in the interest of informally settling labor-management disputes bilaterally, the Service and the Union agree that: (1) *Prior to . . . the . . . filing [of] an unfair labor practice charge* with the . . . Authority the charging party shall provide written notice to the other party; (2) Notice shall be provided or received only by [designated officials of the Service and the Union]; (3) Such notice shall provide a statement of the particular subsections of . . . the Statute alleged to have been violated; the time; the place; and the date of the alleged unfair labor practice . . . ; and requested relief or settlement . . . ; (4) *The parties shall have (30) calendar days after receipt of notice . . . in which to informally resolve the matter in dispute*; (5) If not resolved during the above-mentioned (30) calendar day period, the charging party may escalate the matter to the . . . Authority; (6) Extensions to the informal resolution period shall only be approved by mutual consent . . . . [Emphasis added.]

Section C--Exceptions

Employees filing unfair labor practice charges shall not be compelled to utilize these procedures, but may do so at their own election. Unfair labor practice allegations concerning strikes or other work stoppage activities covered by Section 7116(b)(7) of the . . . Statute are excluded from these procedures.

Appendix 2

The provisions of section 7118 of the Statute which are relevant to the dispute are as follows:

> § 7118. Prevention of unfair labor practices
>
> (a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.
>
> . . . .
>
> (4)(A) Except as provided in subparagraph (b) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.
>
> (B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--
>
> (i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or
>
> (ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,
>
> the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.
>
> (5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS (DoDDS),
PACIFIC REGION

Activity

and Case No. 0-AR-985

OVERSEAS EDUCATION
ASSOCIATION (OEA)

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Herbert Oestreich filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. Because the exceptions presented an issue of the Authority's jurisdiction, the Authority requested and received from the parties statements of position on this issue.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerned the removal of the grievant, a teacher in the Department of Defense Overseas Dependents Schools System, who apparently is not a preference eligible. As his award the Arbitrator denied the grievance finding that management had proved by a preponderance of the evidence that the grievant's removal was for just cause.

III. ANALYSIS AND CONCLUSIONS

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute pertinently provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute[1] include matters similar to those covered under 5 U.S.C. § 7512, such as removal actions, which arise under other personnel systems. In this case, for the reasons which follow, the Authority concludes that the award relates to a matter that is similar to those covered under section 7512 and that the matter has arisen under another personnel system within the meaning of section 7121(f).

The legislative history of the Statute provides one specific example of "[an]other personnel syste[m]." The report of the Senate Governmental Affairs Committee preceding the enactment of the Statute in explaining the identical reference in section 7121(e) of the Statute[2]

---

[1] Section 7121(f) pertinently provides:

> In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

[2] Section 7121(e)(1) pertinently provides:

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the

used as an example the personnel system established by 38 U.S.C. §§ 4101-4119 for Department of Medicine and Surgery (DM&S) professional employees of the Veterans Administration. S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978). In VA Medical Center, Northport, New York v. FLRA, 732 F.2d 1128 (2d Cir. 1984), the court noted some of the features of this personnel system which distinguishes it from the general Federal civil service. Specifically, the court noted that qualifications for DM&S professionals are determined "without regard to civil service regulations," 38 U.S.C. § 4106(a); DM&S professionals have a different probationary period than other civil service employees, 38 U.S.C. § 4106(b); their hours, conditions of employment, and leaves of absence are determined "notwithstanding any law, Executive Order, or regulation," 38 U.S.C. § 4108(a); and they are paid according to special grades and scales, 38 U.S.C § 4107." Id. at 1130 n.4.

Using this personnel system as a benchmark, the Authority concludes that the Defense Department Overseas Teachers Pay and Personnel Practices Act (the Act), Pub. L. No. 86-91, 73 Stat. 214 (1959), 20 U.S.C. §§ 901-907, likewise established a "personnel syste[m]," within the meaning of section 7121(f), for teachers in schools operated by the Department of Defense (DOD) in an overseas area for dependents of members of the Armed Forces and dependents of civilian employees of DOD. As a matter of background, the court in March v. U.S., 506 F.2d 1306 (D.C. Cir. 1974), explained that overseas dependents schools were established

---

(Continued)

> discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.

after World War II to provide educational facilities abroad for dependents of military and civilian personnel. Id. at 1311. Until 1959 the teachers in these schools were subject to civil service laws and regulations which had created a number of inequities. Id. (citing S. Rep. No. 141, 86th Cong., 1st Sess. 2 (1959)). As a result Congress sought to correct this situation of inequities by enacting legislation to specifically address the employment and salary practices of DOD respecting overseas teachers. Id. The statutory enactment, as specifically entitled, includes "personnel practices," and the Senate report that accompanied the bill that was enacted and signed into law specifically stated that the purpose of the bill was "to provide a system of personnel administration for schoolteachers and certain school officers and other employees of the dependents schools operated by [DOD] in overseas areas." S. Rep. No. 141, 86th Cong., 1st Sess. 1 (1959). The report also stated that "[t]he proposed system recognizes and corrects deficiencies in the present system which [DOD] has identified and which long have been apparent." The major provision and means enacted to correct the deficiencies was to no longer generally subject such teachers to civil service laws and regulations as the source of their personnel system and instead to have the Secretary of Defense prescribe and issue regulations to provide for a system of personnel administration. Under the specific provision of 20 U.S.C. § 902(a), such regulations shall govern: "(1) the establishment of teaching positions; (2) the fixing of basic compensation for teachers and teaching positions . . .; (3) the entitlement of teachers to compensation; (4) the payment of compensation to teachers; (5) the appointment of teachers; (6) the conditions of employment of teachers; (7) the length of the school year . . .; (8) the leave system for teachers; (9) quarters, allowances, and additional compensation for teachers; and (10) such other matters as may be relevant and appropriate to the purposes of this chapter." Thus, as noted by the court in March, DOD, pursuant to the Act, has promulgated regulations to "conduct the employment and salary practices applicable to teachers and teaching positions." 506 F.2d at 1311-12 (quoting Act of July 17, 1959, Pub. L. No. 86-91, § 5(a), 73 Stat. 214).

As noted with respect to DM&S professionals, the source of their personnel system in large measure is not general civil service laws and regulations, but instead is 38 U.S.C. chap. 73. Because the sources of the "employment and salary practices" applicable to overseas teachers, similar to the situation of DM&S professionals, are the Act and the regulations of the Secretary of Defense prescribed by and issued pursuant to the Act, and not civil service laws and regulations generally, the Authority finds the "system of personnel administration" for overseas teachers, S. Rep. No. 141, 86th Cong., 1st Sess. 1 (1959), to be "[an]other personnel syste[m]" within the meaning of section 7121(f). Consequently, the Arbitrator's award relating to the grievant's removal relates to a matter described in section 7121(f). Under section 7122(a), exceptions to the Arbitrator's award may not be filed with the Authority, and therefore the Authority is without jurisdiction to review the Union's exceptions.

IV. ORDER

Accordingly, for these reasons, the Union's exceptions are dismissed.

Issued, Washington, D.C., July 15, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 379

Federal Labor Relations Authority

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NUMBER 379 REPORT OF CASE DECISIONS July 25, 1986

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 69 (July 17, 1986)

Veterans Administration, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota and American Federation of Government Employees, AFL-CIO, Case Nos. 7-CA-40426 and 7-CA-40430

22 FLRA No. 71 (July 21, 1986)

Headquarters, Department of the Army, Washington, D.C. and U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri and National Association of Government Employees, R14-32, SEIU/AFL-CIO, Case No. 7-CA-40084

*Case No. 3-CU-50017 (Order Denying Motion for Reconsideration of 22 FLRA No. 1) (July 21, 1986)

U.S. Department of Energy, Federal Energy Regulatory Commission and American Federation of Government Employees, Local 421, AFL-CIO,

NEGOTIABILITY CASE

22 FLRA No. 73 (July 24, 1986)

Hawaii Federal Employees Metal Trades Council, AFL-CIO and Pearl Harbor Naval Shipyard, Case No. 0-NG-1196

ARBITRATION CASES

22 FLRA No. 66 (July 17, 1986)

Social Security Administration and American Federation of Government Employees, Local 1923 (Mount, Arbitrator), Case No. 0-AR-1112

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22 FLRA No. 67 (July 17, 1986)

Panama Canal Commission and International Organization of Masters, Mates and Pilots, Marine Division, ILA, AFL-CIO (Howlett, Arbitrator), Case No. 0-AR-948

22 FLRA No. 68 (July 17, 1986)

United States Customs Service and National Treasury Employees Union (Finston, Arbitrator), Case No. 0-AR-1015

22 FLRA No. 70 (July 17, 1986)

Immigration and Naturalization Service and American Federation of Government Employees, Local 505 (Brisco, Arbitrator), Case No. 0-AR-963

22 FLRA No. 72 (July 23, 1986)

Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840 (Moore, Arbitrator), Case No. 0-AR-435

Case No. 0-AR-764 (Order Denying Motion for Reconsideration) (July 23, 1986)

U.S. Patent and Trademark Office and Patent Office Professional Association

*NOTE Bound volume page numbers will not be assigned to the decisions with an asterisk at this time.

Federal Labor Relations Authority

SSA and AFGE (Mount, Arbitrator), Case No. 0-AR-1112 (Decided July 17, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7121(e)(2)
Discipline	7122(a)

Arbitration
  Discipline
    Standards Governing Review by Arbitrator
      Harmful Error Rule
        5 U.S.C. § 7701(c)
    Suspension, 14 days
  Exceptions Asserted in Appeal
    Award is Contrary to § 7121(e)(2)
    Award is Contrary to 5 U.S.C. § 7701(c)
  Remedy
    Grievant Be Made Whole
    Suspension Rescinded
5 U.S.C. 7512 and 7513

DIGEST NOTES

The arbitrator determined that a 14-day suspension of the grievant could not be upheld because the records used as a basis for the suspension had not been placed in the proper personnel file prior to the proposed suspension as required by the parties' collective bargaining agreement. The arbitrator sustained the grievance, overturned the suspension, and ordered that the grievant be made whole.

In its exception, the agency contended that the award is deficient because the arbitrator failed to make the finding that the violation of the agreement constituted "harmful error" within the meaning of 5 U.S.C. § 7701(c). The Authority found that the harmful-error rule, as it pertains to the arbitration of disciplinary actions, applies in accordance with § 7121(e)(2) only to the more serious adverse actions enumerated in 5 U.S.C. § 7512 that are taken under 5 U.S.C. § 7513; the rule does not apply to suspensions for 14 days or less. The Authority concluded that the arbitrator was not required by law to find that the violation of the parties' agreement constituted harmful error and that his failure to do so provided no basis for finding the award contrary to law as alleged by the agency.

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Federal
Labor Relations
Authority

21 FLRA No. 67

Panama Canal Commission and
Int'l Organization of Masters,
Mates and Pilots, Marine
Division, ILA, AFL-CIO
(Howlett, Arbitrator), Case No.
0-AR-948 (Decided July 17, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness
      Request for Clarification Does Not Extend Time

STATUTE

7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with SS 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The parties' request for clarification of the arbitrator's award did not operate to extend the time limit for filing exceptions. The filing period for exceptions begins with the arbitrator's response to a request for clarification only when an arbitrator, in response to the clarification request, modifies an award and the modification gives rise to the deficiencies alleged in the exceptions.

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22 FLRA No. 68

Federal Labor Relations Authority

U.S. Customs Service and
NTEU (Finston, Arbitrator),
Case No. 0-AR-1015 (Decided
July 17, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Arbitration	
Award	7121(e)(2) 7122(a)

Arbitration
  Award
    Standard of Review
      Disciplinary Actions - 14 Days or Less
  Exceptions Asserted in Appeal
    Arbitrator Improperly Mitigated Discipline
    Award Contrary to Law
      5 U.S.C. § 7701
    Award Inconsistent with Agency Table of Offenses and Discipline
5 U.S.C. § 7512
5 U.S.C. § 7701 and 7701(c)

DIGEST NOTES

The Arbitrator determined in his award that the 14-day suspension of the grievant was not for just cause. He reduced the discipline to an oral admonishment, and ordered that the grievant be made whole. The grievant was suspended on charges that he engaged in conduct prejudicial to the government. The arbitrator determined that the evidence failed to establish that the grievant physically abused a member of the public or acted in any manner clearly inconsistent with agency policy or guidelines. He also determined that that the situation reflected misjudgment by the grievant and a temporary loss of composure. Two mitigating factors were: (1) the grievant's record of no previous disciplinary actions and (2) the several month delay between the alleged misconduct and the imposition of discipline.

In its first exception the agency contended that the award was contrary to law because the arbitrator applied an erroneous standard of review. The Authority has repeatedly held that the standards set forth in in 5 U.S.C. § 7701, pertaining to the appellate review procedures of MSPB, do not apply to the arbitration of suspensions of 14 days or less. Section 7701(c), as it pertains to the arbitration of disciplinary actions, applies in accordance with § 7121(e)(2) only to the more serious adverse actions enumerated in 5 U.S.C. § 7512 that are taken under 5 U.S.C. § 7513; it does not apply to suspensions of 14 days or less in this case. The Authority concluded that the award is not contrary to law because the arbitrator failed to apply the standard of review which the agency asserts is required by § 7701. Unless a specific standard of proof or review is required, an arbitrator may establish whatever standard the arbitrator considers appropriate and the award will not be found deficient on that basis.

In its second exception the agency contended that the award was inconsistent with the agency's table of offenses and discipline which provides for discipline ranging from a 14 day suspension to removal for the first offense of conduct prejudicial to the government. The Authority held that the exception did not provide any basis for finding the award deficient. The agency did not take proper account of the arbitrator's specific finding that the evidence failed to establish that the grievant had engaged in conduct prejudicial to the government.

In its final exception the agency contended that the award was deficient because the arbitrator improperly mitigated the discipline on grounds of delay without making the assertedly required finding that the delay constituted harmful error within the meaning of 5 U.S.C. § 7701. The Authority concluded that the harmful error rule of § 7701(c) is not an applicable standard of review in arbitrations of suspensions of 14 days or less. As with the standard of review pertaining to disciplinary actions, the rule applies in accordance with § 7121(e)(2) only to the more serious adverse actions enumerated in 5 U.S.C. § 7512.

Whether the agency established that the grievant engaged in the conduct with which he was charged is separate from and independent of any asserted procedural error. The Authority found that, at minimum, the award is primarily based on and properly supported by the independent finding of the arbitrator that the evidence failed to establish that the grievant physically abused the individual involved or acted in a manner clearly inconsistent with agency policy or guidelines. To the extent the arbitrator mitigated the suspension on the basis of the failure to promptly impose discipline as required by the parties agreement, the agency has provided no basis for finding the award deficient.

Federal Labor Relations Authority

22 FLRA No. 69

Veterans Administration, Washington, D.C. and VA Medical and Regional Office Center, Fargo, N.D. and AFGE, Case Nos. 7-CA-40426 and 7-CA-40430 (Decided July 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Ground Rules
      - Hours of Work
      - Starting and Quitting Times
  - Official Time
    - Preparation for Negotiation
  - Remedy
    - Back Pay
    - Make Whole
    - Status Quo Ante
- 5 U.S.C. § 5596(b)(1) [Back Pay Act]
- 38 U.S.C. 4107(e)(3)

STATUTE

7116(a)(1) and (5)
7118
7131(d)

DIGEST NOTES

The Judge found that the agency violated § 7116(a)(1) and (5) by changing the hours of work and starting and quitting times of unit employees without bargaining over the changes as requested by the union, and also by refusing to bargain concerning a ground rule proposal that preparation time for negotiations be on official time. The Judge concluded that the agency had violated the Statute and recommended that it be ordered to rescind the changes in work hours and make whole those employees who would have earned premium pay but for the unilateral changes in their hours. The agency excepted to the recommended remedy, asserting that the "but for" test required by the Back Pay Act had not been met; that the General Counsel (GC) had not established the amount of pay employees would have earned but for the unilateral change; and that the GC had not established that the employees would have continued to receive premium pay had the matter been negotiated.

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The Authority agreed with the Judge and found that the agency unlawfully refused to bargain over a ground rule which was identical to a ground rule which had been used by the parties in local negotiations on two previous occasions and the proposed rule was fully consistent with decisions of the Authority which hold generally that the granting of official time to prepare for negotiations is a negotiable matter under § 7131(d). After the agency refused to bargain over ground rules, it unilaterally implemented a change in the employees' starting and quitting times which the Authority also has consistently held to be negotiable. Since the decision itself to change the starting and quitting times of and established shift is within the duty to bargain, and the agency failed and refused to bargain concerning such change, the Authority finds that a status quo ante remedy is appropriate and will best effectuate the purposes and policies of the Statute.

The Authority found that the General Counsel has established that but for the agency's unilateral change in starting and quitting times, particular employees would not have suffered a loss of pay. Thus, the requirements of the Back Pay Act, 5 U.S.C. § 5596, have been satisfied and the Judge's make whole remedy is appropriate. The Authority has concluded that but for management's unilateral change in employees conditions of employment, at least 28 employees working the Sunday night shift, would have earned between $17.50 and $27.76 in premium pay for each Sunday night shift worked had the starting and quitting time not been unilaterally changed. The Authority noted that records exist which permit identification both of the employees qualified for such back pay and the amount of back pay to which each employee is entitled.

Federal Labor Relations Authority

22 FLRA No. 70

Immigration and Naturalization Service and AFGE, Local 505 (Brisco, Arbitrator), Case No. 0-AR-963 (Decided July 17, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Disciplinary Actions
    - Application of 5 U.S.C. § 7701(c)
      - Harmful Error Rule
    - Extraordinary Delay - 8 Months
    - Suspensions - 5 days
  - Exceptions Asserted in Appeal
    - Award Contrary to Law
      - 5 U.S.C. § 5596 [Back Pay Act]
      - 5 U.S.C. § 7503 and 7701(c)
    - Award Contrary to Statute
      - § 7106(a)(2)(a)
- 5 U.S.C. § 7512

STATUTE

- 7106(a)(2)(A)
- 7121(e)(2)
- 7122(a)

DIGEST NOTES

As his award the arbitrator ruled that a 5-day suspension was not for just cause and directed that the grievant be made whole. The arbitrator determined that the evidence established that the grievant had engaged in the misconduct with which he was charged. However, he noted that the agency had delayed more than eight months from the date of the incident before proposing the grievant's suspension. He concluded that this "extraordinary delay" resulted in a disciplinary action which was arbitrary, capricious, and unreasonable and which did not promote the efficiency of the service. He further noted that agency regulations, the collective bargaining agreement and 5 U.S.C. § 7503 all provided that disciplinary action should or must be timely. The arbitrator rejected the agency's argument of excusable delay and found that the the delay violated law, agency regulation and the collective bargaining agreement and that the delay constituted harmful error and the discipline was contrary to law.

In its first exception to the arbitrator's award the agency contended that the award was contrary to 5 U.S.C. § 7503 and 7701 and the Back Pay Act, 5 U.S.C. § 5596. It argued that the award

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was deficient because the delay was not a harmful error within the meaning of § 7701(c) which it maintains should be applied to suspensions of 14 days or less taken under § 7503. The Authority held that the harmful error rule of § 7701(c), as it pertains to disciplinary actions, applies in accordance with § 7121(e)(2) only to the more serious adverse actions enumerated in 5 U.S.C. § 7512 that are taken under § 7513. The rule does not apply to suspensions for 14 days or less taken under § 7503. The arbitrator was not required by law to find that the unwarranted delay in proposing disciplinary action constituted harmful error within the meaning of § 7701(c).

In its second exception the agency contended that the award was contrary to management's right to take disciplinary action. It argued that the arbitrator's setting aside of the grievant's suspension merely because of the lapse of time between the act of misconduct and the imposition of the suspension violates § 7106(a)(2)(A). The Authority found that this case involved review of final disciplinary action to determine whether the agency's eight month delay in imposing discipline resulted in an action which was arbitrary capricious, and unreasonable and which did not promote the efficiency of the service. The arbitrator determined that the suspension had resulted in such unwarranted disciplinary action and ruled that the suspension was not for just and sufficient cause. The arbitrator's award did not, as the agency asserted, amount to a statute of limitations provision which prevented the agency from investigating the alleged incident of misconduct and from acting to propose to suspend the grievant for 5 days. Therefore, the agency's argument provides no basis for finding the award deficient.

Federal Labor Relations Authority

22 FLRA No. 71

Headquarters, Dep't of the Army, Washington, D.C. and Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Mo. and NAGE, R14-32, SEIU/AFL-CIO, Case No. 7-CA-40084 (Decided July 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1), (5) and (8)
Agency Violations	7116(b)(1) and (8)
Interference	7121 and 7122(a)
Higher Level Management	
"Instructions" Not to Continue with Arbitration	
Otherwise Refuse to Comply with Statute	
§ 7121	
Remedy	
Bargaining Order	
5 U.S.C. § 7703(d)	

DIGEST NOTES

An agency violates the requirements of § 7121 when it refuses to continue to participate in proceedings before an arbitrator. Neither the language of § 7121 nor its legislative history provides a basis for excusing a party's continued participation in the procedures for the settlement of grievances. The agency's refusal to to continue to participate in the proceedings results in obstruction of the resolution of a grievance by binding arbitration, contrary to the mandate and intent of Congress.

When agency management at a higher level prevents agency management at a subordinate level of exclusive recognition from complying with its obligations under the Statute by "directive," "requirement," or "direction," the higher-level management entity violates § 7116(a)(1) and (8). Where the subordinate level entity is thus left with no discretion to comply with its statutory obligations, that entity will not also be found to have violated § 7116(a).

Agency Headquarters' "instruction," to its subordinate activity not to comply with an arbitrator's interim awards constituted a violation of § 7116(a)(1) and (8) on Headquarters' part. The Authority viewed the term "instruction" as the functional equivalent of of the terms "directive," "requirement," and "direction," which have been used most frequently in Authority decisions regarding interference violations of § 7116(a)(1). The Authority further found that the "instruction" afforded the subordinate activity no discretion to do otherwise, and rendered its noncompliance with the awards merely ministerial in nature. The subordinate's activity's action in following Headquarters' instruction did not constitute an independent violation of on § 7116(a)(1) and (8).

Although the agency admitted that it refused and failed to comply with the arbitrator's interim awards, the Authority did not find that in doing so it also refused and failed to consult or negotiate in good faith. The agency by its action, did not establish new conditions of employment requiring negotiation, but rather refused to proceed further with the arbitration process. Since these circumstances created no bargaining obligation the Authority dismissed the § 7116(a)(5) allegations.

Federal Labor Relations Authority

22 FLRA No. 72

HQ, 97th Combat Support Group (SAC), Blytheville Air Force Base, Ark. and AFGE, Local 2840 (Moore, Arbitrator), Case No. 0-AR-435 (Decided July 23, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Set Aside
  - Contracting Out
    - Remedial Authority of Arbitrator
      - Cancellation Order - Improper
      - Reconstruction Remedy
  - Exceptions Asserted in Appeal
    - Award Contrary to Law
      - 10 U.S.C. § 2304 note
    - Award Contrary to Statute
      - § 7106(a)(2)(B)
  - Remedy
    - Reconstruct Procurement Action
- OMB Circular A-76, para. 5 (Revised 1983)
- Pub. L. No. 96-342, § 502(a)(2)(B), 10 U.S.C. § 2304 note

STATUTE

7106(a)(2)(B)
7122(a)

DIGEST NOTES

The Authority addresses for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work and holds that an arbitrator is without authority to order cancellation of a procurement action or to review an agency decision in the procurement process concerning a matter of agency judgment or discretion. In view of the substantial discretion vested in agency procurement officials, the paramount public interest in the efficient procurement of goods and services, and the avoidance of excessive costs recognized by both the courts and the Comptroller General, the Authority has determined that an arbitrator may not substitute his or her judgment for that of an agency with respect to the agency's ultimate decision whether to contract out. Similarly, any intermediate decision in the procurement process concerning a matter reserved to agency judgment and discretion also may not be set aside.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

An arbitrator may, in resolving a grievance concerning an agency's determination whether to contract out, in certain circumstances, direct an agency to reconstruct the procurement action. In order to direct an agency to undertake such a reconstruction, the arbitrator must find the following: (1) That in determining to contract out, the agency violated mandatory provisions of applicable procurement laws or regulations. Furthermore, these provisions must contain sufficiently specific standards to objectively analyze and review the agency's actions and permit an objective conclusion that the agency failed to comply with the requirements; and (2) That the agency's failure to comply with those requirements materially affected the final procurement decision and harmed unit employees. The Authority cautions that arbitrators must distinguish between permissible challenges based on material defects in aspects of the procurement process specifically prescribed by law or regulation and improper challenges attacking the exercise of managerial discretion. An agency in taking the action required by such an award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accordance with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, an disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination.

The Authority determined that an arbitrator's award insofar as it directed the activity to cancel the procurement action involved was deficient and must be set aside. The Authority noted, however, that the arbitrator expressly found that the activity violated certain specific requirements of applicable law and regulation in the development and comparison of costs in reaching its decision. The arbitrator also effectively found the activity's violations harmed the employees involved and that the violations materially affected the activity's final decision. Thus the arbitrator established sufficient basis for directing the activity to reconstruct the procurement action.

22 FLRA No. 73

Federal Labor Relations Authority

Hawaii Federal Employees Metal Trades Council and Pearl Harbor Naval Shipyard, Case No. 0-NG-1196 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with FSLMR Statute
      - § 7106(a)(2)(B)
        - Establish Authority to Propose and Effect Removal
  - Management Rights
    - Assign Work
      - Right to Establish Personnel to Propose and Effect Removals

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(2)

DIGEST NOTES

A proposal that would raise the level of authority for both proposing and effecting removal actions is nonnegotiable and inconsistent with management's right to assign work under § 7106(a)(2)(B). The proposal would require non-bargaining unit personnel to perform duties (propose and effectuate removal actions) which they otherwise would not be required to perform. The Authority has consistently held that proposals prescribing specific duties to be performed by particular non-bargaining unit personnel in an agency directly interfere with management's right to assign work. The proposal is not a negotiable procedure, under § 7106(b)(2), as the union asserted.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

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22 FLRA No. 66

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1112

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Robert H. Mount filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.[1]

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming, among other things, that the 14-day suspension of the grievant could not be upheld because the records used as a basis for the suspension were not placed in a particular personnel file as required by the parties' collective bargaining agreement. The Arbitrator agreed. He concluded that the suspension could not be upheld because the summary of the investigation had not been placed in the proper personnel file prior to the proposed suspension as required by the agreement. For this reason the Arbitrator sustained the grievance, overturned the suspension, and ordered that the grievant be made whole.

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[1] In its opposition, the Union argues, among other things, that the Agency's exception should be dismissed because under the parties' collective bargaining agreement, exceptions assertedly cannot be filed to expedited arbitration awards. The Authority, however, has previously rejected this argument and concludes that this matter is properly before the Authority for decision. Social Security Administration and American Federation of Government Employees, 16 FLRA 552 (1984).

III. EXCEPTION

In its exception the Agency contends that the award is contrary to section 7121(e)(2) of the Statute and 5 U.S.C. § 7701(c) as interpreted by the U.S. Supreme Court in Cornelius v. Nutt, 105 S. Ct. 2882 (1985). Essentially, the Agency argues that the award is deficient because the Arbitrator failed to make the finding that the violation of the agreement constituted "harmful error" within the meaning of section 7701(c).

IV. ANALYSIS AND CONCLUSIONS

In American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center, 22 FLRA No. 19 (1986), the Authority was presented with a virtually identical case involving the same Agency and the same provision of the parties' national collective bargaining agreement. In Northeastern Program Service Center the arbitrator determined that the activity had violated the same requirement of the parties' collective bargaining agreement by failing to place all records relied on for the 10-day suspension of the grievant in the proper file, and the arbitrator for that reason directed that the suspension be rescinded and the grievant be made whole. As in this case, the Agency filed exceptions to that award contending, among other things, that the award was deficient because the arbitrator failed to make the finding that the violation of the agreement constituted harmful error. In rejecting this argument, the Authority explained the proper application of the harmful-error rule as it pertains to the arbitration of disciplinary actions. The Authority explained that the rule applies in accordance with section 7121(e)(2) of the Statute only to the more serious adverse actions enumerated in 5 U.S.C. § 7512[2] that are taken under section 7513; the rule does not apply to suspensions for 14 days or less. In Northeastern Program Service Center the Authority therefore concluded that the arbitrator was not required by law to find that the violation of the parties' agreement constituted harmful error and that his failure to do so provided no basis for finding the award contrary to law as alleged by the Agency.

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[2] Section 7512 applies to a removal, a suspension for more than 14 days, a reduction-in-grade, a reduction-in-pay, and a furlough of 30 days or less.

In this case, the Authority concludes for the same reasons set forth in Northeastern Program Service Center that the Arbitrator likewise was not required by law to find that the violation of the parties' agreement constituted harmful error and that his failure to do so likewise provides no basis for finding the award contrary to law.

V. DECISION

Accordingly, the Agency's exception is denied.

Issued, Washington, D.C., July 17, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 67

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PANAMA CANAL COMMISSION

Agency

and

Case No. 0-AR-948

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, MARINE DIVISION,
ILA, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This matter is before the Authority on exceptions to the interest arbitration award of Arbitrator Robert G. Howlett filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. For the reasons that follow, it has been determined that the Union's exceptions are dismissed as untimely.

The Arbitrator's award in this case is dated January 17, 1985, and appears to have been served on the parties by mail on the same day. In his award the Arbitrator ordered, among other things, that certain pilots employed by the Agency were to receive an annual stipend provided the Union agreed to withdraw five pending unfair labor practice charges. In February 1985, both parties requested clarification of the award. The Arbitrator responded on March 15, 1985, and in response to the request for clarification of this portion of the order essentially reiterated his earlier award. The Union then filed its exceptions with the Authority on April 3, 1985.

Under section 7122(b) of the Statute, as amended,1/ and section 2425.1 of the Authority's Rules and Regulations,

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1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

as amended,[2/] which amendments are applicable to these exceptions, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit involved in this case, any exceptions to the Arbitrator's award of January 17, 1985, had to be filed with the Authority by the close of business on February 20, 1985.

The Authority has repeatedly indicated that a party's request for clarification of an award does not operate to extend the time limit for filing exceptions. *Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO*, 15 FLRA 181 (1984). Only when an arbitrator in response to a clarification request modifies an award and the modification gives rise to the deficiencies alleged in the exceptions has the Authority held that the filing period for exceptions began with the arbitrator's response to the request for clarification. *See* *U.S. Department of the Interior, Bureau of Land Management, Eugene District Office and National Federation of Federal Employees, Local 1911*, 6 FLRA 401, 403 n.2 (1981). In this case, however, it is clear that in his clarification of March 15 the Arbitrator did not modify his award of January 17 so as to give rise to the alleged deficiencies. To the contrary, the Arbitrator essentially reiterated his earlier award. Thus, the Union is in effect seeking Authority review of the January 17, 1985 award and the exceptions filed on April 3, 1985 are clearly untimely.

Accordingly, and apart from other considerations, the Union's exceptions are dismissed.

For the Authority.

Issued, Washington, D.C., July 17, 1986.

Harold D. Kessler

Harold D. Kessler
Director, Office of Case Management

FEDERAL LABOR RELATIONS AUTHORITY

[2/] 49 Fed. Reg. 22623 (1984).

22 FLRA No. 68

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES CUSTOMS SERVICE

Agency

and

Case No. 0-AR-1015

NATIONAL TREASURY EMPLOYEES UNION

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Howard V. Finston filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant was suspended for 14 days on charges that he engaged in conduct prejudicial to the Government, as the result of argumentative conversation and subsequent physical confrontation with a member of the public, and that he failed to perform assigned duties in a professional manner, as the result of the use of excessive force by kicking that individual after he had fallen to the ground. A grievance contesting the suspension was filed and ultimately submitted to arbitration where the Arbitrator stated the issue as whether the suspension was for just cause. The Arbitrator determined that the evidence failed to establish that the grievant physically abused the individual involved or acted in a manner clearly inconsistent with agency policy or guidelines. Instead, the Arbitrator determined that the situation reflected a misjudgment by the grievant of the individual's obstinancy and a temporary loss of composure. The Arbitrator also identified two mitigating factors: (1) the grievant's record of no previous disciplinary actions, and (2) the several month delay between the alleged misconduct and the imposition of discipline by the Agency. Accordingly, as his award, the Arbitrator found that the 14-day suspension was not for just cause, reduced the discipline to an oral admonishment, and ordered that the grievant be made whole.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award is contrary to law because the Arbitrator applied an erroneous standard of review. The Agency maintains that with respect to the serious adverse actions enumerated in 5 U.S.C. § 7512,[1] the Merit Systems Protection Board (MSPB) under section 7701 reviews a disciplinary action to determine whether it is arbitrary, capricious, unreasonable, or clearly excessive. The Agency maintains that the Authority should require arbitrators to apply the same standard to suspensions of 14 days or less under 5 U.S.C. chapter 75, subchapter I, and find the award deficient as contrary to management's right to take disciplinary action because the Arbitrator failed to apply such standard.

B. Analysis and Conclusions

The Authority has repeatedly held that the standards set forth in section 7701, pertaining to the appellate review procedures of MSPB, do not apply to the arbitration of suspensions of 14 days or less. The Authority has explained that under section 7121(e)(2) of the Statute, an arbitrator is governed by the standards set forth in section 7701(c). However, as it pertains to disciplinary actions, section 7121(e)(2) only applies to the more serious adverse actions enumerated in section 7512 and therefore neither that section nor the standards set forth in section 7701(c) apply to suspensions of 14 days or less as in this case. *Headquarters, Fort Monroe, Fort Monroe, Virginia and National Association of Government Employees, Local R4-11*, 13 FLRA 405 (1983); *Naval Weapons Station, Yorktown, Virginia and National Association of Government Employees, Local R4-96*, 13 FLRA 133 (1983). Thus, contrary to the Agency's exception, we find that the award is not contrary to law because the Arbitrator failed to apply the standard of review which it asserts is required by section 7701.

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[1] Section 7512 applies to a removal, a suspension for more than 14 days, a reduction-in-grade, a reduction-in-pay, and a furlough of 30 days or less.

Furthermore, consistent with the review of arbitration awards by Federal courts in the private sector, the Authority has uniformly held that unless a specific standard of proof or review is required, an arbitrator may establish whatever standard the arbitrator considers appropriate and the award will not be found deficient on that basis. Social Security Administration and Local 1760, American Federation of Government Employees, AFL-CIO, 17 FLRA 1063 (1985); Department of Defense Dependents Schools, Europe and Overseas Education Association, 4 FLRA 412 (1980). Based on this precedent, we conclude that this exception provides no basis for finding the award deficient.

IV. SECOND EXCEPTION

A. Contentions

In the second exception the Agency contends that the award is inconsistent with the Agency's table of offenses and discipline. The Agency maintains that the table provides for discipline for the first offense of conduct prejudicial to the Government ranging from a 14-day suspension to removal. The Agency argues that the award is therefore deficient by mitigating the range of discipline for such misconduct below that provided by the table.

B. Analysis and Conclusions

The Authority concludes that this exception does not provide any basis for finding the award deficient. In arguing that the Arbitrator improperly mitigated the range of discipline for conduct prejudicial to the Government, the Agency does not take proper account of the Arbitrator's specific finding in this case. In particular, the Arbitrator found that the evidence failed to establish that the grievant had engaged in any conduct prejudicial to the Government as was charged by the Agency. Thus, apart from any other considerations, the Agency fails to establish that the award is inconsistent with the table of offenses and discipline.

V. THIRD EXCEPTION

A. Contentions

In the third and final exception, the Agency contends that the award is deficient because the Arbitrator improperly mitigated the discipline on grounds of delay. Essentially, the Agency argues that the award is deficient because the Arbitrator failed to make an assertedly required finding that the delay constituted harmful error within the meaning of 5 U.S.C. § 7701(c).

In its opposition the Union first maintains that to the extent that the harmful-error rule might be applied to a suspension of 14 days or less, it is a consideration only when an agency has supported that its disciplinary action is for such cause as will promote the efficiency of the service. In this case the Union argues that the Arbitrator found that the suspension was not for just cause and that therefore the additional finding that there was an unwarranted delay is unnecessary to support the award. However, the Union also states that Article 28, Section 1B of the parties' national collective bargaining agreement provides that "disciplinary action shall be carried out in a prompt and timely manner." Thus, the Union argues that the Arbitrator properly enforced this provision in mitigating the suspension on finding that the Agency failed promptly to impose disciplinary action.

B. Analysis and Conclusions

In agreement with the Union, the Authority concludes that whether the Agency established that the grievant engaged in the conduct with which he was charged is separate from and independent of any asserted procedural error. It is not clear from the award whether the procedural error of unwarranted delay served to further mitigate the suspension or only to separately support mitigation. Nevertheless, we find that, at a minimum, the award is primarily based on and properly supported by the independent finding of the Arbitrator that the evidence failed to establish that the grievant physically abused the individual involved or acted in a manner clearly inconsistent with agency policy or guidelines. To the extent that the Arbitrator mitigated the suspension on the basis of the failure promptly to impose discipline as required by the parties' agreement, we conclude that no basis is provided for finding the award deficient as alleged by the Agency in this exception.

Consistent with the decisions previously cited regarding the standard of review in arbitrations of suspensions of 14 days or less, the Authority likewise has held that the harmful-error rule of section 7701(c) does not apply to the arbitration of such disciplinary actions. As with the standard of review pertaining to disciplinary actions, the rule applies in accordance with section 7121(e)(2) of the Statute only to the more serious adverse actions enumerated in section 7512. American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center, 22 FLRA No. 19 (1986). On this basis the Authority specifically concluded in

Northeastern Program Service Center that the arbitrator was not required by law to find that the violation of the parties' collective bargaining agreement in the process of disciplining the grievant constituted harmful error. Accordingly, the Authority further found that the arbitrator's failure to make such a finding did not provide any basis for finding the award rescinding the 10-day suspension of the grievant contrary to law.

We therefore conclude in this case that for the same reasons set forth in *Northeastern Program Service Center*, the Arbitrator was not required by law to find that the unwarranted delay in imposing discipline constituted harmful error. His failure to make such a finding therefore provides no basis for finding the award contrary to law.

VI. DECISION

For these reasons the Agency's exceptions are denied.[2]

Issued, Washington, D.C.,July 17, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In denying the Agency's exceptions, we note that there is no basis for the Authority to grant reasonable attorney fees and costs as requested by the Union. *See* part 2430 of the Authority's Rules; *see also* *U.S. Army Corps of Engineers and National Federation of Federal Employees, Local 639*, 17 FLRA 424 (1985).

22 FLRA No. 69

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
WASHINGTON, D.C.

and

VETERANS ADMINISTRATION MEDICAL
AND REGIONAL OFFICE CENTER
FARGO, NORTH DAKOTA

Respondents

and

Case Nos. 7-CA-40426
7-CA-40430

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority based on exceptions to the attached Administrative Law Judge's Decision filed by the Respondents. The General Counsel filed a brief opposing the exceptions. The complaint alleged that the Respondents violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by changing the hours of work and the starting and quitting times of unit employees without bargaining over the changes as requested by the Union, and also by refusing to bargain concerning a ground rule proposal that preparation time for negotiations be on official time. The Judge found that the Respondents had violated the Statute as alleged, and recommended that they be ordered to rescind the changes in work hours and make whole those employees who would have earned premium pay but for the unilateral changes in their hours. The Respondents excepted only to the recommended remedy.

II. Facts

On April 29, 1984, the Director of the Activity's Regional Office Center implemented a change in the hours of the night shift and the p.m. shift. The change involved moving the night shift hours on Sunday night/Monday morning from 11:45 p.m. - 7:45 a.m. to midnight - 8:00 a.m. Also, a regularly scheduled 15 minutes of overtime was added to the 4:00 p.m. - midnight (p.m.) shift on Sundays because of a need for the two shifts to overlap 15 minutes. Because by law[1] a nurse working any part of a period from midnight Saturday to midnight Sunday receives premium pay for the entire 8 hours worked on the shift, the effect of the change was to eliminate 8 hours of premium pay for nurses who would have worked the 11:45 p.m. Sunday to 7:45 a.m. Monday shift but under the new plan would begin their Monday shift at midnight Sunday.

The record, as more fully discussed by the Judge in her Decision, also details the allegation regarding ground rules negotiations.

III. Administrative Law Judge's Decision

The Judge found that the Respondents had engaged in the unfair labor practices alleged in the complaint, and recommended that they be ordered to cease and desist from the unfair labor practices, rescind the changes in hours, and make whole the employees who lost premium pay as a result of the unfair labor practices.

IV. Positions of the Parties

A. Respondents

The Respondents except only to that portion of the Judge's remedy which would require reimbursement for premium pay lost as a result of the unfair labor practices. They argue that the "but for" test required by the Back Pay Act, 5 U.S.C. § 5596(b)(1), has not been met. That is, Respondents assert that the General Counsel has not established the amount of pay the employees would have earned but for the unilateral change in hours. Further, there is no certainty that the employees would have continued to receive the premium pay at issue if the matter had been negotiated.

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[1] 38 U.S.C. 4107(e)(3).

B. General Counsel

The General Counsel filed a brief in opposition to the exceptions, and in support of the Judge's Decision.

V. Analysis

A. The Judge's findings that Respondents violated section 7116(a)(1) and (5) of the Statute

The Authority has reviewed the findings and conclusions of the Judge with regard to the violations of section 7116(a) (1) and (5) of the Statute alleged in the complaint and adopts the Judge's findings, conclusions and recommendations for the reasons she stated. The Authority notes that no exceptions were filed to this aspect of the Judge's decision.

B. The Judge's recommended remedy

The Judge recommended that the Respondents be directed to cease and desist from the unfair labor practices found, to reestablish the unilaterally changed hours of work, and to make whole those employees adversely affected by the unilateral change in their conditions of employment. The Authority agrees. The Respondents initially refused to bargain over a proposed ground rule providing that preparation time for negotiations would be on official time. As noted by the Judge, this ground rule was identical to a ground rule which had been used by the parties in local negotiations on two previous occasions and the proposed rule was fully consistent with decisions of the Authority which hold generally that the granting of official time to prepare for negotiations is a negotiable matter under section 7131(d) of the Statute.[2] After the Respondents refused to bargain over ground rules, they unilaterally implemented a change in the employees' starting and quitting times which the Authority also has consistently held to be negotiable.[3] Since the decision itself to change the starting and quitting times of an established shift is within the duty to bargain, and the Respondents failed and refused to bargain concerning such change, the Authority finds that a status quo ante remedy is appropriate and will best effectuate the purposes and policies of the Statute.[4]

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[2] Environmental Protection Agency, 16 FLRA 602 (1984) remanded to Authority for clarification regarding remedy, sub nom. American Federation of Government Employees v. FLRA, No. 85-1057 (D.C. Cir. February 5, 1986). The Authority issued a supplemental decision affirming the original disposition in Environmental Protection Agency, 21 FLRA No. 98 (1986). See also Association of Civilian Technicians, Granite State Chapter, 7 FLRA 241 (1981); American Federation of Government Employees, Local 225, 4 FLRA 148 (1980).

Finally, with regard to the make whole remedy recommended by the Judge, the Authority notes that the General Counsel has established that but for the Respondents' unilateral change in starting times, as detailed above, particular employees would not have suffered a loss of pay. Thus, the requirements of the Back Pay Act, 5 U.S.C. § 5596, have been satisfied.[5] In this regard,

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[3] See, for example, United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 89 (1985); United States Department of Transportation, Federal Aviation Administration, 18 FLRA No. 8 (1985).

[4] See, for example, Long Beach Naval Shipyard, Long Beach, California, 17 FLRA 511 (1985). The Authority has wide discretion to fashion remedies under section 7105(g)(3) and section 7118(a)(7) of the Statute, including status quo ante remedies where appropriate. See, for example, United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 89 (1985); Immigration and Naturalization Service, 16 FLRA 1007 (1984). Compare United States Army Air Defense Center and Fort Bliss, Texas, 12 FLRA 719 (1983) (where no status quo ante order was issued since the policy had been rescinded by the agency); Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA 100 (1984) (where a watch schedule was changed and the Authority determined that it was not feasible, due to a change in staffing levels, to return to the status quo); and Department of the Treasury, U.S. Customs Service and U.S. Customs Service, Region IX, Chicago, Illinois, 17 FLRA 221 (1985) (where it was determined that a status quo ante order would be inconsistent with the parties' agreement and would not effectuate the purposes and policies of the Statute).

[5] Compare United States Department of Defense, Department of the Air Force, Headquarters, 47th Flying Training Wing (ATC), Laughlin Air Force Base, Texas, 18 FLRA No. 24 (1985); and United States Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA 725 (1981), in which the Authority ordered backpay, with United States

(Continued)

the evidence established that management's change in the starting time for nurses on the Sunday night shift from 11:45 p.m. to 12:00 midnight eliminated the 25 percent premium pay that otherwise would have been paid to the nurses who worked that shift. Therefore, but for management's unilateral change in the employees' conditions of employment, at least 28 nurses who worked the Sunday night shift since April 29, 1984, would have earned between $17.50 and $27.76 each in premium pay for each Sunday night shift worked had the starting time remained 11:45 p.m. Further supporting the conclusion that the backpay remedy is not speculative, the Respondents stipulated that records exist which would permit identification both of the employees qualified for such back pay and the amount of back pay to which each employee is entitled. Finally, while the Authority notes that management implemented the change for reasons of economy, there is no indication in the record of other circumstances which might affect the appropriateness of a back pay order.

C. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record, and adopts the Judge's findings, conclusions and recommended Order, as explained above.

5/ (Continued)

Department of Transportation, Federal Aviation Administration, Washington, D.C.; Federal Aviation Administration, Eastern Region, Jamaica, New York; and Federal Aviation Administration, Airways Facility Sector 810, Albany, New York, 20 FLRA No. 68 (1985), *petition for review filed sub nom.* *Professional Airways Systems Specialists, MEBA, AFL-CIO v. FLRA*, No. 85-1827 (D.C. Cir. Dec. 20, 1985); *Department of the Air Force, Scott Air Force Base, Illinois*, 19 FLRA No. 13 (1985); *Social Security Administration*, 16 FLRA 1135 (1984); and *United States Department of Labor*, 16 FLRA 969 (1984), in which the Authority did not order backpay due to the failure to establish, in accordance with the requirements of the Back Pay Act, 5 U.S.C. § 5596, that but for the Respondent's unlawful conduct the affected employee(s) would not have suffered a loss or reduction in pay, allowances, or differentials.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Veterans Administration, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota shall:

1. Cease and desist from:

(a) Instituting any change in the hours of work or in the starting and quitting times of the existing Sunday p.m. and Sunday night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, without affording the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of its employees, or its authorized representative, American Federation of Government Employees, Local 3884, notice of and the opportunity to negotiate with respect to the change.

(b) Refusing to bargain, upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning ground rules for negotiations over changes in conditions of employment, including proposals regarding official time to prepare for negotiations.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of its employees, or its authorized representative, American Federation of Government Employees, Local 3884, reestablish as the hours of work and the starting and quitting times of the Sunday p.m. and Sunday night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, those in existence prior to April 29, 1984, and afford the employees' exclusive representative notice of and an opportunity to negotiate with respect to any proposed changes.

(b) Bargain in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of its employees, or its authorized representative, American Federation of Government Employees, Local 3884, over ground rule proposals which may be submitted in connection with negotiations conducted under the Statute, including ground rule proposals that preparation time for negotiations is to be on official time.

(c) Compensate with appropriate Sunday premium pay and otherwise make whole those nurses in the bargaining unit who have worked the Sunday night shift since April 29, 1984, and whose shift hours would have been 11:45 p.m. Sunday through 7:45 a.m. Monday were it not for the unilateral change in hours of work and starting and quitting times on the Sunday p.m. and Sunday night shifts.

(d) Post at its facility at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region VII, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., July 17, 1986.

Jerry D. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the hours of work or in the starting and quitting times of the existing Sunday p.m. and Sunday night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo, North, Dakota, without affording the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of our employees, or its authorized representative, American Federation of Government Employees, Local 3884, notice of and the opportunity to negotiate with respect to the change.

WE WILL NOT refuse to bargain, upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning ground rules for negotiations over changes in conditions of employment, including proposals regarding official time to prepare for negotiations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of its employees, or its authorized representative, American Federation of Government Employees, Local 3884, reestablish as the hours of work and the starting and quitting times of the Sunday p.m. and Sunday night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, those in existence prior to

April 29, 1984, and afford the employees' exclusive representative notice of and an opportunity to negotiate with respect to any proposed changes.

WE WILL bargain in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of our employees, or its authorized representative, American Federation of Government Employees, Local 3884, over ground rule proposals which may be submitted in connection with negotiations conducted under the Statute, including ground rule proposals that preparation time for negotiations is to be on official time.

WE WILL compensate with appropriate Sunday premium pay or otherwise make whole those nurses in the bargaining unit who have worked the Sunday night shift since April 29, 1984, and whose shift hours would have been 11:45 p.m. Sunday through 7:45 a.m. Monday were it not for the unilateral change in hours of work and starting and quitting times on the Sunday p.m. and Sunday night shifts.

____
(Activity)

Dated: ________________ By: ____________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION,
WASHINGTON, D.C.

and

VETERANS ADMINISTRATION MEDICAL
AND REGIONAL OFFICE CENTER,
FARGO, NORTH DAKOTA

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

. . . .

Case Nos. 7-CA-40426
7-CA-40430

Branson Moore,
For the Respondent

James F. Gonzales and
Joseph Swerdzewski,
For the General Counsel,
Federal Labor Relations Authority

Larney Werth,
For the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

In Case No. 7-CA-40426, an unfair labor practice charge was filed by the Charging Party (also referred to herein as the Union or AFGE) on May 1, 1984 and amended on June 18, 1984. In Case No. 7-CA-40430, an unfair labor practice charge was filed by the Charging Party on May 3, 1984. These charges were investigated by the Regional Director, Region VII, of the Federal Labor Relations Authority (hereinafter, the Authority), which, on June 29, 1984 served upon Respondents a complaint consolidating the two cases.

The complaint alleges that Respondents have and are violating Sections 7116(a)(1) and (5) of the Statute[1] by (1) unilaterally implementing a change in conditions of employment concerning the hours of work and starting and quitting times of bargaining unit employees without first bargaining, as requested by the Union, concerning such changes; and (2) by refusing to bargain, as requested by the Union, concerning ground rule proposals including one proposal that preparation time for negotiations be on official time.

Respondent entered a general denial as to the alleged violations.

On September 19, 1984, in Fargo, North Dakota, a hearing was held at which the parties appeared, entered into various stipulations of fact, examined witnesses, and adduced documentary evidence. Briefs were filed by the Respondents and the General Counsel on October 19, 1984. Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact[2]

1. At all times material herein, the Union is, and has been, a labor organization within the meaning of 5 U.S.C. 7103(a)(4).

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[1] Section 7116 provides, in pertinent part that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or] . . .
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .

[2] The following abbreviations will be used in the decision. "Tr." refers to the transcript. "G.C. Exh." refers to the exhibits of the

(continued)

2. At all times material herein, Respondents are, and have been agencies within the meaning of 5 U.S.C. 7103(a)(3).

3(a). On February 28, 1980, the Union was certified as the exclusive representative of a national consolidated unit consisting of certain professional employees of Respondent, Washington, D.C.

(b). On July 23, 1981, the following unit was included as part of the national consolidated unit described in paragraph 3(a), above:

INCLUDED: All registered nurses, including nurse practitioners, clinical specialists and nursing instructors, employed by the Veterans Administration Medical Center, Fargo, North Dakota.

EXCLUDED: All other professional and non-professional employees; guards; part time intermittent employees; Nurse Anesthetists; Head Nurses; management officials; supervisors; and employees described in 5 USC 7112(b)(2), (3), (4), (6) and (7).

4(a). At all times material herein, Respondent, Veterans Administration, Washington, D.C. (hereinafter, VA DC), and the Union have been parties to a national Interim Memorandum of Agreement covering the employees in the unit described in finding 3, above.

(b). At all times material herein, Respondent, Veterans Administration Medical and Regional Office Center, Fargo, North Dakota (hereinafter, VA Fargo or VAM & ROC Fargo) and the Union, have been subject to the terms and conditions of a collective bargaining agreement covering the employees in the unit described in finding 3(b), above (effective July 3, 1974 and amended on December 30, 1976) between VA Fargo, and the North Dakota Nurses' Association, the Union's predecessor, as the exclusive representative of the unit described in finding 3(b), above.

5. At all times material herein, AFGE Local 3884, has been an affiliate and agent of the Union.

2/ (continued)

General Counsel. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondent.

The unopposed motion of the General Counsel to correct the transcript is granted, with additional corrections made by me, pursuant to 5 CFR 2423.19(r). The corrections appear in Appendix A, hereto.

6. By virtue of the certifications described in finding 3, above, the Union has been, and is now, the exclusive representative of the employees described in finding 3, above.

7. At all times material herein, F.E. Gathman has occupied the position of Center Director, at VA Fargo, and has been, and is now, a management official or supervisor within the meaning of 5 U.S.C. 7103(a)(10) and/or (11), and an agent of Respondents.

8. At all times material herein, Ray A. Johnson has occupied the position of Personnel Officer, at VA Fargo, and has been, and is now, a management official or supervisor within the meaning of 5 U.S.C. 7103(a)(10) and/or (11), and an agent of Respondents.

9. Dick Schmiesing has served in the Personnel Office at VA Fargo for one year and filled in for Mr. Johnson at a negotiation meeting on March 27, 1984.

10. For 11 years, Larney Werth has been employed at VA Fargo as a registered nurse. He has been President of Local 3884 "since the inception of the Union" in July, 1981," and has served as its chief negotiator (Tr. 32).

11. Since June 1979, Debra Cederholm has been employed at VA Fargo as a registered nurse. Since July 1981 she has been Vice President of Local 3884.

12. The parties to this proceeding entered into a formal stipulation of facts that was received into evidence as G.C. Exh. 41. It includes the following paragraphs. Additional admissions and facts adduced through testimony, exhibits and briefs are indicated in brackets with a transcript, exhibit, or brief page number following.

(1). By letter dated September 16, 1983, Chief, Nursing Service Irene Bloom established as official policy, effective October 2, 1983, a past practice by which nurses on the night shift worked the hours of 11:45 PM to 7:45 AM (G.C. Exh. 4).

(2). By letter dated January 12, 1984, Center Director F.E. Gathman notified the Union that effective February 5, 1984, Bloom would eliminate the 11:45 PM - 7:45 AM hours of work for nurses on the night shift and would schedule routinely 15 minutes of overtime for the nurses working the PM Shift hours of 4:00 PM - 12:00 PM midnight. (G.C. Exh. 5). By letter dated January 16, 1984, the Union demanded to bargain over this proposed change (G.C. Exh. 6).

(3). On January 20, 1984, Gathman notified the Union that the change proposed by letter dated January 12, 1984, had been rescinded. (G.C. Exh. 8). However, by letter dated February 2, 1984, Gathman notified the Union that, effective March 18, 1984, the hours of the night shift and PM shift would be changed according to the proposed schedule attached to Gathman's notice (G.C. Exh. 9). Essentially, the proposed change would regularly schedule 15 minutes of overtime for the 4:00 PM - 12:00 PM midnight PM shift on Sundays and would change the hours of work for the Sunday night shift nurses from 11:45 PM - 7:45 AM to that of 12:00 PM midnight to 8:00 AM.

(4). By virtue of 38 U.S.C. 4107(e)(3), a nurse who performs duty during any part of that period of time from midnight Saturday to midnight Sunday receives an additional premium pay at the rate of 25% of the nurse's hourly rate of base pay for each of every hour worked during that shift. Thus, a nurse who works from 11:45 PM Sunday to 7:45 AM Monday is entitled to receive 25% premium pay for the entire 8 hours worked on that shift. An effect of management's proposed change would eliminate 8 hours of premium pay for nurses who otherwise would have worked the hours of 11:45 PM Sunday - 7:45 AM Monday. (G.C. Exh. 13).

(5). On February 7, 1984, the Union requested bargaining over the proposed change dated February 2, 1984 by Gathman. (G.C. Exh. 10-A). The Union did not receive a reply from Gathman or other management representative in response to the bargaining request. On February 28, 1984, the Union again demanded bargaining (G.C. Exh. 11). The Union also protested to Gathman that management had instructed head nurses on or about February 28 and March 1, 1984 to proceed with and post the proposed implementation of the new schedule, even though negotiations had not yet occurred. The Union also objected that management's primary motive for changing the night shift's hours of work was to eliminate the 25% premium pay for nurses who worked the Sunday night shift. [Respondents admit that "budget restraints entered into the scheduling" (R. Br. 2)].

(6). By letter dated February 29, 1984, Gathman informed the Union that management would meet with the Union on the specific issues of (1) adverse monetary impact on affected employees and (2) regularly scheduled overtime. Gathman informed the Union that management merely was assigning employees to existing tours of duty, but was not changing starting and quitting times for employees working on the PM and night shifts (G.C. Exh. 12).

(7). As of February 29, 1984, all nurses who worked the night shift worked from 11:45 PM - 7:45 AM except for the number 2 nurse at two posts of duty who worked from 12:00 PM midnight to 8:00 AM. There was no previous practice or policy whereby nurses on the PM shift would work the hours of 4:00 PM - 12:15 AM on a regularly scheduled basis. There was no previous practice of regularly scheduled involuntary overtime (G.C. Exh. 7).

(8). After an exchange of additional bargaining requests and proposals, the parties agreed to meet on March 27, 1984, concerning:

(1) The scheduling of work hours for 2 part-time nurses.

(2) The proposed changes affecting nurses on the PM and night shifts.

(3) Regularly scheduled overtime.

(4) Official time for Union officers and steward for representational purposes (G.C. Exh. 10-B, 14, 15, 16, 17, 18).

Management rescinded the proposed implementation of the changes in hours of work for nurses on the PM and night shift, which was scheduled to become effective on March 18, 1984.

(9). During the meeting on March 27, 1984, Union representatives Larney Werth and Debra Cederholm submitted proposed written ground rules proposals for negotiation to management representatives Irene Bloom and Dick Schmiesing (G.C. Exh. 22). On March 27 the parties did not negotiate concerning the substance, impact, or implementation of the (1) scheduling of work hours for 2 part-time nurses, (2) proposed changes in hours of work affecting nurses on the PM and night shifts, (3) regularly scheduled overtime, or (4) official time for Union officers and stewards for representational purposes. The parties did discuss the Union's ground rules proposals. With respect to Union ground rule proposal number 4, management's representatives considered this proposal to be in the nature of mid-term bargaining, considered the proposal to be inappropriate for the purpose of these negotiations, and determined that management was not obligated to bargain concerning proposal number 4. Accordingly, management's representative would not bargain concerning proposal number 4 on March 27, 1984.

(10) By letter dated March 28, 1984, Gathman notified the Union that the meeting held on March 27 was to provide the Union an opportunity to present its views and recommendations, in accordance with Section 7117(d)(2) and (3) of the Statute, regarding the proposed changes in hours of work, that the Union presented no views and recommendations regarding adverse impact or implementation of the proposed changes in hours of work for unit employees, that the Union used the opportunity on March 27 to enter into negotiations concerning official time, that the proposed hours of work for nurses on the PM and night shifts would take effect beginning April 29, 1984, and that management saw no need for further meetings on the issue of hours of work (G.C. Exh. 21).

(11). On March 27, 1984, the parties had mutually agreed to meet again on April 2 to continue discussions (G.C. Exh. 22). Management did not attend that scheduled meeting on April 2 (G.C. Exh. 21, 23, 24).

(12). By letter dated March 30, 1984, the Union protested management's refusal to bargain on March 27 over proposal number 4 of the proposed ground rules, and repeated its request that management negotiate over the subjects which the parties had agreed to and met to bargain over (G.C. Exh. 22). The Union attached to this letter the proposed ground rules as submitted to management on March 27 and with notations of discussions (G.C. Exh. 22).

(13). Union ground rule proposal number 4, as submitted to management on March 27, 1984, was identical to ground rule number 4 which the parties had agreed to previously on two separate occasions on October 24, 1983, and November 22, 1983 (G.C. Exh. 36 and 37). In part these previous ground rules agreements concerned bargaining over the impact and implementation of the Annual Leave Nursing Service Policies (G.C. Exh. 37). Management representatives Steven Nelson and Irene Bloom negotiated these two previous ground rules agreements.

(14). By letter dated April 12, 1984, the Union again demanded to bargain prior to the implementation of proposed and scheduled changes in hours of work (G.C. Exh. 25). The Union also objected to the fact that management had posted in nursing work areas the new schedule of hours of work on or about April 11, 1984 (G.C. Exh. 25 and 26).

(15). By letter dated April 12, 1984, Gathman informed the Union that management would meet with the Union in regard to impact and implementation bargaining on the following:

(a) Official time for Union officers and stewards.

(b) Hours of work for nurses on the PM and night shift.

(c) Part-time hours of work for RNs (G.C. Exh. 27).

Gathman also recommended that the Union should contact Ray Johnson to arrange ground rules for impact and implementation bargaining (G.C. Exh. 27).

(16). By letter dated April 18, 1984, the Union requested that management rescind the scheduled April 29 implementation date concerning the change in hours of work for nurses on the PM and night shifts (G.C. Exh. 8). Also, the Union informed management that the proposed change in hours of work for nurses on the PM and night shifts was subject to bargaining over the substance, impact, and implementation of that change (G.C. Exh. 28). By letter dated April 18, 1984, Gathman responded to the Union's letter of April 18, but did not agree to rescind the effective implementation date of April 29, 1984 (G.C. Exh. 29).

(17). On April 26, 1984, the parties' representatives met as agreed. Bloom and Johnson represented the agency and Werth, Debra Cederholm, and Doris Nelson represented the Union. Again, the Union submitted written ground rules proposals (G.C. Exh. 30). The parties discussed these proposals. Management's representatives would not negotiate concerning the Union's proposed ground rule number 4, and informed the Union that ground rule number 4 was not an appriate [sic] subject to bargain over. Management did not declare the proposal nonnegotiable.

The parties adjourned the April 26 meeting to April 27. Management representative Johnson agreed to review Authority decisions referenced by the Union representatives concerning the negotiability of ground rule proposal number 4. The Union also made it clear that the Union wanted a ground rules agreement completed prior to commencing negotiations over the substantive issues for which the parties had agreed to meet.

(18). On April 27, 1984, during the meeting between the parties' representatives, the agency's representatives again would not negotiate over Union ground rule proposal number 4. The Veterans Administration Central Office, Washington, D.C., had advised Johnson that the VAM & ROC, Fargo, ND, not negotiate over the Union's ground rule proposal number 4. Accordingly, the agency's representatives informed the Union that the agency had concluded that ground rule proposal number 4 was not an appropriate subject for bargaining, and the agency's representatives refused to bargain over it.

(19). The meeting on April 27, 1984, ended without negotiations concerning ground rule proposal number 4 or any of the underlying substantive matters which were to be negotiated (G.C. Exh. 32).

(20). By letter dated April 28, 1984, the Union repeated its desire to negotiate over the proposed changes in hours of work for nurses on the PM and night shifts, insisted upon the right to negotiate a ground rules agreement first and to negotiate over ground rules proposal number 4, and requested that the agency postpone the April 29 implementation date (G.C. Exh. 32).

(21). Effective April 29, 1984, Respondent did implement the proposed change in hours of work for nurses on the PM and night shifts.

(22). By letter dated May 16, 1984, the Union repeated its demand to bargain concerning the subject of official time, starting and quitting times of nurses on the PM and night shifts, and the starting and quitting times of part-time Registered Nurses (G.C. Exh. 33). The parties exchanged proposed dates and times for such a meeting, but have not met for this purpose (G.C. Exh. 34 and 35).

13. Local 3884's proposed ground rule number 4 is as follows: "Preparation time for negotiations and for intent statements will be on official time." See attachment to G.C. Exh. 22.

14. The reason for the overlap of shifts for nurses is to accomplish the narcotics count. Two persons must count narcotics, one coming on duty and one going off. Prior to September 16, 1983, there was a "gentleman's agreement" that the oncoming night shift nurse would come in 15 minutes early at 11:45 and count narcotics with the nurse on the PM shift, and then the night shift nurse would leave at 7:45 in the morning (Tr. 99). No overtime was paid or compensatory time granted to the nurses under the "gentleman's agreement" (Tr. 99). Since April 29, 1984, the overlap to count narcotics, on Sundays only, is accomplished by having the PM nurses work until 12:15 AM on Monday, using "mandatory overtime" (Tr. 77).

15(a). The agreements under which the parties are operating (see finding 4, above) are silent as to any ground rules bargaining nights. AFGE and VA DC have been negotiating a master agreement for several years. Meanwhile, the bargaining obligation of the parties is governed by the Interim Memorandum of Agreement. See finding 4(a), above. Article 6 of the Interim Agreement provides that any local changes in personnel policies, practices or other matters affecting conditions of employment initiated by VA management at its local facilities, which are not covered by a local agreement, shall be transmitted to local union representatives, and that bargaining obligations will continue over such matters at the local level between local management and designated local officials. See G.C. Exh. 3, page 3. The local agreement between VA Fargo and the Union's predecessor (see finding 4(b), above) requires local bargaining concerning personnel policies, practices and matters affecting working conditions of nurses in the bargaining unit. See G.C. Exh. 2, Article III, Section 6 and 10.

(b). During the meetings between the parties on April 26 and 27, 1984, management's representatives did not point to any provision in the national Interim Agreement between VA DC and AFGE, which arguably precluded or barred local negotiations over any of the proposed ground rules. In fact, Respondents' evidence conceded that Article 6 of the national Interim Agreement subjects to bargaining at the local level any local changes in employment conditions, including the nurses' hours of work and starting and quitting times, initiated by Respondents. (Tr. 126, 132-133 and 137). It is essentially uncontroverted that both the pre-existing local contract and the national Interim Agreement give AFGE Local 3884 the right to propose and negotiate ground rules. (See Tr. 130 and 133-134). Respondents' witness Ray Johnson specifically testified that neither the local predecessor union's contract nor the Interim Agreement prohibited or precluded bargaining at the local level over the Union's ground rule proposal concerning official time to prepare for negotiations. (See Tr. 135). Mr. Johnson also acknowledged that there is no provision in the national Interim Agreement which would deny AFGE Local 3884 the authority, or would relieve VA Fargo of the obligation, to bargain over the disputed ground rule proposal concerning negotiations where local management is initiating a local change in hours of work. (See Tr. 138-139). Moreover, Mr. Johnson acknowledged that management was unwilling to negotiate the proposed ground rule on preparatory time for the union negotiators, even if it applied only to the negotiations over the VA Fargo-initiated change concerning hours and starting and quitting times for nurses. See Tr. 146-147.

(c). At the hearing Mr. Johnson attempted to link on-going national negotiations between VA DC and AFGE with the "appropriateness" of local bargaining over the disputed ground rule proposal concerning official time. See Tr. 138-139. The parties stipulated that such national negotiations have not resulted in an agreement which was in effect at times material to this case. See Tr. 139-142. Mr. Johnson also acknowledged that the on-going national negotiations have not addressed official time in terms of local negotiations over ground rules, and have not prohibited negotiations at the local level over official time. (Tr. 127, 140 and 144). Ultimately, Mr. Johnson stated that VA DC had instructed VA Fargo not to bargain over the disputed ground rule proposal because management perceived this to be a Union-initiated proposal concerning substantive matters which involved mid-term bargaining. (Tr. 143-144). VA Fargo in fact recognized that this was a ground rule proposal which the Union had submitted in connection with exercising its right to negotiate over management-initiated changes in conditions of employment. See Tr. 132, 133, 137, 144 and 145-146. Based upon instructions from VA DC however, Mr. Johnson determined that, since VA Fargo had not initiated a change in the use of official time to prepare for negotiations, then it was inappropriate for AFGE Local 3884 to initiate such a proposal, even in the context of a ground rule pertaining only to negotiations over other local management-initiated changes. See Tr. 122-123, 137-138, and 143-144.

16(a). A primary purpose and effect of management's change in the hours of work and starting and quitting times for nurses on the Sunday PM and night shifts is to eliminate the 25% premium pay each Sunday since April 29, 1984, for all those nurses who work the night shift. Uncontroverted evidence showed that at least 28 identifiable nurses have worked the Sunday night shift since April 29, 1984, and that such nurses would have earned between $17.40 and $27.76 each in premium pay for each

Sunday night shift worked had the starting time remained 11:45 PM. See G.C. Exh. 40 and Tr. 88-91. At the hearing, Respondents stipulated that should a backpay order be deemed appropriate, VA Fargo possesses accurate records upon which the Authority can rely in determining which nurses worked a particular Sunday night shift, and what pay such nurses received. See Tr. 94-95.

(b). Another management reason given for the change in hours here involved is that the old schedule worked out so that, in one of the weeks, nurses would only work 39 hours and 45 minutes, whereas the nurses involved were on full-time status and supposed to work 40 hours a week. See Tr. 125.

17. The significance to having proposed ground rule number 4 negotiated before reaching the substantive issues was attested to by Mr. Werth. See Tr. 41-42, establishing that:

> Q. (BY MR. GONZALES) Now, having explained what you were negotiating in terms of ground rules, specifically in reference to the fourth proposal which involved official time for preparing to negotiate, would you explain for the benefit of the Administrative Law Judge what is the particular significance of that proposal with respect to negotiations at the V.A. Hospital here in Fargo between the Union and Management?
>
> A. There's a great significance to this particular proposal as to number one, also the same reason. Nurses work rotating shifts. They work three shifts a day. The hospital is open 24 hours a day and it's tough to assemble a negotiating team for one thing. If you don't have an agreement that they're going to be off on official time it makes it tougher and you operate at a real disadvantage. And in regard to number four, at these meetings that we came to negotiate on, we came on our own time. And if you don't have time to prepare it and you don't have official time, or official time to negotiate and you worked your own shift, in one day time gets a little bit scarce. It reeks a real hardship on the nurses and negotiators because Management is working their administrative shift, 7:00 or 8:00 to 4:30. We have to prepare for negotiations. We have to negotiate on our own time and unless we get something in writing that stipulates otherwise it just gets to be a real hardship and puts us at a disadvantage when it come to bargaining.
>
> Q. In that connection have you ever proposed to Management that they negotiate at your shift, at the night shift?
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> A. Many times I've asked that they negotiate with me on my schedule of tour of duty. Which I've been working since 1977.

Mr. Werth, the President and chief negotiator for Local 3884 and Ms. Cederholm, the Vice President of Local 3884 were on the negotiating team for the management-initiated proposed changes here at issue, and both are nurses assigned to the night shift. Management has steadfastly refused to bargain, during the night shift.

Discussion and Conclusions

1. The parties do not dispute the well-established principle that an agency may not unilaterally change an existing condition of employment, absent agreement or impasse following good-faith bargaining. See, e.g. Office Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA 73, 95 (1982). The condition of employment in this controversy concerns the admittedly established practice and policy whereby nurses on the Sunday night shift worked from 11:45 PM Sunday to 7:45 AM Monday and nurses on the Sunday PM shift worked from 4:00 PM to 12:00 PM. This practice apparently had existed for some time, as a "gentleman's agreement" prior to its maturing into an officially recognized schedule in 1983. The general prohibition against unilateral changes in terms and conditions of employment includes those conditions established by past practice. United States Department of the Treasury, Internal Revenue Service, Des Moines District, 13 FLRA 296, 307 (1983). In particular, an agency is obligated to negotiate fully, prior to implementation, over the decision to change hours of work and the starting and quitting times of previously existing shifts, as well as over the procedures to be observed in the implementation of, and appropriate arrangements for employees adversely affected by that decision. See, e.g., U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 118-119 (1982). Within that right to negotiate over the substance of an agency's decision to change starting and quitting times, a union may even object to the change and propose that the existing hours of work be retained. See, National Treasury Employees Union, and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927 (1979). See also, American Federation of Government Employees, Local 2875 and Department of Commerce, NOAA, National Marine Fisheries Services, Southeast Fisheries Center, Miami, Florida, 5 FLRA 441-446 (1981).

It is undisputed that proper notice of the intended change was served upon the local union in accordance with the provisions of the National Interim Agreement. It is also undisputed that AFGE Local 3884 promptly and persistently demanded that VA Fargo bargain, prior to implementation, concerning the substance, impact and implementation of the management-initiated change in starting and quitting times. Although VA Fargo met with the Union on three occasions prior to changing the hours of work on April 29, no bargaining over the substantive issues took place. In fact, it is clear there was no discussion of the proposed changes in conditions of employment. It is also clear, and not really controverted, that the changes were bargainable as to substance, impact and implementation and had a "more than de minimis" impact on bargaining-unit employees. See Internal Revenue Service, 16 FLRA 928, fn. 1 (1984).

Ordinarily, the above facts would require a holding that a violation of Sections 7116(a)(1) and (5) had occurred. Here, however, the evidence shows that Respondents stood ready and willing to bargain over the substantive issues, but Local 3884 refused to do so until bargaining took place over its proposed ground rule number 4, that preparation time for negotiations and for intent statements be on official time. Management negotiated, at some length, over other ground rules proposed by Locals 3884; and agreement was reached as to them. However, VA Fargo balked over negotiating proposed ground rule number 4 and claimed such bargaining was "inappropriate," at that time, apparently on the ground that VA DC was in the process of negotiating a master agreement with AFGE -- a process that has been ongoing for several years. There was no evidence that Local 3884's proposed ground rule number 4 was on the bargaining table at the national level. There was undisputed evidence that Local 3884 was empowered to negotiate over management-initiated local changes; that nothing in the agreements of the parties precluded ground rule bargaining; that ground rule number 4 had been agreed to in the past by VA Fargo in negotiating local changes; and that Local 3884 intended its proposed ground rule number 4 to apply only to the particular management-initiated change then at issue.[3]

Under these circumstances, a conclusion that Sections 7116(a)(1) and (5) have been violated turns, in part, on the question of whether the refusal of Local 3884 to discuss the substantive issues between it and VA Fargo, until its proposed ground rule number 4 was negotiated, relieved VA Fargo of its obligations to bargain over the substantive issues.

2. In several recent decisions, this Authority has recognized that negotiating a ground rules agreement prior to commencing bargaining over proposed changes is an inherent aspect of an agency's obligation to bargain in good faith prior to implementation. See Department of Defense Dependents Schools, 14 FLRA 191, 193 (April 6, 1984). The Authority had occasion, recently, to call this to the attention of the Veterans Administration's hospital in Columbia, Missouri. See Harry S. Truman

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[3] Inapposite is Respondents' argument and reliance on a case involving a local union's proposal to change working conditions, after a consolidated, national unit is certified. See R. Br. 5, citing Social Security Administration, Mid-Atlantic Program Service Center, Kansas City, Missouri, 10 FLRA 15 (1982). Here, it is management which initiated the changes in conditions of employment. And, as discussed in section 2 of this decision, a management-initiated change gives a union the right to propose ground rules for bargaining over such changes, and requires management to negotiate concerning the proposed ground rules.

Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA 944 (Dec. 18, 1984, hereinafter referred to as the VA Columbia case). As here, the Respondent in the VA Columbia case claimed that negotiating of ground rules was "inappropriate," the logic being that such negotiations should be confined to "formal contract negotiations." (16 FLRA at 944, 945 and compare, here Tr. 138 and 143-144). The Authority held that this logic was "clearly without merit" (16 FLRA at 945), and "found no distinction in the good faith bargaining process between formal contract negotiations and negotiations conducted as a result of a change in conditions of employment made during the term of a collective bargaining agreement" (16 FLRA at 945). The Authority found a violation of Section 7116(a)(1) and (5), in the VA Columbia case, even though the parties had negotiated an agreement over the change in the conditions of employment at issue.

Here, no such bargaining took place prior to implementation of the change in conditions of employment affecting bargaining-unit employees, due to management's steadfast refusal to bargain, first, over the union-proposed ground rule number 4. Number 4 is similar to other ground rules proposals already determined by the Authority to be negotiable. For example, the Authority has found the following proposals to be within the agency's duty to bargain: "Management will allow equal official time to the Union Negotiation Team, as allotted to the Management Negotiation Team, for preparation of Contract Negotiations;" "All preparation of proposals and impasse resolution shall be on duty time;" ". . . the union negotiating team will be granted official time equal to the time used by management . . . prior to the first negotiating session . . . ." See, respectively, American Federation of Government Employees, Local 1692 and Headquarters, 323rd Flying Training Wing, 3 FLRA 305 (1980); American Federation of Government Employees, Local 225 and U.S. Army Armament Research and Development Command, Dover, New Jersey, 4 FLRA 148 (1980); Association of Civilian Technicians, Granite State Chapter and The Adjutant General, State of New Hampshire, 7 FLRA 241 (1981). In view of these precedents, Local 3884's proposal number 4 clearly is negotiable. Respondents, moreover, did not object to or contest the negotiability of the Union's ground rule proposal, either during meetings with the Union's negotiators or during the hearing in this matter.

The fact that VA Fargo did bargain over some ground rules, does not excuse its conduct as to proposed ground rule 4, as Respondents argue at page 9 of their brief. This was not a failure to agree over ground rule 4; it was a failure to bargain over it as being inappropriate, at that time.

Absent a meritorious affirmative defense, it must be concluded that Respondents violated Sections 7116(a)(1) and (5) of the Statute by refusing to negotiate over a ground rule proposal which is substantially similar to proposals already determined by the Authority to be negotiable. See, Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548, 549 (1981).

3. Whether the alleged violation of Sections 7116(a)(1) and (5) occurred because Respondents unilaterally implemented the change in hours of work and starting and quitting time of the nurses, without first bargaining with Local 3884 is not so easily resolved. As Respondents point out, the record shows that management's representatives were "present and ready to proceed on the substantive issues and attempt to resolve the problems," and implemented the change only "[a]fter three attempts had been rebuffed by the union", which insisted, first, on its right to negotiate ground rule number 4. See R. Br. 8. Respondents rely on Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 10 FLRA 281 (1982), hereinafter Wright-Patterson, wherein the Authority adopted a decision of Administrative Law Judge William B. Devaney, who held that the refusal of the agency to pay travel and per diem expenses to union negotiators violated the Statute, but did not constitute a refusal to bargain over the substantive issues because the agency was willing to bargain over them. Judge Devaney noted that: "The record contains no evidence, or even assertion, that the Union was unable, or even would have been inconvenienced, by proceeding with bargaining and litigating, if necessary, Respondent's liability for the cost of travel and per diem." See 10 FLRA at 292.

The record here does show, at the very least, "inconvenience" to the union bargaining team, if ground rule number 4 could not first be negotiated. On the union negotiating team were the President and chief negotiator for Local 3884, Mr. Werth, and the Vice-President of Local 3884, Ms. Cederholm. Both work as night-shift nurses. Since management's proposed change impacted on the night-shift nurses, it was undoubtedly important for night-shift nurses to represent the interests of the bargaining unit. Management insists on day shift negotiations, which works a "real hardship" on nurses coming off duty on the night shift without any allowances of official time to prepare for negotiations. See finding 17, above.

In view of the record made here, I conclude that the Authority's decision in Wright-Patterson is distinguishable. Furthermore, see Environmental Protection Agency, 16 FLRA 602 (1984) hereinafter EPA, where the agency refused to bargain ground rules proposed by the union prior to the union submitting proposals over management-initiated proposals concerning performance standards, but was ready and willing to bargain over the substantive issues. The Authority adopted the decision of Administrative Law Judge Garvin Lee Oliver that the Respondent violated Sections 7116(a)(1) and (5) "when it failed and refused to negotiate in good faith, including the negotiation of ground rules, and unilaterally implemented the standard-setting procedures . . . ." 16 FLRA at 614. While the Authority modified some aspects of Judge Oliver's decision, it issued a cease-and-desist order ordering the agency not to implement the change without first notifying the union and affording it an opportunity to bargain over the change; and it also ordered the agency to bargain with the union, upon request, over ground rules and over the procedures for establishing the change there at issue. See 16 FLRA No. 87.

Under the circumstances of this case, and following the rationale of the EPA case, I conclude that violations of Sections 7116(a)(1) and (5) did occur when VA Fargo implemented the change in hours and shift times without first bargaining with Local 3884, including bargaining over Local 3884's ground rule proposal 4.

The Remedy

In order to fully and effectively remedy the several violations by Respondents of Sections 7116(a)(1) and (5) of the Statute, the General Counsel urges the entry of an order directing the Respondents to restore the status quo ante by re-establishing the hours of work and starting and quitting times which existed prior to April 29, 1984 on the Sunday PM and night shifts in the nursing service. See G.C. Br. 25. Since Respondents in this case have unlawfully refused to bargain over the substance of a decision which affects working conditions, it is not necessary to review those several criteria governing whether to award status quo ante relief in those cases involving an agency's failure to bargain over the impact and implementation of a decision reserved to managerial discretion. See, Federal Correctional Institution, 8 FLRA 604, 606 (1981). In several decisions which are directly precedential to this case, the Authority has ordered restoration of the status quo ante, where the agency has failed to meet its duty to bargain over the decision to change starting and quitting times on existing shifts, "in order to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." See U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 119 (1982). See also Internal Revenue Service, Los Angeles District, 10 FLRA 653, 655 (1982).

Even assuming that the factors pertinent to determining the restoration of the status quo ante in those cases involving only bargaining over impact and implementation were also applicable here, a review of those factors in the context of the evidence clearly supports an order directing Respondents to restore the status quo ante. Thus, the evidence shows that the Union persistently requested bargaining, that Respondents consistently failed and refused to bargain over negotiable matters, that Respondent unilaterally implemented without a showing of an overriding exigency, and that at least 28 employees suffered direct and measurable economic loss.

The General Counsel also urges the entry of an order that Respondents make whole each nurse employed by VA Fargo for the Sunday premium which each would have been earned had VA Fargo not changed the starting time for the Sunday night shift. See G.C. Br. 26. Uncontroverted evidence introduced at the hearing established that at least 28 employees have worked the Sunday night shift since April 29, 1984, and that each employee suffered a loss of up to $27.76 in premium pay each time the Sunday night shift was worked. Respondents stipulated at the hearing that the Veterans Administration possesses the data and records by which each employee who has worked the Sunday night shift since April 29, 1984, as well as the amount of salary earned, can be accurately determined in the event a back-pay order is included in this remedy. Accordingly, this remedy is not speculative. Compare the situation here to those in Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 9 FLRA 606, 608 note 3 (1982) and United States Department of Labor, 16 FLRA 969, 986-987 (1984), where back pay awards were denied.

An order directing the back payment of premium pay is consistent with the Back Pay Act of 1966, as amended by the Civil Service Reform Act of 1978, 5 U.S.C. § 5596. The nursing employees here involved would have continued to receive 8 hours of Sunday 25% premium pay, each week on the night shift, but for Respondents' unilateral change in the starting time of the Sunday night shift. The unfair labor practice violation in the instant case is a type of unjustifiable or unwarranted personnel action resulting in clearly identifiable losses of night pay differential envisioned in 5 U.S.C. 5596(b)(1).[4] Also, an order directing back pay is within the Authority's power and mandate to require an agency to take whatever remedial action the Authority considers appropriate, under Section

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[4] 5 U.S.C. 5596(b)(1) provides that:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee -
>
> > (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect -
> >
> > > (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; . . . .

7105(g) of the Statute.[5] There is parallel authority and precedent in the private sector to restore to employees those wages or benefits which have been lost due to unlawful changes by an employer in conditions of employment. See Leeds and Northrup Co. v. NLRB, 391 F.2d 874, 879-80 (3rd Cir. 1968); Overnite Transportation Co. v. NLRB, 372 F.2d 765, 770 (4th Cir. 1967), cert. den. 389 U.S. 838.

Respondent's only argument against an award of back pay is that the action taken was not an unjustified personnel action. See R. Br. 9-12. Reliance is placed, first, upon the fact that the action was taken only after several attempts to negotiate or settle. As to this argument, and for reasons already stated, the action was nevertheless an unfair labor practice, under all the circumstances of the case. The only other argument presented in support of the action being a justified one has to do with the "schedule being followed [for the nurses] resulted in confusion and questions as to its legality" in that [t]echnically in the weeks that only 39 3/4 hours were worked, the employee should have been charged annual or some other form of leave." See R. Br. 9-10. If, indeed, this was illegal, then the answer was to correct the problem with an adjustment of leave. Instead, the action taken was to change the hours and starting and quitting times of the shift, unilaterally and admittedly in order to save paying the nurses on the night shift 8 hours of Sunday premium pay when they only worked 15 minutes on Sunday. This action was "justified" in the sense that it was a more economic way to operate. What is unjustified, and an unfair labor practice, was the action of making the changes without first bargaining with Local 3884.

Accordingly, it is concluded that Respondents should reimburse those employees for the Sunday premium pay which they would have earned but for Respondents' conduct. See, generally, Internal Revenue Service, Western Region, 11 FLRA FLRA 655, 656 (1983).

Additionally, an appropriate remedy should include an order that Respondents cease and desist from the unfair labor practices alleged in the complaint, post an appropriate notice to all employees at Respondent VA Fargo's facility which identifies the violative acts herein and the required remedial action to be taken, and bargain upon request with the

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[5] Section 7105(g) provides that:

> In order to carry out its functions under this chapter, the Authority . . .
>
> (3) may require an agency or labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

Union or its authorized representative, AFGE Local 3884, over the hours of work and starting and quitting times for nurses on the Sunday PM and night shifts, and over ground rule proposals concerning official time to prepare for the negotiations over the management-initiated change.

Ultimate Findings and Order

The unfair labor practices alleged in the complaint have been committed, in violation of Sections 7116(a)(1) and (5) of the Statute.

Accordingly, and pursuant to Section 7118 of the Statute and 5 CFR 2423.29, it is hereby ORDERED that Respondents:

1. Cease and desist from:

(a) Instituting any change in the hours of work or in the starting and quitting times of the existing PM and night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo North Dakota, without affording the American Federation of Government Employees, the exclusive bargaining representative of its employees, or its authorized representative, American Federation of Government Employees, Local 3884, the opportunity to negotiate with respect to the change.

(b) Refusing to bargain, upon request of the American Federation of Government Employees, or its authorized representative, AFGE, Local 3884, concerning ground rules for negotiations over changes in conditions of employment, which include proposals regarding official time to prepare for negotiations.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, and AFGE, Local 3884, the exclusive bargaining representative of its employees, reestablish as the hours of work and the starting and quitting times of the PM and night shifts for nurses at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota those in existence prior to April 29, 1984, and afford the American Federation of Government Employees and AFGE, Local 3884, the opportunity to negotiate with respect to any proposed changes thereto.

(b) Compensate with appropriate Sunday premium pay and otherwise make whole those unit employee nurses who have worked the Sunday night shift since April 28, 1984 and whose shift hours would have been 11:45 PM Sunday through 7:45 AM Monday were it not for the unilateral change in hours of work and starting and quitting times on the PM and night shifts.

(c) Post at its facilities at the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, copies of Appendix B, attached hereto, on forms to be furnished by the Regional Director, Region VII, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Veterans Administration Medical and Regional Office Center Director, Fargo, North Dakota and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Center Director shall take all reasonable steps to insure that such Notices are not altered, defaced, or covered by other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: March 5, 1985
Washington, D.C.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT implement a change in conditions of employment concerning the hours of work of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, without first bargaining, upon request, with the American Federation of Government Employees, AFL-CIO, or its authorized representative, AFGE Local 3884, concerning such changes.

WE WILL NOT refuse to bargain, upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, AFGE Local 3884, concerning ground rules for negotiations over changes in conditions of employment of our employees.

WE WILL notify the American Federation of Government Employees, AFL-CIO, or its authorized representative, AFGE Local 3884, of any proposed change in the hours of work and starting and quitting times of unit employees on the PM and night shifts, and, upon request, bargain concerning such change.

WE WILL rescind the change in hours of work implemented on April 29, 1984 for unit employee nurses on the PM and night shifts, reinstate the starting and quitting times for the PM and night shifts which existed prior to April 29, 1984, and compensate with Sunday premium pay those unit employee nurses who have worked the Sunday night shift since April 28, 1984 and whose shift hours would have been 11:45 PM Sunday through 7:45 AM Monday were it not for the unilateral change in starting and quitting times.

WE WILL, upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, AFGE Local 3884, bargain in good faith concerning ground rules for negotiations, including ground rule proposals that preparation time for negotiations is to be on official time, and execute a written document which embodies agreed-upon ground rules for negotiations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 7, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202 and whose telephone number is: (303) 844-5224; FTS-8-564-5224.

22 FLRA No. 70

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

IMMIGRATION AND NATURALIZATION SERVICE

Agency

and

Case No. 0-AR-963

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 505

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator C. Chester Brisco filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant was suspended for 5 days for improper use of a firearm, unsafe use of a service vehicle, and failure to follow service instructions and regulations. A grievance was filed and submitted to arbitration on the issue of whether the suspension was for just and sufficient cause. The Arbitrator determined that the evidence established that the grievant engaged in the misconduct with which he was charged. However, the Arbitrator noted that the Agency had delayed more than eight months from the date of the incident before proposing the grievant's suspension. He concluded that this "extraordinary delay" resulted in a disciplinary action which was arbitrary, capricious, and unreasonable and which did not promote the efficiency of the service. He further noted that agency regulations require that discipline must be timely; that the collective bargaining agreement provides that employees shall be furnished with notices of proposed disciplinary action at the earliest practicable date after the alleged offense has been committed and made known to the Agency; and that 5 U.S.C. § 7503 directs that the employee is entitled to a written decision and the specific reasons for the discipline at the earliest practicable date. Rejecting the Agency's argument that the delay was excusable, the Arbitrator found that the delay violated law, agency regulation, and the collective bargaining agreement and that therefore the delay constituted harmful error and the discipline was contrary to law. As his award the Arbitrator ruled that the suspension was not for just cause and directed that the grievant be made whole.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award is contrary to 5 U.S.C. §§ 7503 and 7701(c) and the Back Pay Act, 5 U.S.C. § 5596. In support of its exception, the Agency essentially argues that the Arbitrator's award is deficient because the delay was not a harmful error within the meaning of section 7701(c) which the Agency maintains should be applied to suspensions of 14 days or less taken under section 7503.

B. Analysis and Conclusions

In American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center, 22 FLRA No. 19 (1986), exceptions were filed to an award rescinding a 10-day suspension. The suspension was rescinded because the arbitrator determined that the activity violated a requirement of the collective bargaining agreement by failing to place all records relied on for the suspension in a particular personnel file. In one of its exceptions, the agency contended that the award was deficient because the arbitrator failed to find that the violation of the agreement constituted harmful error.
In denying this exception, the Authority explained the proper application of the harmful error rule of section 7701(c) as it pertains to the arbitration of disciplinary actions. The Authority explained that the rule applies in accordance with section 7121(e)(2) of the Statute only to the more serious adverse actions enumerated in 5 U.S.C. § 7512*/ that are taken under section 7513; the rule does not apply to sus-

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*/ Section 7512 applies to a removal, a suspension for more than 14 days, a reduction-in-grade, a reduction-in-pay, and a furlough of 30 days or less.

pensions for 14 days or less taken under section 7503. In Northeastern Program Service Center the Authority therefore concluded that the arbitrator was not required by law to find that the violation of the parties' agreement constituted harmful error and that his failure to do so provided no basis for finding the award contrary to law.

Consistent with Northeastern Program Service Center, we conclude in this case that the Arbitrator was not required by law to find that the unwarranted delay in proposing disciplinary action constituted harmful error within the meaning of section 7701(c). Accordingly, the Agency's allegation that the Arbitrator failed to properly make such a finding provides no basis for finding the award contrary to law as alleged by the Agency.

IV. SECOND EXCEPTION

A. Contentions

In its second and final exception the Agency contends that the award is contrary to management's right in accordance with section 7106(a)(2)(A) of the Statute to take disciplinary action. In support of this exception, the Agency cites the Authority's decision in National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of the Interior, 17 FLRA 318 (1985), petition for review filed sub nom. NFFE Local 615 v. FLRA, No. 85-1299 (D.C. Cir. May 15, 1985), and argues that the arbitrator's setting aside of the grievant's suspension merely because of the lapse of time between the act of misconduct and the imposition of the suspension violates section 7106(a)(2)(A).

B. Analysis and Conclusions

The Authority concludes that the Agency's reliance on Sequoia and Kings Canyon National Parks is misplaced. In that case, as correctly noted by the Agency, provision 2 essentially provided that investigations of incidents for which disciplinary action may be taken will normally be initiated within 60 days after the incident. The Authority characterized the provision as establishing a contractual "statute of limitations" on the agency's ability to investigate such incidents. 17 FLRA at 321. Recognizing that in many situations investigations are the essential first step to disciplinary action, the Authority concluded that preventing the initiation of an investigation would in certain circumstances prevent the agency from acting at all with respect to the right to take disciplinary action. In this case, the Agency was in no manner prevented by a statute of limitations provision from investigating the alleged incident of misconduct and from acting to propose and suspend the grievant for 5 days. Instead, as stated by the Arbitrator, this case involves review of final disciplinary action to determine whether the Agency's eight-month delay in imposing discipline resulted in an action which was arbitrary, capricious, and unreasonable and which did not promote the efficiency of the service. As noted, the Arbitrator determined that the suspension of the grievant had resulted in such an unwarranted disciplinary action and on that basis ruled that the suspension was not for just and sufficient cause. We conclude that such an award is not precluded by the decision in Sequoia and Kings Canyon National Parks and that therefore the Agency's argument provides no basis for finding the award deficient.

V. DECISION

For these reasons the Agency's exceptions are denied.

Issued, Washington, D.C., July 17, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 71

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, DEPARTMENT OF THE ARMY
WASHINGTON, D.C. AND U.S. ARMY TRAINING
CENTER ENGINEER AND FORT LEONARD WOOD
FORT LEONARD WOOD, MISSOURI

Respondents

and

Case No. 7-CA-40084

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, R14-32, SEIU/AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties who have agreed that no material issue of fact exists. The General Counsel alleges in its complaint that the Respondents committed unfair labor practices in violation of section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing and refusing to comply with an interim arbitration award and a supplement to that award, by refusing to consult or negotiate in good faith with the Union, and by interfering with its employees' exercise of their rights under the Statute. Although both the General Counsel and the Charging Party have submitted briefs, only the General Counsel's brief was timely filed and will be considered. The Respondents did not submit a brief.

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[1] Section 7116 provides as follows:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(Continued)

II. Background

The National Association of Government Employees, R14-32, SEIU/AFL-CIO (NAGE or Union), is the exclusive representative of certain of the Respondents' employees. At all times material to this matter, NAGE and Respondent Fort Leonard Wood have been parties to a collective bargaining agreement providing for binding arbitration as part of the grievance procedure.

On January 30, 1980, Respondent Fort Leonard Wood removed a unit employee for alleged misconduct. The dispute eventually reached arbitration under the parties' collective bargaining agreement. The Arbitrator issued an interim award on May 20, 1983, ordering the Union and the employee to elect within 35 days whether to obtain a psychiatric evaluation of the employee. The Arbitrator further ordered that, in any event, a written report should be submitted to him within 90 days, setting forth the arrangements for the employee's evaluation or the reasons for the parties' failure to reach an agreement. The Arbitrator retained jurisdiction to render a final award.

Respondent Fort Leonard Wood filed an "Objection to Interim Award, dated 20 May, 1983, and Request for Reconsideration" on July 1, 1983. The objection concerned the substance of the interim award. The Arbitrator then issued a supplement to the interim award on August 12, 1983. The supplement essentially affirmed the initial award and required that the written report mandated by the initial award be submitted not later than October 11, 1983.

1/ (Continued)

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Respondent Fort Leonard Wood notified NAGE and the Arbitrator on September 20, 1983, that it had been instructed by Respondent Headquarters not to recognize the authority of an arbitrator to issue an interim award, and to decline to participate further in the procedures specified in the interim award. NAGE attempted to comply with the procedures on October 27, 1983, but the Respondent has refused. No final award has been issued.

III. Position of the General Counsel

First, the General Counsel contends that the interim award and its supplement constitute final interlocutory awards because they were not appealed by Respondent Fort Leonard Wood or Respondent Headquarters, and that the Respondents' failure and refusal to comply with those awards, as required under section 7121, constitutes a violation of section 7116(a)(8) by both. The General Counsel concedes that the Authority generally will not consider such interlocutory matters, but it urges the Authority to do so here because there are no other means of resolving the issue of the Respondents' duty to comply with the interim awards.

The General Counsel also asserts in its complaint that the instruction by Respondent Headquarters to Respondent Fort Leonard Wood not to comply with the interim award and its supplement, coupled with the action of Fort Leonard Wood in following that instruction, constitutes a violation of section 7116(a)(1). It argues that, since Fort Leonard Wood was the level of exclusive recognition, the involvement of Headquarters in the decision not to comply with the interim awards resulted in improper interference with the collective bargaining relationship.

Finally, the General Counsel contends that the Respondents' failure and refusal to comply with the interim awards also violates section 7116(a)(5). It argues that such failure and refusal "injected a new term and condition into the bargaining relationship without affording the Union prior notice and an opportunity to engage in pre-implementation bargaining" in good faith.

IV. Analysis

In Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C., 10 FLRA 316 (1982), the Authority reconsidered its previous decisions on whether a refusal to participate in arbitration proceedings under a negotiated grievance procedure is inconsistent with section 7121 of the Statute and consequently violates section 7116(a)(1) and (8) or (b)(1) and (8), as applicable. The Authority concluded that neither the language of section 7121 nor its legislative history "provides a basis for excusing [a] party from participating in the mechanism mandated by Congress in section 7121 for resolving grievances not satisfactorily settled by the parties at earlier stages of the negotiated grievance procedure." 10 FLRA at 320. The Authority noted that a refusal to participate in arbitration proceedings could result in the hindrance or obstruction of grievance resolution by binding arbitration, contrary to the mandate and intent of Congress in enacting section 7121. The Authority therefore ruled that a refusal by a party to participate in "the procedures for the settlement of grievances" conflicts with section 7121 of the Statute.

This principle was subsequently applied in Department of the Army, 83rd United States Army Reserve Command, Columbus, Ohio, 11 FLRA 55 (1983), where the parties had presented their positions to the arbitrator on whether there first should be a separate hearing on a question of the arbitrability of the grievance. When the arbitrator decided not to hold a separate hearing, the agency notified the arbitrator and the union that it refused to participate in the proceeding and that it considered the hearing cancelled. On the basis of the Employment Standards Administration case, the Authority determined that the agency had failed to comply with the requirements of section 7121 and therefore had violated section 7116(a)(1) and (8) of the Statute. The Authority held that, whatever the agency's position on the propriety of the arbitrator's procedural determination, the agency was obligated to proceed to arbitration and, if dissatisfied with the award, take the appropriate action of filing exceptions to the award under section 7122(a) of the Statute. 83rd U.S. Army Reserve Command, 11 FLRA 56 n.1.

Although both the Employment Standards Administration and the 83rd U.S. Army Reserve Command cases involved the refusal to participate in any proceedings before the arbitrators, we find in this case that the refusal to continue to participate in the proceedings before the Arbitrator likewise failed to comply with the requirements of section 7121. As similarly concluded in Employment Standards Administration, neither the language of section 7121 nor its legislative history provides a basis for excusing a party's continued participation in the procedures for the settlement of grievances. Further, in this case the Respondents' refusal to continue to participate in the proceedings before the Arbitrator has resulted in the obstruction of the resolution of a grievance by binding arbitration, contrary to the mandate and intent of Congress. See Employment Standards Administration at 321. As the Authority indicated in 83rd U.S. Army Reserve Command, whatever the position of the Respondents on the propriety of the Arbitrator's interim awards, the Respondents were obligated to proceed with the arbitration proceedings absent appropriate action, if any, to challenge those awards immediately.2/

We note that the Respondents admitted in their joint answer to the General Counsel's complaint, and then also stipulated, that Respondent Headquarters "instructed" Respondent Fort Leonard Wood not to comply with the Arbitrator's interim awards, and Fort Leonard Wood followed that instruction. We note further that, before receiving Headquarter's instruction, Fort Leonard Wood had participated actively in the arbitration proceeding, as discussed above.

The Authority has repeatedly held that, when agency management at a higher level prevents agency management at a subordinate level of exclusive recognition from complying with its obligations under the Statute by "directive," "requirement," or "direction," the higher-level management entity violates section 7116(a)(1) and (8) of the Statute.3/ The Authority has held further that, where the

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2/ The Authority notes in this regard that the interim awards relate to a removal action as to which exceptions may not be filed with the Authority under the Statute. Thus, whatever action might appropriately have been available to challenge the interim awards would necessarily have involved the Office of Personnel Management under 5 U.S.C. § 7703(d) which effectively provides that, in certain circumstances, the Director of OPM may obtain judicial review of any final order or decision of an arbitrator in these types of matters.

3/ See, for example, U.S. Department of Justice and Department of Justice Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA No. 5 (1985), enforced, 792 F.2d 25 (2d Cir. 1986);

(Continued)

subordinate entity is thus left with no discretion to comply with its statutory obligations, that entity will not also be found to have violated section 7116(a).[4]

Consistent with this precedent, we find here that Respondent Headquarters' "instruction" to Respondent Fort Leonard Wood not to comply with the Arbitrator's interim awards constitutes a violation of section 7116(a)(1) and (8) on Headquarters' part. We view the Respondents' use of the term "instruction" as the functional equivalent of the terms "directive," "requirement," and "direction,"[5] which have been used most frequently in prior Authority decisions regarding "interference" violations under section 7116(a)(1).[6] Further Respondent Headquarters' instruction not to comply with the Arbitrator's interim awards afforded Respondent Fort Leonard Wood no discretion to do otherwise, and rendered its non-compliance with the awards merely ministerial in nature. We therefore find that Fort Leonard Wood's action in following Headquarters' instruction cannot be deemed to constitute an independent violation of section 7116(a)(1) and (8) by Fort Leonard Wood. We shall therefore dismiss that allegation.

Finally, although the Respondents admitted that they refused and failed to comply with the Arbitrator's interim awards, we cannot find that, in doing so, they also refused and failed to consult or negotiate with the Union in good faith, as alleged. The General Counsel argues in support of this allegation that, by not complying with the interim

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3/ (Continued)

Department of Health and Human Services, Region II, 15 FLRA 710, 711 n.2 (1984); Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington, 9 FLRA 385, 388 (1982).

[4] See cases cited in footnote 3 above.

[5] A superior's "instruction" is, by definition, the same as a superior's "direction" or "order" in allowing for no course of action but to follow the instruction. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985).

[6] See cases cited in footnote 3 above.

awards, the Respondents "injected a new term and condition into the bargaining relationship without affording the Union prior notice and an opportunity to engage in pre-implementation bargaining." We find that the Respondents, by their actions, did not establish new conditions of employment requiring negotiation, but rather refused to proceed further with the arbitration process. Since these circumstances created no bargaining obligation, we shall dismiss the section 7116(a)(5) allegation as to both Respondents.

Conclusion

Based on the above analysis, we conclude that Respondent Headquarters has violated section 7116(a)(1) and (8) of the Statute, as alleged, but that Respondent Fort Leonard Wood has not. We conclude additionally that neither of the Respondents has been shown to have violated section 7116(a)(5), as further alleged.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority ORDERS that the Department of the Army Headquarters in Washington, D.C., shall:

1. Cease and desist from:

a. Instructing Fort Leonard Wood not to comply with the Arbitrator's interim awards or otherwise interfering with the pending arbitration regarding a grievance filed by the National Association of Government Employees, R14-32, SEIU/AFL-CIO, the employees' exclusive representative at the Fort Leonard Wood, Missouri, facility, in connection with the removal of a unit employee, contrary to the requirements of section 7121 of the Statute.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

a. Upon the request of the National Association of Government Employees, R14-32, SEIU/AFL-CIO, permit Fort

Leonard Wood to comply with the Arbitrator's interim awards and otherwise resume full participation in the arbitration proceedings regarding the removal of the unit employee.

b. Post at Headquarters and at its Fort Leonard Wood, Missouri, facility, copies of the attached Notice, on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed personally by the Administrator of the agency, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

c. Notify the Regional Director of Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the allegation in the complaint regarding Fort Leonard Wood's violation of section 7116(a)(1), (5), and (8) of the Statute is DISMISSED, as is the allegation regarding Army Headquarters' violation of section 7116(a)(5) of the Statute.

Issued, Washington, D.C. July 21, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT instruct Fort Leonard Wood not to comply with the Arbitrator's interim awards or otherwise interfere with the pending arbitration regarding a grievance filed by the National Association of Government Employees, R14-32, SEIU/AFL-CIO, the employees' exclusive representative at the Fort Leonard Wood, Missouri, facility, in connection with the removal of a unit employee, contrary to the requirements of section 7121 of the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL, upon the request of the National Association of Government Employees, R14-32, SEIU/AFL-CIO, permit Fort Leonard Wood to comply with the Arbitrator's interim awards and otherwise resume full participation in the arbitration proceedings regarding the removal of the unit employee.

____
(Agency)

Dated: ______________ By: ______________________________
(Signature and Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, whose address is: 535 16th Street, Suite 310, Denver, CO 80202 and whose telephone number is (303) 837-5224.

22 FLRA No. 72

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, 97th COMBAT SUPPORT
GROUP (SAC), BLYTHEVILLE AIR FORCE
BASE, ARKANSAS

Activity

and

Case No. 0-AR-435

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2840

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Preston J. Moore filed by the Department of the Air Force (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.1/

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned the Activity's determination to contract out certain aircraft maintenance functions. The grievance alleged that the decision to contract out was not made in accordance with applicable law and regulation governing determinations to contract out commercial and industrial activities in the Department of Defense. Compliance with such law and regulation was required by the parties' collective bargaining agreement. The Arbitrator first ruled that the grievance was arbitrable. On the merits of the grievance, the Arbitrator ruled that the Activity's procurement action was not in accordance with the procedures and standards provided by law and regulation in a number of respects. Consequently, the Arbitrator sustained the grievance and directed the procurement action be cancelled.

1/ The National Federation of Federal Employees filed a brief as an amicus curiae.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that by finding the grievance arbitrable, the award is contrary to management's right pursuant to section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out.

B. Analysis and Conclusions

The Authority has previously addressed the grievability and arbitrability of a grievance claiming that a procurement action failed to comply with applicable law and regulation pertaining to contracting out as required by the parties' collective bargaining agreement. The Authority specifically held that such a grievance was not contrary to section 7106(a)(2)(B) of the Statute and was grievable and arbitrable. American Federation of Government Employees, Local 1904, AFL-CIO and United States Army Communications and Electronics Materiel Readiness Command, 16 FLRA 358 (1984). Similarly, the Authority has held that even in the absence of a specific negotiated contract provision, a grievance over whether a procurement action complies with OMB Circular A-76 is within the broad scope grievance procedure prescribed by the Statute and is not precluded by management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out. American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986) (per curiam).[2] Consequently, the Authority concludes that the Arbitrator's ruling on the arbitrability of the grievance is not contrary to section 7106(a)(2)(B) of the Statute, and therefore this exception is denied.

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[2] Although this determination was affirmed by the U.S. Court of Appeals for the D.C. Circuit, with the U.S. Supreme Court dismissing the agency's subsequent appeal, this same approach was rejected by the U.S. Court of Appeals for the Ninth Circuit in Defense Language Institute, Presidio of Monterey, California v. FLRA, 767 F.2d 1398 (9th Cir. 1985), denying enforcement of National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of Monterey, California, 14 FLRA 761 (1984).

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Agency contends that the Arbitrator's cancellation of the procurement action is contrary to law. In support of this exception, the Agency argues that the procurement action could not be cancelled by the Arbitrator absent a finding that but for the alleged errors by management in the procurement process, the decision to contract out could not have properly been made.

B. Analysis and Conclusions

This exception provides the Authority with an opportunity to address for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work.

General laws and regulations governing contracting out, and specific laws and regulations governing contracting out of commercial and industrial activities in the Department of Defense, evidence a clear intent that their application result in the most cost-effective performance of commercial and industrial activities. Pub. L. No. 96-342, § 502(a)(2)(B), 10 U.S.C. § 2304 note (1982); OMB Circular A-76 (Revised August 1983), para. 5. The longstanding policy of the Federal Government has been to rely on private enterprise to supply commercially available products and services it needs except when comparative cost analysis indicates that procurement from a private source is not as cost effective as in-house performance. AFGE Local 2017 v. Brown, 680 F.2d 722, 724 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). This policy is designed to achieve economy and enhance productivity through competition between in-house and commercial sources for performance of commercial activities. OMB Circular A-76, para. 5. The procurement process established to effectuate this policy accords to agency officials substantial discretion in "the application of technical, and often esoteric, regulations to the complicated circumstances of individual procurements." M. Steinthal & Co. v. Seamens, 455 F.2d 1289, 1301 (D.C. Cir. 1971); see Local 2855, AFGE v. U.S., 602 F.2d 574, 580-83 (3d Cir. 1979).

In conjunction with the provisions of procurement law and regulation, section 7106(a)(2)(B) of the Statute expressly reserves to management officials the right, in accordance with applicable laws, to make determinations with respect to contracting out. The Authority has repeatedly recognized that the plain language of section 7106(a) of the Statute provides that "nothing" in the Statute, including an award of an arbitrator, shall "affect the authority" of an agency to exercise the rights enumerated in that section. American Federation of Government Employees, Local 3258 and U.S. Department of Housing and Urban Development, 21 FLRA No. 56 (1986). More specifically, the Authority has recognized that management's right under section 7106(a)(2)(B) encompasses not only the right to act, but also the right to deliberate concerning the relevant factors on which a determination to contract out will be made. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574, 578 (1981), enforced sub nom. NFFE Local 1167 v. FLRA, 681 F.2d 886 (D.C. Cir. 1982). In addition, with the strong public interest in a Federal Government procurement process which is efficient and economical and which proceeds without disruption, the Authority must be mindful of Congress' admonition in section 7101 of the Statute that the provisions of the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." See Sea-Land Service, Inc. v. Brown, 600 F.2d 429 (3d Cir. 1979).

In recognition of the substantial discretion accorded agency officials under procurement law and regulation and the many decisions made as a part of the procurement process that necessarily are a matter of judgment and managerial choices, the scope of review of procurement actions by courts and administrative bodies has been narrow and limited. See Local 2855, AFGE v. U.S., 602 F.2d 574 (3d Cir. 1979).

In the administrative review of disputed procurement actions, the Comptroller General will review an action only to determine whether it conforms to mandatory provisions of procurement laws and regulations and will not review matters reserved to agency discretion. Thus, the protester must establish that the disputed action violated requirements of law or regulation and that the violation materially affected the result of the procurement action. Matter of: Video Visions, Inc., Decision of the Comptroller General B-210010.2, June 26, 1984.

Judicial review of disputed procurement actions is also narrow and limited. The most common articulation by the courts of the standard of review of a procurement action is that of a rational or reasonable basis. See Sea-Land Service, Inc. v. Brown; Kinnett Dairies v. Farrow, 580 F.2d 1260 (5th Cir. 1978); M. Steinthal & Co. v. Seamens; Robert E. Derecktor of Rhode Island v. Goldschmidt, 516 F. Supp. 1085 (D.R.I. 1981). As indicated above, the courts also recognize that there must be respect for public interest considerations in the efficient procurement of goods and services and the avoidance of excessive procurement costs. Sea-Land Service, Inc. v. Brown, 600 F.2d at 434. In short, the courts generally hold that a procurement decision may not be overturned unless it is demonstrated that there is no rational basis for the agency's decision and that no public interest considerations override cancelling the procurement. M. Steinthal & Co. v. Seamens, 455 F.2d at 1301. It has been held that the absence of a rational basis may be established by a demonstration that the procurement process involved a clear and prejudicial violation of mandatory provisions of applicable procurement laws or regulations. Kentron Hawaii v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973). However, courts have stressed that the provisions alleged to have been violated must contain discernible requirements and meaningful criteria against which the determination to contract out may be analyzed and reviewed. In other words, there must be rules or specifications that permit adjudication of disagreements and amply specific standards against which agency conduct can be measured. See AFGE Local 2017 v. Brown, 680 F.2d at 726; Local 2855, AFGE v. U.S., 602 F.2d at 582-83. Courts will not review matters within an agency's judgment and discretion because the courts stress that there must be respect for the substantial discretion permitted by, and the judgment to be exercised under, procurement laws and regulations on the part of procurement officials. Kinnett Dairies v. Farrow, 580 F.2d at 1272; M. Steinthal & Co. v. Seamens, 455 F.2d at 1298-99. Courts therefore will not cancel a procurement action just because it seems ill-advised or a less desirable alternative than performing the work in-house. It is regularly stated that the courts must be diligent not to substitute their judgment for that of responsible agency officials in the administration and application of procurement statutes and regulations. See International Association of Firefighters, Local F-100 v. Department of the Navy, 536 F. Supp. 1254 (D.R.I. 1982).

The Authority believes that these analytical approaches provide sound guidance for arbitral review of procurement actions. In view of the substantial discretion vested in agency procurement officials, the paramount public interest in the efficient procurement of goods and services, and the avoidance of excessive costs recognized by both the courts and the Comptroller General, the Authority has determined that an arbitrator may not substitute his or her judgment for that of an agency with respect to the agency's ultimate decision whether to contract out. Similarly, any intermediate decision in the procurement process concerning a matter reserved to agency judgment and discretion also may not be set aside. Thus, the Authority holds that an arbitrator is without authority to order cancellation of a procurement action or to review an agency decision in the procurement process concerning a matter of agency judgment or discretion.

There are, nevertheless, certain permissible remedies available to an arbitrator in resolving a grievance concerning an agency's determination whether to contract out. In particular, with respect to the disputed procurement action, we hold that an arbitrator may, in certain circumstances, direct an agency to reconstruct the procurement action. In order for an arbitrator to direct an agency to undertake such a reconstruction, the arbitrator must find the following:

> (1) The arbitrator must expressly find that in determining to contract out, the agency violated mandatory provisions of applicable procurement laws or regulations. Furthermore, these provisions must contain sufficiently specific standards to objectively analyze and review the agency's actions and permit an objective conclusion that the agency failed to comply with the requirements; and
>
> (2) The arbitrator must find that the agency's failure to comply with those requirements materially affected the final procurement decision and harmed unit employees. The Authority cautions that arbitrators must distinguish between permissible challenges based on material defects in aspects of the procurement process specifically prescribed by law or regulation and improper challenges attacking the exercise of managerial discretion.

In sum, arbitrators are not authorized to cancel a procurement action and are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. These provisions must be sufficiently specific to permit the arbitrator to adjudicate whether there has been compliance with such provisions. When presented with such a grievance, an arbitrator on finding a failure to comply may sustain the grievance. In sustaining the grievance, the arbitrator as a remedy may properly order a reconstruction of the procurement action when the arbitrator finds that an agency's noncompliance materially affected the final procurement decision and harmed unit employees. An agency in taking the action required by such an award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accordance with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination. For example, an agency could determine that immediate cancellation is warranted, or an agency could determine that cancellation is not warranted, but that an improperly granted contract should not be renewed. Additionally, an agency may use its discretion to fashion other remedies appropriate to the circumstances.

In applying that test in this case, the Authority concludes that the Arbitrator's award insofar as it directed the Activity to cancel the procurement action involved is deficient and must be set aside. We note, however, that the Arbitrator expressly found that the Activity violated certain specific requirements of applicable law and regulation in the development and comparison of costs in reaching its decision. The Arbitrator specifically found that the methodology used in estimating in-house labor costs violated the requirements of Department of Defense Directive 4100.33-H, which provides procedures and standards to assist and guide agencies in cost comparisons. The Arbitrator ruled that the estimate used an incorrect wage inflation factor and improperly accounted for the grade of a temporary position. The Arbitrator also found that contrary to OMB Circular A-76, the Activity failed to account for the costs of obtaining security clearances for contractor employees. We also note that the Arbitrator based his award on the conclusion that the defective procurement action would displace employees and that the violations of procurement law and regulation all favored the decision to contract out. In these circumstances, we conclude that the Arbitrator effectively found that the Activity's violations harmed the employees involved and that the violations materially affected the Activity's final decision. Thus, the Arbitrator established a sufficient basis for directing the Activity to reconstruct the procurement action.

C. Reconstruction

The Agency asserts in its exceptions that a cost analysis revised in accordance with the Arbitrator's findings shows that contracting out is still more economical than in-house performance. In support of this assertion, the Agency offers only wage rate schedules and other computation worksheets which have been revised in part. The Agency does not explain how these attachments demonstrate that reconstruction favors contracting out. In these circumstances, we believe application of the approaches set forth in this decision requires that such a reconstruction be specifically conducted pursuant to the order of the Authority and in accordance with the guidance which has now been provided.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified to direct the Activity to reconstruct the disputed procurement action in accordance with the requirements of applicable law and regulation and to make a determination and take appropriate action based upon the results of such reconstruction.

Issued, Washington, D.C., July 23, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 73

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HAWAII FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Union

and

Case No. 0-NG-1196

PEARL HARBOR NAVAL SHIPYARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a Union proposal affecting language in a recently changed Agency regulation (NAVSHIPYDPEARL INSTRUCTION 12750.1F).

II. Union Proposal

1. Letter to FLRA dated September 27, 1985, in the NAVSHIPYDPEARLINST 12750.1F, in the table titled, "Delegation of Authority to Effect Disciplinary Action," under column, "Authority to Effect," in the "Removal" action row.

   HFEMTC proposes to have "Activity Head Level" inserted where presently "Shipyard Commander (Commanding Officer)" exists.

2. Letter to FLRA dated October 16, 1985 - That regarding the table in NAVSHIPYDPEARLINST 12750.1F, titled,

"Delegation of Authority to Effect Disciplinary Action," under the "Authority to Sign Advance Notice" column, "Action" Removal row.

HFEMTC proposal is to retain existing language.

III. Positions of the Parties

The proposal refers to two letters sent by the Union to the Authority in an attempt to comply with the requirements of the Statute and the Authority's Rules and Regulations. It appears from the Union's petition for review that it intends the first part of its proposal to require the Activity Head, rather than the Shipyard Commander, to exercise final authority to effect the removal of employees. The second part of the proposal would require the Group Superintendent or Department Head to exercise authority in proposing the removal of employees. The Union asserts that its proposal is a negotiable procedure under section 7106(b)(2) of the Statute. The Union did not file a response to the Agency's statement of position in this case.

The Agency contends that the proposal interferes with its right to assign work, under section 7106(a)(2)(B) of the Statute.

IV. Analysis and Conclusion

It appears from the record that by regulation the Agency changed the level of authority for both proposing and effecting removal actions, and that the Union is proposing to raise the level of authority required for these actions. The Authority has consistently held that proposals prescribing specific duties to be performed by particular non-bargaining unit personnel in an agency directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute by eliminating the discretion inherent in that right. See, for example, National Federation of Federal Employees, Local 78 and Veterans Administration Regional Office, Indianapolis, Indiana, 9 FLRA 819 (1982). The proposal in this case would require certain non-bargaining unit personnel to perform duties which they otherwise would not be required to perform, and would have the same effect as the proposal held nonnegotiable in Veterans Administration Regional Office. Therefore, the Authority concludes that the proposal would directly interfere with the exercise of the right to assign work and as a result, is not a negotiable procedure.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 24, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1083

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Union seeking reconsideration of the Authority's decision of April 16, 1986, denying the Union's exceptions to the Arbitrator's award in the case, and of the Authority's order of May 29, 1986, denying the Union's first request for reconsideration of that decision.*/ In its decision denying the Union's exceptions, the Authority held that the Union had failed to establish that the Arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute. In its first motion for reconsideration, the Union essentially reiterated arguments made in its exceptions that the Arbitrator's award was contrary to law and contained a number of factual errors. In this request for reconsideration the Union again reiterates arguments made in its exceptions to the award and in its first request for reconsideration.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Union has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Union in support of its request essentially constitute nothing more than disagreement with the merits of both the Authority's decision denying the exceptions and the Authority's order denying reconsideration; in short, the Union's motion is merely an attempt to continue to relitigate this matter.

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*/ The Union also filed requests for oral argument and that the motion be held in abeyance to permit the filing of additional submissions with the Authority relative to the award. However, these requests are not warranted and they are denied.

Accordingly, the Union's request for reconsideration is denied.

Issued, Washington, D.C., July 23, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

ORDER DENYING MOTION FOR RECONSIDERATION
(22 FLRA No. 1)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

Activity

and

Case No. 3-CU-50017
(22 FLRA No. 1)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 421, AFL-CIO

Labor Organization

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority on a timely motion for reconsideration of a portion of the Authority's Order Denying in Part and Granting in Part the Activity's Application for Review in U.S. Department of Energy, Federal Energy Regulatory Commission, 22 FLRA No. 1 (1986), filed by the Activity. The Activity seeks reconsideration of that part of the decision in which the Authority upheld the Regional Director's findings that 27 employees were not management officials and should be included in the unit.

Section 2429.17 of the Authority's Rules and Regulations provides, in part, that a party who can establish extraordinary circumstances can move for reconsideration of an Authority decision. Based upon review of the Activity's arguments in support of its motion, the Authority concludes that the motion raises no issue not previously raised before or considered by the Authority, */ and that no extraordinary circumstances

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*/ The Activity is incorrect when it contends that reconsideration should be granted because the Authority failed to consider certain of the Activity's arguments concerning the consistency of the Regional Director's decision with the Statute and Authority precedent. As the Authority stated in its order denying in part the Activity's Application for Review (at 2), "The application as to all of the included employees in essence expresses mere disagreement with the Regional Director's findings which are based on Authority precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party."

warranting reconsideration have been established. Rather, the arguments made in support of the motion merely constitute disagreement with the Regional Director's finding of fact and application of existing case law.

Accordingly, IT IS ORDERED that the Activity's motion for reconsideration in the case be, and it hereby is, denied.

Issued, Washington, D.C., July 21, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 380

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 380 REPORT OF CASE DECISIONS July 28, 1986

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UNFAIR LABOR PRACTICE CASE

22 FLRA No. 74 (July 24, 1986)

U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri and National Federation of Federal Employees, Local 29, Case No. 7-CA-40283

NEGOTIABILITY CASES

22 FLRA No. 75 (July 24, 1986)

National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corp of Engineers, Kansas City District, Kansas City Missouri, Case No. 0-NG-689 (Remand of 16 FLRA 75)

22 FLRA No. 76 (July 24, 1986)

National Federation of Federal Employees, Local 1705 and General Services Administration, Case No. 0-NG-945 (Remand of 17 FLRA 945)

22 FLRA No. 77 (July 24, 1986)

National Treasury Employees Union, Chapter 229 and Department of Health and Human Services, Headquarters, Case No. 0-NG-1188

22 FLRA No. 79 (July 24, 1986)

National Association of Government Employees, Local R7-23 and Department of the Air Force, Headquarters 375th Air Base Group (MAC), Scott Air Force Base, Illinois, Case No. 0-NG-1033 (Remand of 19 FLRA No. 63)

22 FLRA No. 80 (July 24, 1986)

National Treasury Employees Union and Nuclear Regulatory Commission, Case No. 0-NG-1095 (Remand of 20 FLRA No. 21)

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22 FLRA No. 81 (July 24, 1986)

American Federation of Government Employees, Local 2094, AFL-CIO and Veterans Administration Medical Center, New York, New York, Case No. 0-NG-1006

ARBITRATION CASES

22 FLRA No. 78 (July 24, 1986)

Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, Case No. 0-AR-1157

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

July 24, 1986

0-AR-1138 0-AR-1142 0-AR-1147 0-AR-1149
0-AR-1155

Federal
Labor Relations
Authority

22 FLRA No. 74

Army Corp of Engineers,
Kansas City District,
Kansas City Mo. and NFFE,
Local 29, Case No.
7-CA-40283 (Decided July
24, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Information
        Minority Listing
        Privacy Act Does Not Prevent Disclosure
    Otherwise Refuse to Comply with Statute
      § 7114(d)(4)
5 U.S.C. § 552a (1982) [Privacy Act]
29 C.F.R. § 1613.302 (1984)

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The Authority found, consistent with the Judge, that the activity violated § 7116(a)(1), (5) and (8) by failing and refusing to furnish the union with necessary data, requested pursuant to § 7114(b)(4). The activity excepted to the Judge's order that it furnish the union with a sanitized copy of its listing of minority employees. The activity asserted that the provisions of the Privacy Act, 5 U.S.C. § 552a (1982), prohibited it from disclosing the listing. The Authority concluded that disclosure of necessary data to exclusive representatives pursuant to requests under § 7114(b)(4) is not prohibited by the Privacy Act if the disclosure will not result in a clearly unwarranted invasion of privacy. In making that determination the Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data. The necessary data here requested is to be used by the union to determine whether the activity is complying with the provisions of the parties' collective bargaining agreement, to determine whether to file grievances in certain merit promotion actions and to prepare for contract negotiations. The data will receive limited circulation. Striking the balance between the limited intrusion

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

on the privacy interests of the three highest ranked individuals and the selected employees, and the union's need to identify these individuals and their minority status in order to pursue its representational duties, the Authority found that disclosure of the necessary data would not result in a clearly unwarranted invasion of privacy and hence would not contravene the Privacy Act.

Federal Labor Relations Authority

22 FLRA No. 75

NFFE, Local 29 and Dep't of the Army, U.S. Corps of Engineers, Kansas City District, Kansas City, Mo., Case No. 0-NG-689 (Remand of 16 FLRA 75) (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

- Negotiability
  - Competitive Areas
    - Encompassing Non-Bargaining Unit Employees
    - Reduction In Force
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Competitive Areas
        - Reduction In Force
  - Reduction In Force
    - Competitive Areas
      - Encompassing Non-Bargaining Unit Employees
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Conditions of Employment of Non-Bargaining Unit Employees

DIGEST NOTES

On remand from the United States Court of Appeals for the District of Columbia Circuit, and in response to the court's inquiry as to whether "competitive areas" within an agency for reduction-in-force purposes (RIF) are within the duty to bargain, the Authority concluded, based on American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), that a proposal which would establish a competitive area which necessarily includes nonunit employees within its boundaries is outside the mandatory obligation to bargain. The proposal is nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit.

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READEX FICHE best copy available

22 FLRA No. 76

Federal Labor Relations Authority

NFFE, Local 1705 and GSA, Case No. 0-NG-945 (Remand of 17 FLRA 945) (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES | STATUTE

- Negotiability
  - Competitive Areas
    - Encompassing Non-Bargaining Unit Employees
    - Reduction In Force
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Competitive Areas
        - Reduction In Force
  - Reduction In Force
    - Competitive Areas
      - Encompassing Non-Bargaining Unit Employees
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Conditions of Employment of Non-Bargaining Unit Employees

DIGEST NOTES

On remand from the United States Court of Appeals for the District of Columbia Circuit, and in response to the court's inquiry as to whether "competitive areas" within an agency for reduction-in-force purposes (RIF) are within the duty to bargain, the Authority concluded, based on American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), that a proposal which would establish a competitive area which necessarily includes nonunit employees within its boundaries is outside the mandatory obligation to bargain. The proposal is nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit.

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Federal Labor Relations Authority

22 FLRA No. 77

NTEU, Chapter 229 and HHS, Headquarters, Case No. 0-NG-1188 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Appropriate Arrangement - No Basis for Finding
      - Technology of Performing Work
        - Adequate Access to Telephone When Use Required by Agency

STATUTE

7105(a)(2)(E)
7106(b)(1) and (3)

DIGEST NOTES

A proposal is nonnegotiable which provides that "employees will have adequate access to telephones in the performance of their official duties if such is required as part of the employees' duties and responsibilities to perform at an acceptable level." The Authority found that the proposal would subject substantive decisions about using telephones to accomplish the agency's work to bilateral determination and intrude upon the the agency's discretion to determine numbers, types and locations of telephones to be provided employees. The proposal likewise concerns the technology of performing work under § 7106(b)(1), and is bargainable only at the election of the agency.

A proposal concerning adequate employee access to telephones which are required in the performance of employees' duties and responsibilities is not an appropriate arrangement under § 7106(b)(3). The Authority noted that the union offered no support whatsoever for its assertion that the proposal concerns an appropriate arrangement. There was no information concerning the nature and extent of the adverse effects, if any, on employees which might result from their relocation nor did the record provide a basis for assessing how the proposal would address or ameliorate those adverse effects.

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22 FLRA No. 78

Federal Labor Relations Authority

Portsmouth Naval Shipyard and Federal Employees Metal Trades Council (Bornstein, Arbitrator), Case No. 0-AR-1157 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

Arbitration
  Procedure
    Lack of Jurisdiction
      Matters Covered by 5 U.S.C. § 7512
5 U.S.C. § 7703
	7121(f)
	7122(a)

DIGEST NOTES

The Arbitrator's award relates to a matter covered by 5 U.S.C. § 7512. Under § 7122(a), exceptions to the award may not be filed with the Authority. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703 -- in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. Consequently the Authority is without jurisdiction to review the exceptions filed herein.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

22 FLRA No. 79

NAGE, Local R7-23 and Dept of the Air Force, HQ 375th Air Base Group (MAC), Scott Air Force Base, Ill., Case No. 0-NG-1033 (Remand of 19 FLRA No. 63) (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

- Negotiability
  - Competitive Areas
    - Encompassing Non-Bargaining Unit Employees
    - Reduction In Force
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Competitive Areas
        - Reduction In Force
  - Reduction In Force
    - Competitive Areas
      - Encompassing Non-Bargaining Unit Employees
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Conditions of Employment of Non-Bargaining Unit Employees

DIGEST NOTES

On remand from the United States Court of Appeals for the District of Columbia Circuit, and in response to the court's inquiry as to whether "competitive areas" within an agency for reduction-in-force purposes (RIF) are within the duty to bargain, the Authority concluded, based on American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), that a proposal which would establish a competitive area which necessarily includes nonunit employees within its boundaries is outside the mandatory obligation to bargain. The proposal is nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit. The proposal is nonnegotiable despite the union's stated intent that the proposal not include nonbargaining unit employees or employees represented by another bargaining agent. Applicable OPM regulations do not allow a competitive area defined under the union's terms, but require all employees within the stated organizational and geographic boundaries to be included.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 80

Federal
Labor Relations
Authority

NTEU and Nuclear Regulatory Commission, Case No. 0-NG-1095 (Remand of 20 FLRA No. 21) (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

- Negotiability
  - Competitive Areas
    - Encompassing Non-Bargaining Unit Employees
    - Reduction In Force
  - Conditions of Employment
    - Non-Bargaining Unit Employees
      - Competitive Areas
        - Reduction In Force
  - Reduction In Force
    - Competitive Areas
      - Encompassing Non-Bargaining Unit Employees
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Conditions of Employment of Non-Bargaining Unit Employees

DIGEST NOTES

On remand from the United States Court of Appeals for the District of Columbia Circuit, and in response to the court's inquiry as to whether "competitive areas" within an agency for reduction-in-force purposes (RIF) are within the duty to bargain, the Authority concluded, based on American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), that a proposal which would establish a competitive area which necessarily includes nonunit employees within its boundaries is outside the mandatory obligation to bargain. The proposal is nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

22 FLRA No. 81

AFGE, Local 2094 and VA Medical Center, New York, N.Y., Case No. 0-NG-1006 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Inconsistent with Government-wide Rule or Regulation
      - FPM Chapter 630, subchapter 11
  - Conditions of Employment
    - Non-Duty Activity Not Condition of Employment
      - Use of Recreational Facilities
      - Supervision of Recreational Facilities
  - Management Rights
    - Assign Work
      - Overtime
      - Selection of Alcohol and Drug Abuse Counselors
      - Selection of EEO Counselors
      - Training
    - Discipline Employees
      - Indefinite Delay - Employee Participation in Abuse Programs
    - Engage in Free and Open Deliberations
      - Union Observer on Management Committee
  - Subjects of Bargaining
    - At Election of Agency
      - Numbers, Types and Grades of Employees
        - Agency Failed to Show Integral Relationship
  - Vehicles - Government Owned
    - Transportation of Employees Not "Official Business"
      - Use Not Incident to Otherwise Authorized Use
- FPM Chapter 630, subchapt. 3-4.a(2) and 4-2.a(2)
- FPM Supplement 990-2, Book 610, Appendix A-2
- 5 C.F.R. § 792.105 (1986)
- 5 U.S.C. § 4101(4), 6311 and 6326(c)
- 31 U.S.C. § 1344
- 42 U.S.C. § 290dd-1 and ee-1
- 62 Comp. Gen. 438 (1983)

STATUTE

- 7103(a)(14)
- 7105(a)(2)(E)
- 7106(a)(2)(A) and (B)
- 7106(b)(1)
- 7117(a)(1) and (c)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A proposal that requires management to select EEO counselors from among a list of union nominees is nonnegotiable because it interferes with management's right to assign work pursuant to § 7106(a)(2)(B). The proposal directly prescribes the assignment of certain duties to particular employees and prevented the assignment of those duties to other employees. The fact that the proposal concerns only part-time duties does not alter this conclusion. (proposal 1)

A proposal which provides for a union observer on the Position Management Committee is nonnegotiable and is not merely a procedure to be followed by the agency in exercising its reserved rights. The Committee has the responsibility for reviewing and recommending approval prior to implementation of all changes in organization involving work design, occupational distribution, grade distribution, staffing requirements and cost. The Authority found that the committee is an integral part of the process by which management decides and acts pursuant to rights reserved to it by the Statute. Union representation on the committee would directly interfere with management's rights under § 7106. While the union proposal adverts only to an "observer" on the committee, the presence of a union designee would nonetheless prevent management officials from engaging in free and open deliberations. (proposal 2)

A proposal concerning employees' use of recreational facilities on off-duty time (lunch and break periods) does not concern their conditions of employment and is nonnegotiable. Proposals concerning employee activities, unrelated to assigned work, conducted while such employees are in non-duty status, such as employee use of agency recreational facilities during non-duty time, are not within the bargaining obligation because they do not meet the § 7103(a)(14) definition of "conditions of employment." (proposal 3)

A proposal which provides that employees will not be "forced to work overtime if he/she feels it will [affect] his efficiency, health or emotional stability," is nonnegotiable and inconsistent with management's right to assign work pursuant to § 7106(a)(2)(B). The right to assign work includes the right to determine that certain work will be performed on overtime. This proposal would absolutely prohibit management from assigning overtime to employees if the circumstances described in the proposal apply. Such a complete prohibition on the assignment of work is not a procedure, but rather is a substantive infringement on the agency's right to assign work. (proposal 4)

A proposal requiring the agency to furnish transportation for unit employees to and from the subway station violates the prohibition in 31 U.S.C. § 1344(a) against the use of government vehicles for transporting employees between their domiciles and places of employment and is outside the duty to bargain pursuant to § 7117(a)(1). Title 31 U.S.C. § 1344 provides that appropriations may not be expended for operation, maintenance and repair of passenger motor vehicles that are used for "an official purpose." An official purpose does not include transporting officers or employees of the government between their domiciles and places of employment. One narrow exception to the general prohibition on use of government vehicles for commutation is authorized when the home-to-work transportation of employees is incident to otherwise authorized use of the vehicles. 63 Comp. Gen. 438 (1983). There is nothing in the record to indicate that vehicles would be used for any official purpose at the same time it engaged in transporting employees to and from the subway. (proposal 5)

Proposals requiring management to provide formal training, or periodically to assign employees to specific types of training programs, are outside the duty to bargain. Further, any proposal addressing the substantive aspects of training is a direct interference with management's right to assign work. The proposal herein, prescribes the content of training and requires that such training be conducted during duty hours, it is also not a procedure for implementing a training program, but is likewise inconsistent with § 7106(a)(2)(B). The proposal however, is not inconsistent with 5 U.S.C. § 4104(4) as it does not expressly bar the type of training proposed. (proposal 6)

A proposal providing that employees will be eligible for release without charge to leave of any kind when an emergency or illness occurs during the third quarter of the employee's tour of duty is outside the duty to bargain under § 7117(a)(1). FPM, Chapter 630, subchapter 11 governs excused absences and prescribes when absences may be granted individuals without loss of pay or charge to leave. It is clear that annual and sick leave are intended to cover the circumstances described in the disputed proposal and the governing regulations do not contemplate personal emergencies or illnesses as justifiable grounds for granting administrative leave in lieu of annual or sick leave. The proposal is inconsistent with government-wide regulations. (proposal 7)

A proposal which provides that the agency will make every effort to insure that employees whose tours are scheduled for more than five consecutive days will receive three consecutive days off is within the duty to bargain. The agency argued the proposal is integrally related to, and consequently determinative of, numbers, types and grades of employees assigned to a work project or tour of duty. The Authority concluded that when a proposal does not "explicitly" relate to the numbers, types and grades of employees assigned to a tour of duty or organizational subdivision, it is incumbent upon the agency to support an allegation that § 7106(b)(1) applies to that proposal. The disputed proposal did not reveal any direct or integral relationship to numbers, types and grades, nor has the agency established the necessary connection. (proposal 8)

A proposal providing that "the employer will not institute disciplinary action against an alcoholic or drug abuser until he/she is given every opportunity to overcome his/her alcoholism or drug abuse," is nonnegotiable because it interferes with management's right to discipline employees under § 7106(a)(2)(A). The proposal would effectively enable employees to avoid discipline indefinitely by continuing in any program, the object of which is to treat alcoholism or drug abuse. It would therefore, prevent the agency from exercising its right to discipline. (proposal 9)

A proposal which permits the union to select five members of a committee concerned with alcoholism and drug abuse, prescribes the five members' titles and grants them official time to carry out their functions, interferes with management's right to assign work under § 7106(a)(2)(B). Counselors in Alcohol and Drug Abuse Programs perform work assigned to them by their employer. The designation of specific employees to perform alcohol and drug counseling is, in reality, a decision to assign specific duties. Allowing a union to make such designations is outside the duty to bargain. (proposal 9)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY CORPS OF ENGINEERS
KANSAS CITY DISTRICT
KANSAS CITY, MISSOURI

Respondent

and Case No. 7-CA-40283

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision, and the General Counsel and the Charging Party filed oppositions to the Respondent's exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order as modified herein.

The Authority adopts the Judge's conclusion that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Charging Party (the Union) with certain necessary data it requested pursuant to section 7114(b)(4) of the Statute. She ordered the Respondent to furnish the Union with a copy of the "Status of Minority Employment" listing (the Minority Listing)[1] maintained by the Respondent, but to "sanitize" the Minority Listing by deleting all data pertaining to nonbargaining unit employees, and all other data except the names and minority status of bargaining unit employees. We agree.

---

[1] The Minority Listing is statistical data, compiled from data collected by visual identification by the Respondent, which lists the names, grade plan, pay plan, position title, occupational series and organizational element of all female and minority employees in the Respondent's work force.

The Respondent in its exceptions again contends that, notwithstanding any obligation it might otherwise have under section 7114(b)(4) of the Statute, the provisions of the Privacy Act[2] prohibit it from disclosing the Minority Listing.[3] The Authority has previously determined that disclosure of necessary data to exclusive representatives pursuant to requests under section 7114(b)(4) of the Statute is not prohibited by the Privacy Act if the disclosure will not result in a clearly unwarranted invasion of privacy,[4] and that in making such determination in each case the

---

[2] Privacy Act of 1974, Pub. L. No. 83-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (1982)).

[3] The Respondent also contends that, pursuant to the provisions of Equal Employment Opportunity Regulation, 29 C.F.R. § 1613.302 (1984), it could not lawfully provide the Minority Listing to the Union. The Respondent argues that the restrictive language in section 7114(b)(4) of the Statute, limiting an agency's duty to furnish data "to the extent not prohibited by law," incorporates the Equal Employment Opportunity Commission (EEOC) regulation. The Authority disagrees, and adopts the Judge's conclusion on this issue. The Authority finds that, while the EEOC has the authority to issue regulations that take precedence over other laws when such regulations apply to EEOC's own proceedings (see Internal Revenue Service, Fresno Service Center, Fresno, California v. FLRA, 706 F.2d 1019 (9th Cir. 1983)), its procedural regulations such as here involved serve rather only as guidelines to agencies, and do not have the force and effect of "law" as that term is used in section 7114(b)(4) of the Statute. See generally General Electric Company v. Gilbert, 429 U.S. 125 (1976).

[4] See Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624 (1985), reversed and remanded as to other matters, sub nom. American Federation of Government Employees, AFL-CIO, Local 1345 v. FLRA, No. 85-1378 (D.C. Cir. June 27, 1986); Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C., 18 FLRA No. 74 (1985); U.S. Equal Employment Opportunity Commission, Washington, D.C., 20 FLRA No. 37 (1985).

Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data. The Authority notes that the necessary data here requested is to be used by the Union to determine whether the Respondent is complying with the provisions of the parties' collective bargaining agreement, to determine whether to file grievances in certain merit promotion actions, and to prepare for contract negotiations, and has considered the limited circulation the data is likely to receive.[5/]

In striking the balance between the limited intrusion on the privacy interests of the three highest ranked individuals and the selected employees, and the Union's need to identify these individuals and their minority status in order to pursue its representational duties under the Statute, which will also ensure that the Government's merit promotion system operates fairly, the Authority finds that disclosure of the necessary data would not result in a clearly unwarranted invasion of privacy and hence would not contravene the Privacy Act so as to be prohibited by law within the meaning of section 7114(b)(4) of the Statute. Therefore, the Authority concludes that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Union with the necessary data contained in the Minority Listing.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, shall:

1. Cease and desist from:

(a) Failing or refusing to furnish, upon request by the National Federation of Federal Employees, Local 29, the exclusive representative of a unit of its employees, the data contained in the "Status of Minority Employment" listing which the Authority has deemed necessary for the full and proper performance by such exclusive representative of its representational duties.

[5/] Should the data in fact become widely known, the Authority would necessarily take this experience into account in future similar cases.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, furnish to the National Federation of Federal Employees, Local 29, the exclusive representative of a unit of its employees, the data contained in the "Status of Minority Employment" listing which the Authority has deemed necessary for the full and proper performance by such exclusive representative of its representational duties.

(b) Post at its facilities at the U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Engineer, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 24, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish, upon request by the National Federation of Federal Employees, Local 29, the exclusive representative of a unit of our employees, the data contained in the "Status of Minority Employment" listing which the Authority has deemed necessary for the full and proper performance by such exclusive representative of its representational duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish the National Federation of Federal Employees, Local 29, the exclusive representative of a unit of our employees, the data contained in the "Status of Minority Employment" listing which the Authority has deemed necessary for full and proper performance by such exclusive representative of its representational duties.

____
(Activity)

Dated: ________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

U.S. ARMY CORPS OF ENGINEERS
KANSAS CITY DISTRICT
KANSAS CITY, MISSOURI,

Respondent

and

Case No.: 7-CA-40283

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29,

Charging Party

Jane P. Cornwell,
For the Respondent

Gerald Eggemeyer and
Joseph Swerdzewski,
For the General Counsel
Federal Labor Relations Authority

Diane E. Carney,
For the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1192, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

This proceeding was initiated by the filing of an unfair labor practice charge on March 2, 1984, which was amended on May 24. The Region VII Office of the Federal Labor Relations Authority (the Authority) investigated the charges and, on May 30, issued a complaint against Respondent.

The complaint alleges that on or about February 7 and 15, 1984, and pursuant to 5 U.S.C. 7114(b)(4), the Charging Party (also referred to herein as the Union) submitted to Respondent written requests for a copy of the "Status of Minority Employment" listing, which concerns the race, sex, national origin, and disability status of Respondent's employees, and that on or about February 8 and 23, and at all times since, Respondent has failed and refused to furnish the Charging Party the data requested, thereby engaging in unfair labor practices in violation of 5 U.S.C. 7116(a)(1), (5) and (8).[1]

---

[1] 5 U.S.C. 7116(a) make it an unfair labor practice:

> (1) to interfere with, restrain, or coerce any employee in the exercise of any right under this chapter; . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter. . . [or]
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. 7114 provides that:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation - . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

Respondent admits that the listing has been requested, is normally maintained by it in the regular course of business, and that it has refused to furnish it. Respondent denies that the requested data is reasonably available and necessary for collective bargaining. And it avers that it is constrained from furnishing it by 29 CFR 1613.302(b); by the Privacy act, 5 U.S.C. 552(b); and by 5 U.S.C. 7116(b)(4). And it further avers that it disclosed all relevant and necessary data in accordance with 5 U.S.C. 7114(b)(4).

A hearing on the matter was held in Kansas City, Missouri, on July 10, 1984. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed on August 30, by Respondent, and on August 31 by the General Counsel, pursuant to an August 6 order extending the briefing time until August 31 for good cause shown by the General Counsel of the Authority in an unopposed motion.

Based upon the record made in this proceeding, my observation of the demeanor of the witnesses, and the briefs, I make the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact[2]

1. It is admitted that the Charging Party is a labor organization and the Respondent is an agency within the meaning of 5 U.S.C. 7103(a)(3) and (4).

2. It is also admitted that the Charging Party has been the exclusive representative of a unit of Respondent's employees since August 5, 1970. The bargaining unit fluctuates between 650 and 750 employees. Its members are spread over approximately 30 installations in 5 states, with stewards in only 2 of the 30.

3. It is also admitted that the Respondent and the Charging Party have been parties to a collective bargaining agreement, effective July 1, 1981 to July 1, 1984, which contains, inter alia, a provision stating that no employee will be discriminated against because of, inter alia, race, sex, national origin, and physical handicap. See Article 6 of GC 2 at page 7. The agreement also contains provisions relative to merit promotion (Article 14 of GC 2 at page 25); equal employment opportunity (EEO, Article 15 of GC 2 at page 28); and a grievance procedure which provides for the processing of grievances concerning equal employment and

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[2] Abbreviations to be used herein are as follows: "TR" refers to the transcript. The General Counsel's unopposed motion to correct the transcript is granted. "GC" refers to the exhibits of the General Counsel and "R" to those of Respondent. "GCBr" refers to the brief of the General Counsel and "RBr" to that of Respondent.

discrimination complaints (Article 9 of GC 2 at pages 14 and see also TR 49 and 79).

4. In late November or early December, 1983, Gary W. Divine, Union President, met with Elvin J. Gant, the Respondent's Equal Employment Manager, to discuss ways both could "firm up" the relationship between the Union and the Equal Employment Opportunity Office (EEOO), and to discuss a grievance being processed by the Union (TR 22). During this conversation Mr. Gant stated that there was "institutional racism" within the Respondent and, in particular, stated that although there was a large number of minority candidates ranked in the top three on merit promotion referrals, they were routinely not selected (TR 22). Mr. Gant also indicated that he had the documents to verify these statements.[3]

5. Based upon the statements of Mr. Gant, the Union felt compelled, for contract administration purposes, to investigate his allegation of institutional racism. Accordingly, on December 30, 1983, in a letter to Colonel Gurnie C. Gunter, Respondent's District Engineer, Mr. Divine, referencing "information Local 29 ha[d] received from Mr. Gant of [his] staff and in the interest of proper contract administration," requested, pursuant to Section 7114(b)(4) of the Statute, "copies of all DA 2600's dated 1 July 1981 to present; wherein one of the three highest ranked candidates was not selected for the bargaining unit position in question" (G.C. Exh. 3).

6. Department of Army Form 2600 (DA 2600) is a referral and selection roster showing the position to be filled, and listing the best qualified candidates and their present position. The form is forwarded to the selecting supervisor. Article 14, Section 6 of the parties' collective bargaining agreement provides that:

> Selections. The selecting official should normally choose one candidate from the three highest rankings. Any candidate may be selected provided the selecting official furnishes a statement indicating why he/she believes the selected candidate can perform more effectively and efficiently than any candidate in the three highest rankings.

See GC 2 at page 26.

7. Shortly thereafter, Robert G. Blaylock, Respondent's Chief of the Management-Employee Relations and Training Branch of the Personnel Office,

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[3] This finding is based on the uncontradicted testimony of Mr. Divine, who was a credible witness. Mr. Gant was called as a witness by counsel for Respondent, but was asked no questions about this particular conversation with Mr. Divine. See TR 73-76.

told the Union that he would allow the Union access to the DA 2600s contained in the merit promotion files which the Union felt it needed. The Union chief steward and another steward reviewed about 500 merit promotion packages, from which they pulled approximately 150 DA 2600s. According to Mr. Divine, the DA 2600s were requested so that the Union could determine, under the merit promotion process, who was selected for a position. This would, in turn, assist the Union in finding out whether the individual selected was among the three highest ranked candidates, whether a minority candidate was listed, and finally whether the minority candidate was selected.

8. The Union's preliminary review of the DA 2600s revealed that the three highest ranked candidates were not selected approximately 50 per cent of the time. In addition, four position selections, with their accompanying DA 2600s and supporting documents, were particularly instructive to the Union.

a. The first concerned selections for two vacancies in the position of power plant trainee. The DA 2600 listed 14 candidates which, according to a stamp placed on the DA 2600 by the Personnel Office, included 2 females and 1 minority. This DA 2600 was of interest because the selecting supervisor wrote that he selected one of the two candidates because "[h]is selection will also provide a start in overcoming a severe underrepresentation of minorities in this career field" (GC 4). Consequently, two facts became evident from this DA 2600: that the Personnel Office stamp indicated that the selecting supervisor was being notified of minority and female applicants; and that the supervisor's justifications for one of the selections indicated that in at least one case minority consideration had been a factor in the selection. Since it was the Union's understanding that the merit promotion article (Article 14) of the agreement required selections only to be based on merit, and not on race, creed, color, national origin or sex, the Union felt there may have been a contract violation in this instance. Respondent's chief of labor-management relations, Robert G. Blaylock, conceded that it was the policy of the Personnel Office to make merit selections for promotion "without regard to race or sex or any other non-merit factor" (TR 88).

b. The Union's review of the DA 2600s also revealed a possible problem with a selection for the position of civil engineering technician in the Construction Division. In a November 16, 1983, memorandum to the selecting supervisor for this position, Mr. Gant stated, in part, that there was one minority applicant on the referral list for this position, and that Respondent had a severe underrepresentation of minority employees in this particular career field, which should be considered together with other selection criteria. The first DA 2600 for this position indicates that on December 12, 1983, the selecting supervisor made his selection. In a memorandum dated December 15, 1983, to Colonel Gunter, Mr. Gant states that, given the underrepresentation currently existing, the proposed selection did not reflect appropriate support for the spirit, intent, or the implementation of affirmative action policies or objectives.

Thereafter, in a memorandum dated December 16, 1983, the then acting Construction Division Chief stated that while he agreed with Mr. Gant's comments, he supported the selecting supervisor's justifications for the selection. However, the second DA 2600 for this position, dated January 22, 1984, shows that the selection supervisor overturned his original selection and selected a black male based upon merit factors, underrepresentation and Respondent's affirmative action program, indicating that the selection was partly based upon minority consideration, rather than merit only.

c. The Union's review of a DA 2600 for the position of Miscellaneous Documents Examiner, and its investigation of an unrelated employee grievance, revealed another possible problem selection. During investigation of the grievance, the Union learned that the selecting supervisor had originally proposed selecting two employees, but that Mr. Gant did not concur in one of the selections because of the absence and underrepresentation of black employees in this particular career field, and he recommended selection of the black employee on the referral list. Mr. Gant's March 17, 1983 memorandum to the selecting supervisor stated that race can be considered in the selection process and that support for equal employment opportunity (EEO) will be relied upon to determine whether a division chief has met the critical equal employment opportunity element of his or her job performance standards. Subsequently, the selecting supervisor selected the black female, and failed to select any of the three highest ranked candidates, even though the Union's investigation of the grievance revealed that the black female had the lowest ranking of all the candidates. Further, this DA 2600 was again stamped with a statement that the list included seven females and one minority.

d. Finally, the Union's review of a DA 2600 for the Contract Specialist or Contract Administrator position disclosed a fourth questionable selection regarding the administration of the contract's non-discrimination and merit promotion articles. This DA 2600 showed four candidates with the three highest rankings, a stamp stating that the list included nine females and four minorities, and that the person selected was not among one of the candidates in the three highest rankings. The DA 2600, however, did not reveal whether any of the four highest ranked candidates were minorities, and the Union was unable to identify whether two of the four were minorities.

e. The Union's preliminary review of the other DA 2600s disclosed that the candidates in the top three rankings were not being selected approximately one half of the time, and that underrepresentation was a consideration in the selection process.

f. The Union was left with two areas where patterns of discrimination may have been occurring - (1) minority candidates being among the three highest rankings and not being selected, and (2) minority candidates being given preferential treatment and selected over candidate within the three highest rankings. However, from the DA 2600s alone, only the female candidates could normally be identified. The minority candidates could not readily be identified. Accordingly, in order to fully investigate Mr. Gant's allegation of institutional racism and to complete its discrimination analysis, the Union felt it needed the names and the minority status of the candidates to see if there was the possibility of a union grievance or contract compliance problem with the merit promotion article, the employee rights article, and the EEO article.

9. As a result, in late January 1984, Mr. Divine met with Mr. Gant in the EEOO. According to Mr. Divine, he asked Mr. Gant about the stamp showing the number of female and minority applicants on the DA 2600s and if this was done by the EEOO. He was told by Mr. Gant that the stamp was put on by the Personnel Office, and that Mr. Gant did review the stamp for accuracy and completeness using a Status of Minority Employment lising.[4] The listing is a computer-generated, by-name listing of all minorities and women in Respondent's workforce which also identifies their grade, pay plan, position title, occupational series and organizational element. Mr. Gant uses this listing, as raw data, to compile the Affirmative Action Panel Report, a quarterly publication, which assesses Respondent's work force profile in terms of race, gender, grade, pay plan, and organizational element. Mr. Divine asked Mr. Gant if the Union could have access to the information on the listing, and explained the Union's investigation based on Mr. Gant's earlier allegation of institutional racism. Mr. Gant replied that the EEOO would be willing to cooperate in the Union's investigation and in gathering information. Mr. Gant did not indicate that he would give the listing to Mr. Divine.

10. On February 7, 1984, Mr. Divine sent another letter to Colonel Gunter. He referred to his earlier letter of December 30, 1983, requesting copies of the DA 2600s from July 1, 1981 (see finding 5, above) and noted that the Personnel Office had allowed the Union access to them. He requested one copy of each status of Minority Employment listing for the past two years so that the Union might "adequately analyze" the DA 2600s, and cited 5 U.S.C. 7114(a)(4). See GC 8. He stated his "understanding that these document [were] maintained by the Equal Employment Manager and w[ould] be provided upon request" (GC 8).

11. On February 8, 1984, Mr. Blaylock replied to Mr. Divine's February 7 letter to Colonel Gunter. In the letter he stated that the:

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[4] Mr. Divine testified that Mr. Gant "showed" him the listing which he "looked at" (TR 45). Mr. Divine denied "show[ing]" the listing to Mr. Divine but admitted that the listing was on his desk when he talked to Mr. Divine about it. See TR 73. I find that Mr. Divine did view the listing during the late January discussion in Mr. Gant's office, as Respondent concedes (see RBr 3), and that Mr. Gant at least indicated to Mr. Divine its position on a desk.

> Statute prohibits the release of employment information by race or national origin. Any such data maintained may be used only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program (See 5 CFR 29, Section 1613.302).

See GC 9. Mr. Blaylock testified that the citation used in his letter was incorrect and should have been 29 CFR 1613.302. See TR 90. The correct citation is to a regulation of the Equal Employment Opportunity Commission (EEOC).[5] Mr. Blaylock never contacted anyone at EEOC for an interpretation of the regulation or for guidance as to what it might mean. He thought it was "plain enough" (TR 91), but admitted that he really did not know the "standard" for individual privacy under the regulation (TR 95).

12. On February 9, 1984, Mr. Divine wrote to Mr. Blaylock and stated his view that refusal to furnish the requested data violated the Statute.

13. On February 15, 1984, in a letter to Colonel Gunter, Mr. Divine made a request for five items, and reiterated the request for the Status of Minority Employment, a copy of which, he explained, he had viewed briefly in the presence of Mr. Gant in late January 1984. Mr. Divine explained to Colonel Gunter that he was making the request as President of Local 29, "in order to prepare for upcoming contract negotiations and to ensure proper administration of the current contract" (GC 11). One of the "primary articles" to be renegotiated was the one concerning "merit promotion" (TR 50).

14. One February 23, 1984, Mr. Blaylock replied to Mr. Divine's letter of February 15. He furnished five of the items requested, but declined to furnish the Status of Minority Employment listing with the comment: "again I must remind you that the release of this information is prohibited by 29 CFR, Section 1613.302" (GC 12).

15. At the hearing, Mr. Blaylock testified that he also relied upon the Privacy Act in declining to furnish the requested listing, but never mentioned reliance upon it to the Union. The Union never indicated to him that it was "investigating a potential grievance" (TR 96).

16. At the hearing, the Union President testified that the Status of Minority Employment listing was needed in order to administer the current contract provisions, particularly Article 6 dealing the non-discrimination provision; Article 14, the merit-promotion provision; and Article 15, the

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[5] See page 14, *infra*, for a full quotation.

equal employment opportunity provision. He further testified that it was needed also for contract negotiations due to commence in July 1984 because one of the primary articles to be negotiated was the merit promotion one, the Respondent having already given to the Union a "totally new promotion package" (TR 51). The Union had to know the extent of the problem in the merit promotion area as it related to discrimination; whether the contract needed tightening in that area; what emphasis would be placed on minority status and underrepresented positions; how these factors would be identified; and what weight should be given to them in the merit selection process.

17. Respondent never asked the Union why it needed the listing, or to clarify its request. Respondent never offered to sanitize the listing to limit it to bargaining unit members -- an action which the Union President testified would have been acceptable as far as non-unit positions were concerned.

18. However, on or about April 23, 1984, as part of a separate unfair labor practice charge, Respondent did provide to the Union the EEO Affirmative Action Panel Report for the first quarter of fiscal year 1984, as well as a listing of positions designated as underrepresented and other positions filled within the last year. See R 2. The Panel Report was not offered as alternative data to the Union's request for the Status of Minority Employment listing. See TR 56. The Panel Report, while giving an overall profile of Respondent's work force, was of no use to the Union's investigation of discrimination in the merit promotion area, since it did not identify employees by name, and did not allow the Union to identify the minority status of actual candidates on the DA 2600s. And the gross statistics represented by the Panel Report do not allow the Union to identify potential discrimination problems with particular vacancies, or a series of vacancies, which are required to file a grievance, or determine the extent of possible grievances.

19. The data contained in the Status of Minority Employment listing is maintained in Respondent's computer system. This data can be generated into a listing, in the form of a computer print-out, at little cost. When the listing is in computer print-out form, the listing is maintained in the EEO office and is used to compile the EEO Affirmative Action Reports. The form is destroyed after the Reports are compiled.

20. Respondent admits that the Status of Minority Employment listing was and is data normally maintained in the regular course of its business, and does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining.

21. Respondent has furnished to the Union the names and addresses of bargaining-unit employees, and allows the Union access to its internal mail system.

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,[6] that Respondent committed an unfair labor practice, in violation of 5 U.S.C. 7116(a)(1), (5) and (8), by failing to furnish the Status of Minority Representation listings as requested by the Union pursuant to 5 U.S.C. 7114(b)(4).

a. The requested data met the statutory conditions for production.

With exceptions to be discussed infra, all that section 7114(b)(4) explicitly requires to justify a request for information is proof that the information sought is (1) "data;" that it is (2) "normally maintained by the agency in the regular course of business;" (3) that it is "readily available;" and (4) that it is "necessary for the full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." See section 7114(b)(4) quoted fully in footnote 1, supra. Respondent admits that the listings are data, normally maintained by it in the regular course of business. It is established by the record that this data can be easily generated in the form of a computer printout and is, thus, readily available..

As to the last element of proof, the necessity for the data sought, the Authority has held that "matters related to discrimination in employment" are "within the scope of the duty to bargain, under section 7117 of the Statute." See American Federation of Government Employees, AFL-CIO, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 617 (1980). (See also Respondent's apparent concession on this point, at page 14 of its brief.)

The Authority has not yet ruled on the necessity of minority employment listings in a situation similar to the present case but, in situations arising in the private sector, the National Labor Relations Board had ruled; and the Board's decisions can be instructive, if not dispositive for Federal-sector, labor-relations matters. See Director of Administration, Headquarters, U.S. Air Force, 6 FLRA 110, 120-123 (1981). Thus, in Lucky Markets, Inc., 251 NLRB 836, 837 (1980), the union asked for, inter alia, a list containing the names, ages, race, sex, and marital status of all employees in the bargaining unit. The Board held the list was relevant and necessary, and must be disclosed, citing its prior decision in Westinghouse Electric Corporation, 239 NLRB 106, 108 (1978) wherein the Board, after noting the Union's duty of fair representation, stated:

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[6] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

> Since the cases have plainly established that a union has a right to protect the employees it represents from discriminatory treatment by an employer, it follows that a union needs information related to race and sex in order to make proposals and then to take other action to correct such discrimination.

Also see *Safeway Stores, Inc. v. N.L.R.B.*, 691 F.2d 953, 957 (C.A. 10, 1982), holding that when anti-discrimination clauses are inserted into a bargaining agreement, the union has a duty to ensure that the contractual obligations are being met by the employer, and enforcing an order that information pertaining to the employment status, ethnic background and sex of employees be disclosed.

A similar role for Federal sector unions was explicated by Congressman William D. Ford, in a post-enactment statement in which he commented upon the fact that House and Senate conferees in the U.S. Congress had decided to remove from the Statute "the exclusion of discrimination matters from the definition of conditions of employment" which determines which matters are negotiable. Congressman Ford stated that this decision was made because of the belief that: "Federal sector unions should shoulder their full obligation to help achieve equality of employment opportunity in their agencies." See 124 Cong. Rec. H13606, daily ed. Oct. 14, 1978, quoted in full on page 991 of the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, (hereinafter, *Legislative History*), Committee Print No. 96-7 of the Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Session. Congressman Ford was a member of the Subcommittee, and a sponsor of legislation that led to enactment of the Statute.

Here, the Union has shouldered this responsibility and bargained for and won from Respondent provisions in its contract relating to merit promotion (which the parties agree must not be on any other factor, such as race or sex); to equal employment opportunity; and to the handling of grievances involving equal employment and discrimination complaints. See finding 3, above. Here, the Union was investigating an allegation of institutional racism, made in particular as as to merit promotion selections and by one of Respondent's own managers. See finding 4. If true, the allegation raised problems of contract administration and the possible filing of grievances over actions that were becoming stale. Whether it was true depended upon information as to the minority status of candidates selected and rejected for promotion, a status which the Union could not always identify. See findings 8d and f. The Status of Minority Employment listings sought from Respondent contain this information.

Here, the Union was also preparing for upcoming negotiations over a contract due to expire July 1, 1984; and one of the primary articles to be renegotiated was the merit promotion article. See finding 13. The Union's investigation of discrimination in merit promotion selections was crucial to determining its negotiation strategies; whether the merit promotion article needed to be strengthened; or whether, and to what degree, minority status and underrepresentation should be given weight in the selection process. See finding 16.

The gross statistics, which Respondent did furnish to the Union, were helpful in showing underrepresented areas in the work force; but they were inadequate for showing whether current contract provisions were being violated as to particular merit promotion selections, and exact problems with the selection process that might help with the renegotiation of the merit promotion article being proposed by Respondent.

These are sufficient facts upon which to conclude that the information sought was necessary to enable the Union to effectively carry out its statutory representational obligations to bargain, to administer its contract, and to obtain evidence in order to handle any grievances based upon allegations of discrimination in making selections for promotions. It is noted that some of these selections were made over two years ago (see finding 5); and the Union needed to act promptly in determining whether to file grievances. See United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA 52, 54 (1984) wherein the Authority repeated its ruling that section 7114(b)(4) "requires management to furnish an exclusive representative with information which would enable the union to effectively carry out its representational obligation in connection with the processing of an employee grievance or the determination whether to file a grievance" (emphasis added).

b. The Union was precise enough in its demand. Respondent argues that the Union was not precise enough in stating its needs for the information sought. See RBr 14. What the Union told Respondent's managers was that it had information from the Equal Employment Manager that required it to look at copies of merit promotion papers (DA 2600s) for the past several years, wherein one of the three highest ranked candidates was not selected for a bargaining unit position (finding 5); that after looking at such papers it needed the Status of Minority Employment listings for the same years to adequately analyze the DA 2600s (finding 10); that it had viewed a listing, briefly, in the presence of the Equal Employment Manager (finding 13); and that it also needed the listings to prepare for the upcoming contract negotiations and to ensure proper administration of the current contract. See finding 13. The Union President told the Equal Employment Manager, before the requests for the listings were made, that he needed access to the information on the listing in connection with the allegation of institutional racism (finding 9).

With this information, an intelligent manager could have concluded that the Union was concerned about discrimination in particular past merit-promotion selections. In view of the fact that Respondent had submitted a new merit-promotion package to the Union in connection with renegotiation of this contract article, an intelligent manager could have also concluded that the Union needed to know what past practices were in regard to merit promotion selections vis-a-vis minorities. Had Respondent's managers been sincerely in doubt as to the need for the requested information, they could have requested clarification, which they did not do. See finding 17. Instead, Respondent's managers simply took the position that they need not furnish the information. See findings 11 and 14. Under these circumstances, the demand must be held as precise enough; and the Union cannot be faulted for not elaborating further.

c. It is irrelevant that the Union is able to obtain requested information from alternative sources.

Respondent stresses the fact that the Union has other means of obtaining the information sought, in that it "need only contact its membership and request the statistical information regarding race, sex, and national origin or any other pertinent data" (RBr 16). Respondent points to the sources it has made available to the Union -- namely use of its internal mail system, and the names and addresses of all bargaining-unit employees.

The fact that a union has alternative means to obtain information it seeks from the agency, through use of section 7114(b)(4), raises an unsettled issue of statutory construction, one on which the Authority has expressly reserved consideration. See Veterans Administration Regional Office, Denver, Colorado (VA), 10 FLRA 453, 458, fn. 11 (1982).

Nothing in the legislative history of the Statute provides any clue of congressional intent on this issue. See references to section 7114(b)(4) at pages 92, 93, 144, 262, 337, 403, 404, 694, 914, 926, 974, and 995 (a post-enactment statement) of the Legislative History of the Statute.

The language of the Statute seems plain enough, however. It deals specifically with exemptions from its reach (see footnote 1, above). It makes no mention of an exemption when alternative sources of information are available to a union. And this makes sense. After all, Congress found that allowing employees to participate in decisions that affect them, through labor organization of their own choosing, contributes to "the effective conduct of public business." See 5 U.S.C. 7101(a)(1)(B). Ineffectiveness will result if public unions are required to scramble around for information necessary for them to represent public employees, even though the information is maintained by public agencies in their files or computer memories. The time and resources which a public union could spend on representational duties on behalf of public employees would be diverted to this needless pursuit of information.

In dealing with other issues raised under section 7114(b)(4), the Authority has favored a broad interpretation of management's duty under it. When called upon to decide whether an agency had a duty to furnish information for purposes of a grievance involving a matter that was nonnegotiable under the parties' contract, the Authority noted how "broadly" section 7114(b)(4) reached, and concluded that the duty to furnish the information did exist. See U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251, 253 (1982). And when called upon to decide whether the agency must furnish the data cost free, the Authority held that it must. See its VA decision wherein it held that an interpretation requiring cost-free information "would further Congressional intent to require an agency to furnish the data" (10 FLRA at 456).

So here, I conclude that Congressional intent is furthered by requiring an agency to furnish to a union information necessary to the union's representational duties, when it is normally maintained by and reasonably available to the agency, and without regard to whether sources other than the agency's files or computer memory may be available to the union for the information.

d. The release of the data sought is not "prohibited by law" within the meaning of section 7114(b)(4).

In denying the Union's request for the data, Respondent relied solely upon regulations of the Equal Employment Opportunity Commission (EEOC). See findings 11 and 14. These regulations provide that:

> (a) Each agency shall establish a system which provides statistical employment information by race or national origin.
>
> (b) Data shall be collected only by visual identification and shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information of the race or national origin of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel records.

See 29 CFR 1613.302, emphasis by Respondent (RBr 3). These regulations were formulated and last amended by EEOC prior to passage of the Statute. See 34 FR 5371 (Mar. 19, 1969) as amended at 34 FR 14024 (Sept. 4, 1969) and redesignated at 43 FR 60971 (Dec. 29, 1978).

The General Counsel argues that the EEOC "regulation" cannot preclude release of data to which it is otherwise entitled under section 7114(a)(4), in that section 7114(a)(4) conditions release only to the extent not prohibited by "law," and that "law" refers to a congressional enactment, not an agency regulations.

As in cases cited at pages 7 and 9-10 of Respondent's brief, courts, including the United States Supreme Court, have held that an agency or departmental regulation can have "the force and effect of law if it be not in conflict with express statutory provision." See Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920), noting that the regulation must also be "addressed to and reasonably adapted to the enforcement of an act of Congress the administration of which is confided to such department." EEOC, of course, is not charged with the administration of the Statute here involved. And here this Statute expressly deals with the release of information to a union. In formulating this provision, Congress took pains to spell out specific conditions and exemptions governing the furnishing of information by agencies to unions representing their employees. Thus, it is unlikely that Congress would have intended for agencies, such as EEOC, to promulgate their own regulations on the matter, or, in this case, to have its express statutory provisions frustrated because of an agency regulation promulgated even before Congress spoke to the duty to produce, in 5 U.S.C. 7114(b)(4).

The unlikelihood of such a congressional intent is bolstered by the fact that Congress, in formulating the provisions of the Statute, used the terms "law, rule or regulation" (emphasis added) in the sections immediately preceding and following section 7114(b)(4), as well as in several other provisions of the Statute. See sections 7114(a)(5)(B); 7114(c)(2) and (3); 7117(a)(1); and 7122. This indicates that the use of only the term "law," in section 7114(b)(4), was deliberate and purposeful. As the General Counsel argues at page 27 of his brief, to construe the use of the term "law" to include "regulation" could thwart the exclusive representative's right to information from an agency, because an agency could simply promulgate its own regulations prohibiting the release of the information.

Thus, I conclude that Congress did not intend the use of the term "law," in section 7114(b)(4), to embrace regulations of EEOC.

As an affirmative defense in answering the complaint, Respondent raised, for the first time, the issue of the Privacy Act prohibiting the release of the requested data. See findings 11 and 14. Respondent's Chief of Management-Employee Relations and Training Branch testified that he also relied upon the Privacy Act in declining to release the data, but admits that he never mentioned the Privacy Act to the Union. See finding 15. While I do not conclude that Respondent was precluded from raising the issue in its answer to the complaint, I note that the failure to raise it with the Union accounts for why the Union did not try to obtain the listings in an appropriately sanitized format to meet Privacy Act considerations. See finding 15.

The pertinent portion of the Privacy Act, 5 U.S.C. 5529(b), provides that:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a

> written request by, or with the prior written consent of the individual to whom the record pertains, unless disclosure would be - . . . (2) required under section 552 of this title. . . .

Section 552 of Title 5 is the Freedom of Information Act (FOIA) Section 552(b)(6) of FOIA prohibits disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

No "clearly unwarranted" intrusion would result from the disclosure here sought. Assuming that Respondent compiled its Status of Minority listing in accordance with the EEOC regulations quoted above, it did so "only by visual identification." Thus, the information sought is "public" in a sense, anyway, and unlike information that exists only in agency files, as was the situation in the cases cited by Respondent at pages 9-12 of its brief. See Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979) holding protected employee aptitude tests; Local 2047, American Federation of Government v. Defense General Supply, 423 F. Supp. 481 (E.D. VA, 1976), affirmed per uniam, 573 F.2d 184 (C.A. 4, 1978), holding protected the names of employees on lists in respect to awards, promotions, reductions in force, and abuse of leave; and National Federation of Federal Employees, Local 1745 and Veterans Administration, 13 FLRA 543 (1983) holding non-negotiable a union proposal to allow disclosure of records used by a promotion panel to any rejected candidate for the position, on the ground of Privacy Act restrictions.8/

Balanced against the minor invasion of personal privacy involved here is the Union's need for the information in order to protect the bargaining unit against discrimination in job actions, to administer the contract's provisions on equal employment opportunity and merit promotions, and to bargain intelligently on Respondent's proposal for a revised merit promotion article. While the Union could go out and visually identify each bargaining unit employee, this would require an enormous effort and waste of official time, as the bargaining unit is scattered over approximately 30 installations in 5 States with stewards in only 2 of the 30 installations While the Union could solicit this information from the bargaining-unit members by use of the mails, there is no assurance of a complete or prompt enough response to be helpful in scheduled contract

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7/ Another case cited by Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC v. National Labor Relations Board, 658 F. 2d 18 (1980) could not be found where cited. In any went, the copies of EEO complaints apparently involved there, would also be kept in agency files and not be generally available to the public.

negotiations or in filing grievances on job actions which were already over two years old.[8]

However, the listings should be sanitized to exclude non-bargaining unit employees. See United States Environmental Protection Agency, Health Effects Research Laboratory, Cincinnati, Ohio, 16 FLRA 52, 55 (1984), holding that information as to non-bargaining unit employees (performance appraisal work sheets) need not be furnished under section 7114(b)(4) as the information was not necessary or relevant to assist the Union in determining whether a grievance was warranted over the failure of certain bargaining unit employees to be rated outstanding. Here, the Union apparently agrees that information as to non-bargaining unit employees is not appropriate or needed. See finding 17.[9]

The listings should also be sanitized to exclude all but the names and minority status of bargaining-unit employees, since these are the sole concerns of the Union in obtaining these listings. See findings 8d and f and 16.

In view of the above conclusions, it is unnecessary to decide other issues raised by the General Counsel.

Ultimate Findings and Recommended Order

The General Counsel has proved, by a preponderance of the evidence, that Respondent has committed unfair labor practices, in violation of 5 U.S.C. 7116(a)(1), (5) and (8) as alleged in the complaint.

Accordingly, and pursuant to 5 CFR 2423.29 and 5 U.S.C. 7118, the Authority hereby orders that the U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, shall:

8/ Compare Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982), adopting the conclusion of Administrative Law Judge Salvatore J. Arrigo that "arguments against supplying such data [names of individuals corresponding to the alphanumerical designations used by the rating panel needed to process a grievance over a merit promotion selection], such as those raised by Respondent herein with regard to the applicability of the Freedom of Information Act, have been frequently raised and rejected when the privacy rights under the FOIA were balanced against a union's representational rights under the Executive Order [11491, under which Federal sector labor relations were conducted prior to the Statute] and the paramount public interest." 7 FLRA at 637-638.

9/ As to the other exemptions from disclosure in section 7114(b)(C), Respondent admits that they are not applicable here. See paragraph 8(d) to GC 1(d) and (e).

1. Cease and desist from:

(a) Refusing or failing to furnish upon request of the National Federation of Federal Employees, Local 29, herein NFFE, the Status of Minority Employment listing for all unit employees, as appropriately sanitized, which information is necessary and relevant for the NFFE to discharge its obligations as the exclusive representative to represent the interests of all employees in the exclusively represented unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, make available to NFFE, the Status of Minority Employment listing for all unit employees, as appropriately sanitized, which information is relevant and necessary to enable NFFE to discharge its obligations as the exclusive representative to represent the interests of all employees in the exclusively represented unit.

(b) Post at its facilities copies of the attached Notice To All Employees on forms to be furnished by the Regional Director, Region VII, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Engineer, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Engineer shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 CFR 2423.30, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: November 30, 1984
Washington, DC

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish, upon request, to the National Federation of Federal Employees, Local 29, herein NFFE, the Status of Minority Employment listing for all unit employees, as appropriately sanitized, which information is necessary and relevant for the NFFE to discharge its obligations as the exclusive representative to represent the interests of all employees in the exclusively represented unit.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish to NFFE the Status of Minority Employment listing for all unit employees, as appropriately sanitized.

____
(Agency or Activity)

Dated: __________________ By: __________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, CO 80202 and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and

Case No. 0-NG-689
16 FLRA 75

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
KANSAS CITY DISTRICT
KANSAS CITY, MISSOURI

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question involved is whether "competitive areas" within an agency for reduction-in-force (RIF) purposes are within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

In a previous decision in this case, National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 75 (1984), the Authority held, as relevant here, that the following Union proposal defining the competitive area to be used for a RIF was outside the duty to bargain:

Union Proposal 2

Section 3.

The following definition(s) shall apply:
Competitive Area: The geographic area that

> usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring areas) and the surrounding localities in which people live and reasonably can be expected to travel in their usual employment.

On review, the D.C. Circuit found an apparent inconsistency between this Authority finding and the Authority's finding in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (ACT) that a proposed competitive area was within the duty to bargain.*/ It remanded this case and another case with the same holding, American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984) (Local 32), and directed the Authority to address and resolve the apparent conflict between its Local 32 and ACT decisions. Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985).

III. Analysis

The proposal at issue in this case would narrow the established competitive area encompassing four states by restricting it to the local commuting area. Even as more narrowly defined, the proposed competitive area would still include both bargaining unit employees and positions and nonbargaining unit employees and positions.

In its Decision and Order on Remand in the Local 32 case referred to above, the Authority responded to various questions raised by the court. With respect to the apparent conflict between the Local 32 and ACT decisions, the Authority reconciled and distinguished the two cases as follows:

> In summary, the proposals in both the ACT and Local 32 cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected

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*/ The Union withdrew its appeal of the Authority's other holding in the case concerning reassignments (Union Proposal 1), and therefore the court did not have that matter before it.

> conditions of employment of nonunit employees indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.
>
> Consistent with this analysis, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip op. at 8 (1986). Accordingly, the Authority concluded that the proposal in Local 32 was nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit. As the proposal at issue in this case, similar to the one in Local 32, would establish a competitive area which necessarily includes nonunit employees within its boundaries, consistent with the requirements of applicable OPM regulations, it also is outside the mandatory obligation to bargain.

IV. Conclusion

Accordingly, for the reasons stated by the Authority in its Decision and Order on Remand concerning the proposal in the Local 32 case, the proposal at issue here also is nonnegotiable.

Issued, Washington, D.C., July 24, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1705

Union

and

Case No. O-NG-945
17 FLRA 945

GENERAL SERVICES ADMINISTRATION

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question involved is whether "competitive areas" within an agency for reduction-in-force (RIF) purposes are within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

In a previous decision in this case, National Federation of Federal Employees, Local 1705 and General Services Administration, 17 FLRA 945 (1985), the Authority held that the following Union proposal defining a competitive area within the Agency for purposes of a RIF was outside the duty to bargain:

> The competitive area for bargaining unit employees shall consist of employees of FPRS, OIRM, GMA, and PBS located within the GSA Central Office organization, Metropolitan Washington, D.C. area.

The Union's petition for review of that decision to the United States Court of Appeals for the District of Columbia

Circuit was pending when the D.C. Circuit issued its decision in Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985), remanding two related cases involving the same issue*/ and directing the Authority to address and resolve what the court described as an apparent conflict between the Authority's finding in those cases and the Authority's findings in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (ACT) that a proposed competitive area was within the duty to bargain. On December 3, 1985, pursuant to the Authority's unopposed request, the D.C. Circuit remanded the instant case for further consideration in light of the court's decision and the Authority's consideration of those cases on remand. National Federation of Federal Employees, Local 1705 v. FLRA, No. 85-1399 (D.C. Cir. Dec. 3, 1985).

III. Analysis

The proposal at issue here would establish a competitive area consisting of portions of four subordinate organizational elements within the Agency's Metropolitan Washington, D.C. Central Office, and would include both bargaining unit and nonbargaining unit employees within that proposed competitive area.

In its Decision and Order on Remand in the Local 32 case referred to above, the Authority addressed the apparent conflict between the Local 32 and ACT decisions, reconciling and distinguishing the two cases as follows:

> In summary, the proposals in both the ACT and Local 32 cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected conditions of employment of nonunit employees

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*/ The two cases remanded by the court were American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984) (Local 32) and National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 75 (1984).

> indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.
>
> Consistent with this analysis, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip op. at 8 (1986). Accordingly, the Authority concluded that the proposal in Local 32 was nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit. As the proposal at issue in this case, similar to the one in Local 32, would establish a competitive area which necessarily includes nonunit employees within its boundaries, consistent with the requirements of applicable OPM regulations, it also is outside the mandatory obligation to bargain.

IV. Conclusion

Accordingly, for the reasons stated by the Authority in its Decision and Order on Remand concerning the proposal in the Local 32 case, the proposal at issue here also is nonnegotiable.

Issued, Washington, D.C., July 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 77

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 229

Union

and

Case No. 0-NG-1188

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, HEADQUARTERS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal. The proposal was presented during negotiations concerning the relocation of bargaining unit employees:

> Management agrees that bargaining unit employees will have adequate access to telephones in the performance of their official duties if such is required as part of the employees' duties and responsibilities to perform at an acceptable level.

II. Positions of the Parties

In its petition, the Union asserts that the proposal does not concern the technology of performing work since it is limited to seeking adequate access to telephones only if use of them is required by the Agency as part of the employees' duties. It also contends that the proposal is an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute for employees adversely affected by their relocation.

The Agency argues that the proposal interferes with its right under section 7106(b)(1) to determine the technology of performing work. It contends that, despite the Union's representation that the proposal leaves to the Agency the determination as to whether to use telephones, it would nevertheless have the practical effect of requiring negotiation over the numbers, types and locations of telephones provided. It would also subject the Agency's decisions on these matters to arbitral review. For these reasons, the Agency argues that the proposal is not within the duty to bargain.

The Union did not file a response to the Agency's statement of position.

III. Analysis and Conclusions

A. The Proposal Concerns the Technology of Performing Work

The Authority has previously found that a proposal which required that adequate telephones be provided for the conduct of government business was not within the duty to bargain because it concerned the technology of performing work. American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA 902 (1984) (Proposal 3). The proposal in this case would have a similar effect as that in Mine Safety and Health Administration, Morgantown in that it would subject substantive decisions about using telephones to accomplish the Agency's work to bilateral determination. In this regard, the Union has not rebutted the Agency's contention that the proposal would intrude upon its discretion to determine the numbers, types and locations of telephones to be provided for employees. Based on the reasons expressed in Mine Safety and Health Administration, Morgantown, and the cases cited in that decision, the Authority finds that this proposal likewise concerns the technology of performing work under section 7106(b)(1), and is bargainable only at the election of the Agency.

B. The Record Doesn't Establish That the Proposal Concerns an Appropriate Arrangement

A proposal is negotiable as an appropriate arrangement under section 7106(b)(3), if it would not excessively interfere with management's rights under section 7106. *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA 24 (1986). In applying this standard the Authority considers, as a threshold matter and based on the parties' submissions, whether the proposal is intended to be an arrangement for employees adversely affected by management's exercise of its rights. In this case, the Union has offered no support whatsoever for its assertion that the proposal concerns an appropriate arrangement. We have no information concerning the nature and extent of the adverse effects, if any, on employees which might result from their relocation. Additionally, the record provides no basis for assessing how this proposal would address or ameliorate those adverse effects. *See American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region*, 21 FLRA No. 104 (1986) (Union Proposal 3). Consequently, we cannot conclude that this proposal involves an appropriate arrangement under section 7106(b)(3).

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 24, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PORTSMOUTH NAVAL SHIPYARD

Activity

and

Case No. 0-AR-1157

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Tim Bornstein filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

In his award the Arbitrator found that the 30-day suspension of the grievant was for just cause and denied the grievance.

III. ANALYSIS AND CONCLUSIONS

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as a suspension for more than 14 days. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base, 21 FLRA No. 41 (1986).

Because the Arbitrator's award relates to a matter covered by section 7512, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

IV. DECISION

Accordingly, for these reasons, the Union's exceptions are dismissed.

Issued, Washington, D.C., July 24, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R7-23

Union

and

Case No. O-NG-1033
19 FLRA No. 63

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 375TH AIR BASE
GROUP (MAC), SCOTT AIR FORCE
BASE, ILLINOIS

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question involved is whether "competitive areas" within an agency for reduction-in-force (RIF) purposes are within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

In a previous decision in this case, National Association of Government Employees, Local R7-23 and Department of the Air Force, Headquarters 375th Air Base Group (MAC), Scott Air Force Base, Illinois, 19 FLRA No. 63 (1985), the Authority held that the following Union proposal defining a competitive area within the Agency for purposes of a RIF was outside the duty to bargain:

> All bargaining unit positions in all areas serviced by the CCPO shall be in the same competitive area for reduction-in-force purposes.

The Union's appeal of that decision to the United States Court of Appeals for the District of Columbia Circuit was pending when the D.C. Circuit issued its decision in Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985), remanding two related cases involving the same issue*/ and directing the Authority to address and resolve what the Court described as an apparent conflict between the Authority's findings in those cases and the Authority's finding in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984)(ACT) that a proposed competitive area was within the duty to bargain. On December 3, 1985, pursuant to the Authority's unopposed request, the D.C. Circuit remanded the instant case for further consideration in light of the Court's decision and the Authority's consideration of those cases on remand. National Association of Government Employees, Local R7-23 v. FLRA, No. 85-1522 (D.C. Cir. Dec. 3, 1985).

III. Analysis

The proposal at issue here seeks to define a competitive area within the Agency for RIF purposes which would include all bargaining unit positions serviced by the Consolidated Civilian Personnel Office (CCPO). As noted in the Authority's previous decision in this case, the CCPO services areas that are composed of both bargaining unit and nonbargaining unit employees, as well as appropriated fund and nonappropriated fund employees.

In its Decision and Order on Remand in the Local 32 case referred to above, the Authority addressed the apparent conflict between the Local 32 and ACT decisions, reconciling and distinguishing the two cases as follows:

> In summary, the proposals in both the ACT and Local 32 cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the

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*/ The two cases remanded by the Court were American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984)(Local 32) and National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 75 (1984).

> proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected conditions of employment of nonunit employees indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.
>
> Consistent with this analysis, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip op. at 8 (1986). Accordingly, the Authority concluded that the proposal in Local 32 was nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit.

The Union claims that its proposal is not intended to include nonbargaining unit employees or employees represented by another bargaining agent in the proposed competitive area but only to place all bargaining unit employees it represents in a single competitive area. Despite the Union's intent, applicable OPM regulations do not allow a competitive area to be defined in terms of positions (such as bargaining unit positions) but require all employees within the stated organizational or geographic boundaries to be included. As the proposal at issue in this case, similar to the one in Local 32, would establish a competitive area which necessarily includes nonunit employees by operation of applicable OPM regulations, it also is outside the mandatory obligation to bargain.

[22 FLRA No. 79]

IV. Conclusion

Accordingly, for the reasons stated by the Authority in its Decision and Order on Remand concerning the proposal in the Local 32 case, the proposal at issue here also is nonnegotiable.

Issued, Washington, D.C., July 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. 0-NG-1095
20 FLRA No. 21

NUCLEAR REGULATORY COMMISSION

Agency

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question involved is whether "competitive areas" within an agency for reduction-in-force (RIF) purposes are within the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

In a previous decision in this case, National Treasury Employees Union and Nuclear Regulatory Commission, 20 FLRA No. 21 (1985), the Authority held that the following Union proposal defining a competitive area within the Agency for purposes of a RIF was outside the duty to bargain:

> Our counterproposal in this area is to use commuting area as the area of competition and to allow normal personnel considerations to be used in determining the similarity of positions.

The Union's appeal of that decision to the United States Court of Appeals for the District of Columbia Circuit was pending when the D.C. Circuit issued its decision in Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985), remanding two related cases involving the same issue[*/] and directing the Authority to address and resolve what the Court described as an apparent conflict between the Authority's findings in those cases and the Authority's finding in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984)(ACT) that a proposed competitive area was within the duty to bargain. On January 22, 1986, pursuant to the Authority's unopposed request, the D.C. Circuit remanded the instant case for further consideration in light of the Court's decision and the Authority's consideration of those cases on remand. National Treasury Employees Union v. FLRA, No. 85-1749 (D.C. Cir. Jan. 22, 1986).

III. Analysis

The Union's proposal in this case would define a competitive area within the Agency for RIF purposes as the "commuting area."

In its Decision and Order on Remand in the Local 32 case referred to above, the Authority addressed the apparent conflict between the Local 32 and ACT decisions, reconciling and distinguishing the two cases as follows:

> In summary, the proposals in both the ACT and Local 32 cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected conditions of employment of nonunit employees indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.

[*/] The two cases remanded by the Court were American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984)(Local 32) and National Federation of Federal Employees, Local 29 and Department of the Army, U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 75 (1984).

> Consistent with this analysis, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip op. at 8 (1986). Accordingly, the Authority concluded that the proposal in Local 32 was nonnegotiable because it would directly determine conditions of employment for employees outside the bargaining unit.

As noted in our previous decision in this case, while the Union asserts that its proposal applies only to bargaining unit employees, applicable OPM regulations require all employees within the stated organizational or geographic boundaries of the competitive area to be included. As the proposal at issue in this case, similar to the one in Local 32, would establish a competitive area which necessarily includes nonunit employees by operation of applicable OPM regulations, it also is outside the mandatory obligation to bargain.

IV. Conclusion

Accordingly, for the reasons stated by the Authority in its Decision and Order on Remand concerning the proposal in the Local 32 case, the proposal at issue here also is nonnegotiable.

Issued, Washington, D.C., July 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 81

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2094, AFL-CIO

Union

and

Case No. O-NG-1006

VETERANS ADMINISTRATION MEDICAL CENTER
NEW YORK, NEW YORK

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of nine Union proposals.

II. Procedural Issue

The Union's Petition for Review contained a proposal concerning the staying of adverse personnel actions pending exhaustion of grievance and appeal rights. However, the Union included no document purporting to be an Agency head determination on that proposal, nor did the Agency address that proposal in its Statement of Position. Consequently, the referenced proposal is not appropriately before us for review. American Federation of State, County, and Municipals Employees, AFL-CIO, Local 2910 and Library of Congress, 11 FLRA 632 n.1 (1983).

III. Union Proposal 1

> The Union may recommend to Management 10 employees for EEO Counselor positions. Management will select at least 2 of the candidates as counselors. Whereby a counselor serves as a bridge between the complainant and Management in the resolution of problems

rather than as a chosen representative of the employee, and in order to avoid conflicts of interest, no Union Officer or Shop Steward may be nominated.

A. Positions of the Parties[1]

The Agency contends that Union Proposal 1 is inconsistent with management's rights, under section 7106(a)(2)(A) and (B) of the Statute, "to assign" and to determine the personnel by which the Agency's operations will be conducted. The Agency cites American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced as to other matters sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982) in support of its position.

The Union asserts that the proposal is not inconsistent with the right to assign the workforce because the duties assigned to counselors are not their primary function, but is only part time work.

B. Analysis

In requiring that equal employment opportunity counselors be selected from among a list of Union nominees, Union Proposal 1 is to the same effect as the disputed portion of Union Proposal XI which was found to be outside the duty to bargain in Wright-Patterson Air Force Base, 2 FLRA 604, 622-3 (1980). Proposal XI required that half of the agency's EEO Counselors be selected from a list of union nominees. We determined that the proposal directly prescribed the assignment of certain duties to particular employees and prevented the assignment of those duties to other employees. Concluding that the disputed part of the proposal was inconsistent with management's right to assign work, we noted that "EEO Counselors perform the duties associated with EEO counseling either as their total work assignment or in addition to the other duties which are regularly assigned to them and which comprise their appointed positions."

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[1] The Union's positions with respect to all nine proposals are drawn from its petition for review because no reply brief was filed in this case.

C. Conclusion

For the same reasons stated in Wright-Patterson Air Force Base, we find that Union Proposal 1 also requiring management to select from a list of Union nominees, is outside the duty to bargain because it interferes with management's right to assign work pursuant to section 7106(a)(2)(B) of the Statute.[2] The fact that the proposal concerns only part time duties does not alter this conclusion.

IV. Union Proposal 2

> The Union will be allowed to have one observer on the Position Management Committee. The observer will be designated by the President, the observer will be notified when the Position Management Committee meets.

A. Positions of the Parties

The Agency states that its Position Management Committee has responsibility for reviewing and recommending approval prior to implementation of all changes in organization involving work design, occupational distribution, grade distribution, staffing requirements and cost. The Agency asserts that, as the Committee is an integral part of its decision-making process, Union participation in that process would inhibit full and open deliberations and, thus, interfere with management's rights under section 7106 of the Statute. In support, the Agency cites National Federation of Federal Employees, Local 1431 and Veterans Administration Medical Center, East Orange, New Jersey, 9 FLRA 988 (1982).

The Union notes that the Committee is a process whereby positions are allocated to bargaining unit employees and contends that the process by which "management engages in its rights [is] negotiable."

B. Analysis

As described by the Agency, the Position Management Committee in this case has responsibilities nearly identical to the committee of the same name on which the union sought representation in VA Medical Center, East Orange, 9 FLRA 988 (1982). There it was determined that the committee was an integral part of the process by which management decides and acts pursuant to rights reserved to it by the Statute. We held that union representation on the committee "would thereby impair the flexibility which Congress intended management officials to have under the Statute." We therefore concluded that the proposal "would directly interfere with management's rights under section 7106 of the Statute . . . ." While we note that the disputed proposal in this case adverts only to a Union "observer" on the committee, the presence of a Union designee would nonetheless "prevent management officials from engaging in free and open deliberations among themselves." 9 FLRA at 1002. Thus, contrary to the Union's view, the proposal is not merely a procedure to be followed by the Agency in exercising its reserved rights, but rather would inhibit management in reaching decisions and in acting with respect to those rights.

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[2] In view of our conclusion concerning Union Proposal 1 and the long-standing precedent embodied in the cited case, we find it unnecessary to address the Agency's further contention that its right to determine the personnel by which its operations are to be conducted is also violated.

C. Conclusion

Consistent with our findings in VA Medical Center, East Orange, we conclude that Union Proposal 2 in the present case is outside the duty to bargain.

V. Union Proposal 3

> 1. Bargaining Unit employees will have use of the swimming pool when the pool is not being used for patient therapy. The Union will provide a qualified life guard to oversee the bargaining unit employees, when using the pool.
>
> 2. Bargaining Unit employees will have use of the gym on the 17th floor. The Recreation Equipment on the 17th floor will be available for the employees to use. It is understood that the gym and equipment will not be available for use by bargaining unit employees if they are being used by patients.

A. Positions of the Parties

The Agency contends that Union Proposal 3 does not concern matters principally related to conditions of employment. The proposal would require management to hire personnel to supervise employee use of the facilities. In addition, the prime beneficiaries of the facilities, hospital patients, would be unable to use them during the period set aside for employee use.

The Union asserts that the proposal relates to working conditions because access to the facilities would allow employees to relax during lunch and break periods and thereby enhance the efficiency and effectiveness of their work performance. Under the proposal, the Union would provide volunteers to supervise use of the facilities and would assume responsibility for security of the equipment.

B. Analysis

In view of the Union's offer of self-supervision of employee use of the recreation facilities involved, we find that the Agency has not sustained its argument that the proposal would require it to hire additional employees to oversee the unit employees' use of such facilities. In addition, since the proposal expressly provides that employees would have access to the recreation facilities only if such facilities are not being used by patients, patients would not be denied access to such facilities.

It is well established however, that the duty to bargain under the Statute extends only to "conditions of employment," as defined in section 7103(a)(14) of the Statute. Parties are obligated to negotiate concerning personnel policies, practices, and matters affecting working conditions. Consequently, proposals concerning employee activities, unrelated to assigned work, conducted while such employees are in a non-duty status, such as employee use of agency recreational facilities during non-duty time, have been held to be not within the bargaining obligation because they do not meet the section 7103(a)(14) definition. For example, see National Association of Government Employees, Local R5-168 and Department of the Army, Headquarters 5th Infantry Division and Fort Polk, Louisiana, 19 FLRA No. 75 (1985). In this case, the Union indicates that its proposal would grant employees access to the listed facilities during lunch and breaks or when the employees are otherwise in a non-duty status. Therefore, based on our holding in Fort Polk, Union Proposal 3 does not concern conditions of employment of bargaining unit employees. See also United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 16 FLRA 335 (1984).

C. Conclusion

Union Proposal 3 does not concern matters directly related to conditions of employment affecting bargaining unit employees. Therefore, it is not within the Agency's duty to bargain.

VI. Union Proposal 4

> No employee will be forced to work overtime if he/she feels it will effect [sic] his efficiency, health or emotional stability.

A. Positions of the Parties

The Agency contends that Union Proposal 4 violates its rights under the statute "to determine the numbers, types and kinds of employees required to carry out its mission" and "to assign."

The Union asserts that its proposal does not violate management's right to assign the workforce. Rather, the Union contends that the proposal "deals with a process whereby management engages in its rights" and further, that "[o]vertime is voluntary" under the parties' negotiated agreement.

B. Analysis

The Agency provides no support whatever for its claim that Union Proposal 4 concerns "numbers, types and kinds of employees." Thus, the Agency's argument cannot be sustained.

This Proposal, however, would prevent the Agency from assigning overtime work to employees who assert the grounds listed in the proposal. In National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983), we noted, in considering Union Proposal 2, that the management right to assign work, pursuant to section 7106(a)(2)(B) of the Statute, includes the right to determine that certain work will be performed on overtime and that a proposal limiting management's authority to assign overtime work is inconsistent with the Statutory right to assign work. Thus, Union Proposal 4 is to the same effect as the disputed proposal in American Federation of Government Employees, AFL-CIO, Local 3631 and Environmental Protection Agency, 11 FLRA 637 (1983). In that case the proposal sought to prevent assigning employees to WANG terminals for more than three consecutive months if the agency health and safety committee concluded that assignment to such terminals in excess of three consecutive months induced stress. Rejecting the union's argument that the proposal merely constituted a procedure which concerned health and safety matters to be followed in assigning work, we found that "the proposal would absolutely prohibit management from assigning certain duties to employees beyond a specified period of time if the circumstances described in the proposal apply." Such a complete prohibition on the assignment of work "is inconsistent with management's right under section 7106(a)(2)(B) of the Statute to 'assign work' and is not within the duty to bargain."

This analysis is not altered by the Union's claim that under a provision of the parties' agreement "[o]vertime is voluntary." Since there is nothing in the record to indicate the existence of such a provision, the Union's claim is totally unsupported.

C. Conclusion

Union Proposal 4 is not a "procedure," but rather is a substantive infringement on the Agency's right to assign work. Therefore, based on our findings in Social Security Administration and Environmental Protection Agency, it is outside the duty to bargain.

VII. Union Proposal 5

> The Medical Center will provide the use of vehicles to representatives of the Union for official business (this does not include internal Union business). Transportation will also be provided to and from the subway along 23rd Street in the non-daylight hours. If necessary Union representatives will be given the opportunity to obtain Federal drivers license.

A. Positions of the Parties

It appears from the record that the Agency objects only to that part of this proposal requiring it to furnish transportation to and from the subway. In the Agency's view, that part of the proposal does not concern a condition of employment.

The Union contends that the disputed part of the proposal is a condition of employment. Citing the high incidence of crime committed against unit employees, the Unions states that the Agency-furnished transportation "would provide a safer means of reaching the place of employment."

B. Analysis

It is clear that the transportation contemplated would be provided to employees to assist them in commuting between their homes and the work site. Further, based on the reference in the proposal to "Federal drivers license," such transportation would be provided in the form of a Government motor vehicle.

Title 31 U.S.C. § 1344 governs the use of Government-owned passenger motor vehicles and provides that appropriations may be expended for operation, maintenance and repair of passenger motor vehicles that are used for "an official purpose." This section further states, "An official purpose does not include transporting officers or employees of the Government between their domiciles and places of employment . . .," except in certain situations not relevant in this case. In interpreting 31 U.S.C § 1344, the Comptroller General has determined that, in the absence of other specific authorization, one narrow exception to the general prohibition on use of Government vehicles for commutation is authorized when the home-to-work transportation of employees is incident to otherwise authorized use of the vehicles involved. See 62 Comp. Gen. 438 (1983).

Thus, in American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982), Union Proposal 10, which permitted an employee already authorized to use a Government vehicle in traveling to and from his home to arrange a carpool with other employees living in the same general area, was found to be within the duty to bargain. Specifically, we held that the proposal was consistent with the official use only requirement "where transportation of employees in a Government vehicle between their homes and place of employment is such that they merely accompany another employee on an otherwise already authorized trip for the transaction of official business, and the Agency determines that the trip is in the Government's interest." See also American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) where a union proposal requiring an agency to provide shuttle bus service between various work sites and permitting employees to ride the buses as part of their travel to and from work was found to be within the duty to bargain because it was also consistent with the statutory requirements concerning the use of Government vehicles.

There is nothing in the record to indicate that the Government vehicle required by Union Proposal 5 would be used for any official purpose at the same time it is engaged in transporting employees to and from the subway. Hence, it must be concluded that the vehicle would be dedicated exclusively to assisting employees in commuting between home and work; a purpose which is inconsistent with Federal law.

C. Conclusion

Union Proposal 5 violates the prohibition in 31 U.S.C. § 1344(a) against the use of Government vehicles for transporting employees between their domiciles and places of employment. Therefore, pursuant to section 7117(a)(1) of the Statute, it is outside the duty to bargain.

VIII. Union Proposal 6

> The Medical Center will provide training to all bargaining unit employees on the definition of reasonable accommodation for handicapped employees. This training should include all the aspects of how management can provide a reasonable accommodation for handicapped employees.

A. Positions of the Parties

The Agency states that bargaining over Union Proposal 6 is barred by the terms of the parties' master agreement. The Agency argues that the proposal also violates its right to assign work under section 7106(a)(2)(B) of the Statute. The Agency further appears to contend that the type of training proposed is inconsistent with the definition of "training" contained in 5 U.S.C. § 4101(4).

The Union asserts that the proposal is not inconsistent with the master agreement, but rather "has to do with a process whereby management engages in its EEO responsibilities."

B. Analysis

1. Duty to Bargain

When a union files a negotiability appeal under section 7105(a)(2)(E) of the Statute, section 7117(c) entitles it to a decision on the negotiability issues in dispute. To the extent there are factual issues disputed by the parties in the circumstances of a case, such issues should be resolved in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984). Hence, the Agency argument that it is relieved of any duty to bargain on the proposal by the master agreement is not relevant in the context of this negotiability appeal.

2. Management Rights

Since both parties interpret this proposal as requiring formal training sessions to be conducted during employees' duty hours, such meaning will be adopted for the purpose of our analysis. It is well established, under Authority precedent, that proposals requiring management to provide formal training, or periodically to assign employees to specific types of training programs, are outside the duty to bargain. In National Federation of Federal Employees, Local 422 and Department of Interior, Bureau of Indian Affairs, Colorado River Agency, Parker, Arizona, 14 FLRA 48 (1984), we noted our consistent position "that training assignments during duty hours are assignments of work, covered by section 7106(a)(2)(B). . . . As such, any proposal addressing the substantive aspects of training is a direct interference with management's right to assign work." Because Union Proposal 6, like the proposals in Bureau of Indian Affairs, prescribes the content of training and requires that such training be conducted during duty hours, it is also not a procedure for implementing a training program, but is likewise inconsistent with section 7106(a)(2)(B).

3. Violation of Law

The Agency's reliance on 5 U.S.C. § 4101(4) is misplaced. The definition contained in the referenced section does not cover the kind of training proposed by the Union and does not render such training illegal. That section of law concerns long-term professional and technical training but does not expressly bar the type of training proposed. Thus, the proposal is not inconsistent with 5 U.S.C. § 4101(4).

C. Conclusion

Union Proposal 6 does not violate 5 U.S.C. § 4101(4), but directly interferes with the right to assign work under section 7106(a)(2)(B) of the Statute. Consequently it is outside the duty to bargain.

IX. Union Proposal 7

> During the third quarter of an employee's work tour, the employee will be eligible for release without charge to leave of any kind in case of emergency or illness.

A. Positions of the Parties

The Agency contends that the proposal violates laws governing the purpose and uses of annual and sick leave and also is inconsistent with the right to determine the personnel by which Agency operations are conducted under section 7106(a)(2)(B) of the Statute.

The Union contends that the proposal does not violate management rights because discretion to grant or deny an employee's request remains with the supervisor.

B. Analysis

Because the proposal does not mandate the granting of leave upon request, we do not find it to be inconsistent with management rights. However, the question remains as to whether the proposal is consistent with law and regulation. More specifically, the issue to be addressed is whether the Agency has the authority to grant administrative leave upon the request of individual employees who are ill or have a personal emergency.

Title 5 U.S.C., chapter 63 governs the accumulation of both annual and sick leave and further authorizes agencies "to grant administrative leave excusing an employee from work when it is in the public interest." 5 U.S.C. § 6326(c). 5 U.S.C. § 6311 states: "[t]he Office of Personnel Management may prescribe regulations necessary for the administration of this subchapter." Thus, the coverage of the relevant OPM regulations is coextensive with that of chapter 63, covering most, but not all, employees in the executive and judicial branches of Government. The OPM regulations are, therefore, "Government-wide" within the meaning of section 7117(a)(1) of the Statute. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748, 754 (1980). Federal Personnel Manual (FPM), Chapter 630, subchapter 11 governs excused absences and prescribes when absences may be granted to individuals without loss of pay or charge to leave. Subchapter 11-5.b provides:

> Brief absences from duty of less than an hour and tardiness may be excused when the reasons are justifiable to the supervisor. When not justifiable, the absence must be made up or charged to an appropriate leave account; in addition the absence may become the basis for disciplinary action.

Although what constitutes a "justifiable" reason for such a grant is not specified, FPM Supplement 990-2, Book 610, Appendix A-2 provides that when employees are dismissed because of an emergency situation, the emergency "must be general, rather than personal in scope and impact." In this connection, it is pertinent to note that FPM Chapter 630, subchapter 3-4.a(2) states that one of the purposes of annual leave is to provide time off for "emergency purposes." Similarly, with regard to illness, FPM Chapter 630, subchapter 4-2.a states that one of the purposes of sick leave "is for use when an employee is physically incapacitated to do his job . . . ." Thus, annual and sick leave are intended to cover the circumstances described in Union Proposal 7 and the governing regulations do not contemplate personal emergencies or illness as justifiable grounds for granting administrative leave in lieu of either annual or sick leave.

Union Proposal 7 is distinguishable from the proposals before us in International Federation of Professional and Technical Engineers, Local 174, AFL-CIO and Long Beach Naval Shipyard, Long Beach, California, 7 FLRA 362 (1981). In that case, the proposals concerned the agency's practice of curtailing its operations during the Christmas/New Year holiday period. The proposal specifically sought to change the requirement that employees not needed during that period (4-5 workdays) take annual leave. Noting that pertinent regulations gave management discretion to grant administrative leave when it decided to curtail operations, we found the proposals to be within the duty to bargain. Union Proposal 7 in this case does not concern absence from duty caused by a managerial decision to close a facility temporarily. Rather, it deals with absences sought by individual employees based on their personal needs. Consequently, our decision in Long Beach Naval Shipyard has no bearing on Union Proposal 7.

C. Conclusion

Union Proposal 7 is outside the duty to bargain under section 7117(a)(1) of the Statute because it is inconsistent with Government-wide regulations.

X. Union Proposal 8

> If employee tours are scheduled for more than 5 consecutive days, the Medical Center will make every effort to insure that the employees will receive three (3) consecutive days off.

A. Positions of the Parties

The Agency, states that it is a medical facility providing around the clock care to veterans and asserts that the proposal is integrally related to, and consequently determinative of, the numbers, types and grades of employees assigned to a work project or tour of duty. Hence, the Agency claims the proposal is negotiable only at its election in accordance with section 7106(b)(1) of the Statute. In support the Agency cites American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota, 2 FLRA 641 (1980).

The Union contends that its proposal is a procedure to be observed by management in exercising its rights under section 7106(b)(1).

B. Analysis

When a proposal sought to be bargained does not "explicitly" relate to the numbers, types and grades of employees assigned to a tour of duty or organizational subdivision, it is incumbent upon an agency to support an allegation that section 7106(b)(1) applies to that proposal. In National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927 (1979) the disputed proposal did not, on its face, relate to "numbers, types and grades," nor was the agency able to support its assertion that a direct or integral relationship existed. The proposal was therefore found to be within the duty to bargain.

As with the proposal in Kansas City Service Center, a reading of Union Proposal 8 does not reveal any direct or integral relationship to numbers, types and grades of employees assigned to a tour of duty or organizational subdivision. The Agency appears to argue that Union Proposal 8 relates to these section 7106(b)(1) matters in the same manner as the disputed proposal in VA Medical Center, Minneapolis. In that case, the agency clearly established that the proposal applied to nurses with highly specialized medical skills and knowledges and that the proposal's requirement that the nurses be guaranteed every other weekend off would necessitate the hiring of additional nurses with the requisite skills to provide adequate around-the-clock medical care to the hospital's patients. The Agency having established the necessary connection, we found the proposal to be within the scope of section 7106(b)(1) and to be not within the duty to bargain.

While it is noted that the activity in this case is also a hospital, the Agency nonetheless fails to establish the necessary connection between Union Proposal 8 and the numbers, types and grades of employees. The Agency merely asserts that such a nexus exists without establishing that the employees covered by the proposal possess highly specialized skills such as those in VA Medical Center, Minneapolis that would not be available to the hospital's patients under the terms of the proposal. The record in this case is in fact silent concerning the types of occupations and skills within the bargaining unit. The Agency has, therefore, failed to meet its burden of demonstrating a "direct or integral relationship" between the proposal and 7106(b)(1) of the Statute as required by the Kansas City Service Center decision.

C. Conclusion

The Agency has not established, nor is it otherwise apparent, that Union Proposal 8 imposes any limitation on its ability to determine the numbers, types or grades of employees assigned to a work project or tour of duty. Consequently, the proposal is within the duty to bargain.

XI. Union Proposal 9

> The employer and the Union jointly recognize alcoholism as a treatable illness and drug abuse as a treatable health problem. Therefore, the employer will not institute disciplinary action against an alcoholic or drug abuser until he/she is given every opportunity to overcome his/her alcoholism or drug abuse. Membership of the VA Medical Center Committee established to implement this program will include five Union representatives. The Union representatives will be designated as Substance Abuse Counselors for the Union. They will be given official time to conduct substance abuse program and to counsel bargaining unit employees. Any employee participation in the program should remain confidential. Medical records, if any,

> will be protected. No medical records will be released without the employee's consent. Substance Abuse Coordinators should be given beepers in order to cope successfully with emergencies due to the abundance to [sic] substance abuse problems.

A. Positions of the Parties

The Agency contends that it is not obligated to bargain over the proposal because of its conflict with provisions of the parties' master agreement. The Agency also argues the proposal is inconsistent with management's right to discipline employees pursuant to section 7106(a)(2)(A) of the Statute and cites in support National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Union Proposal 1). The Agency further asserts that the portion of the proposal permitting the Union to designate five Substance Abuse Counselors violates management's right "to assign" and to determine the personnel by which Agency operations will be conducted pursuant to section 7106(a)(2)(A) and (B) of the Statute.

The Union contends that the Counselors it would designate would represent the Union. According to the Union, substance abuse is a condition of employment. In the Union's view Union representatives are entitled to official time to represent and counsel employees on alcoholism and substance abuse. The designated Counselors would be more accessible to both managers and employees if provided with beepers by the Agency.

B. Analysis

The Authority will address only the negotiability issues involved in a case. Wurtsmith Air Force Base, 14 FLRA 302 (1984). Thus, the Agency's argument that it has no duty to bargain in the circumstances of this case is not relevant in the context of this negotiability appeal.

We previously held in Internal Revenue Service, 1 FLRA 522 (1981) that a proposal, prohibiting the agency from disciplining an employee as long as the employee was an active participant in a recognized alcohol/drug abuse program and requiring a stay of discipline if the employee entered such a program, to be inconsistent with management's right to discipline under section 7106(a)(2)(A). Further, in American Federation of Government Employees, Local 1812, AFL-CIO and United States Information Agency, 16 FLRA 308 (1984), we held to be nonnegotiable a provision in that case preventing management from disciplining for substandard performance an employee experiencing personal problems if the employee was participating in a formal counseling program and progressing toward an acceptable performance level. Noting that pursuant to the provision "an employee would completely avoid disciplinary action for his or her conduct or unacceptable work performance by remaining a participant in the program and making progress, however slight," we found that the provision directly affected management's right to discipline employees under section 7106(a)(2)(A) of the Statute. Similarly, as this proposal effectively would enable employees to avoid discipline indefinitely by continuing in any program, the object of which is to treat alcoholism or drug abuse, it would for the reasons more fully stated in Internal Revenue Service and USIA, 16 FLRA 308 (1984) also prevent the Agency from exercising its right to discipline.

In addition, Union Proposal 9 permits the Union to select five members of the committee concerned with alcoholism and drug abuse, prescribes the five members' titles and grants them official time to carry out their functions. As with Equal Employment Opportunity Counselors, counselors in Alcohol and Drug Abuse Programs perform work assigned to them by their employer as part of a program established by that employer.3/ The designation of specific employees to perform alcohol and drug counseling is, in reality, a decision to assign specified duties. Allowing a union to make such designations is outside the duty to bargain. Air Force Logistics Command, 2 FLRA 604 (1980).

C. Conclusion

The disputed portions of Union Proposal 9 interfere with management's rights to discipline employees pursuant to section 7106(a)(2)(A) of the Statute and to assign work under section 7106(a)(2)(B). Consequently, those segments are outside the duty to bargain.

XII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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3/ Agencies are required to establish such programs by the following: 42 U.S.C. § 290dd-1 and ee-1 and 5 CFR § 792.105 (1986).

petition for review, as it relates to Union Proposals 1 through 7 and 9, be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 8.[4]

Issued, Washington, D.C., July 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

4/ In finding Union Proposal 8 to be within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BREMERTON METAL TRADES COUNCIL
OPERATING ENGINEERS, LOCAL 286

Union

and

Case No. 0-AR-1138

PUGET SOUND NAVAL SHIPYARD

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Kenneth M. McCaffree filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 24, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 913

Union

and

Case No. 0-AR-1142

U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jerome Katz filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION,
BOSTON REGION

Agency

and

Case No. 0-AR-1147

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1164

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Cornelius J. McAuliffe filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 24, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY RESERVE COMPONENTS
PERSONNEL AND ADMINISTRATIVE CENTER
ST. LOUIS, MISSOURI

Activity

and

Case No. 0-AR-1149

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 900

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator James P. O'Grady filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 24, 1986.

J Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
WARNER ROBINS AIR FORCE BASE, GEORGIA

Agency

and

Case No. 0-AR-1155

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator William G. Haemmel filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 24, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case No 381

Federal Labor Relations Authority

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NUMBER 381 REPORT OF CASE DECISIONS July 29, 1986

22 FLRA No. 85 (July 28, 1986)

American Federation of State, County, and Municipal Employees, Local 2477 and Tyrone Bryant, an Individual, Case No. 3-CO-40033

22 FLRA No. 86 (July 29, 1986)

U.S. Department of Energy, Western Area Power Administration, Golden, Colorado and International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, Case No. 7-CA-1229

NEGOTIABILITY CASES

22 FLRA No. 82 (July 24, 1986)

National Weather Service Employees Organization and Department of the Commerce, National Weather Service, Case No. 0-NG-1242

22 FLRA No. 83 (July 24, 1986)

Federal Union of Scientists and Engineers and Department of Navy, Naval Underwater Systems Center, Case No. 0-NG-1238

ARBITRATION CASE

22 FLRA No. 84 (July 28, 1986)

General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236 (Bussey, Arbitrator), Case No. 0-AR-905

3. F31/21-3:

Federal Labor Relations Authority

22 FLRA No. 82

National Weather Service Employee Organization and Department of Commerce, National Weather Service, Case No. 0-NG-1242 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Grievance Procedure
    Designation of Union Official to Initiate
5 U.S.C. 7701(c)(2)

STATUTE

7101(b)
7102
7103(a)(9)
7105(a)(2)(E)
7121(b)(1), (3)(A) and (B)

DIGEST NOTES

A union proposal designating the official who will initiate grievances on behalf of the union and establish time limits within which certain prescribed steps will be taken in the grievance process is negotiable. The Authority found that the agency's arguments that the proposal violated § 7101(b), 7102, 7103(a)(9), 7105(a)(2)(E), 7121(b)(1), (3)(A) and (B), and 5 U.S.C. § 7701(c)(2), were, without exception, based upon a misinterpretation of the proposal itself. The proposal did not concern identification of a grievant, employee rights to file or not file grievances, or any remedy that an arbitrator may or may not fashion. Moreover, the Authority concluded that there was no reasonable basis in the proposal or the record for the agency's conclusions.

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Federal Labor Relations Authority

22 FLRA No. 83

Federal Union of Scientists and Engineers and Dep't of Navy, Naval Underwater Systems Center, Case No. 0-NG-1238 (Decided July 24, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Management Rights
    Right to Lay Off
      Part-time vs. Full-time Employees
  Subjects of Bargaining
    Mandatory Subjects
      Appropriate Arrangements
        Proposal Excessively Interferes
          Management's Right to Lay Off
  Reduction In Force
    Retention of Full-time vs. Part-time Employees

STATUTE

7105(a)(2)(E)
7106(a)(2)(A)
7106(b)(1), (2) and (3)

DIGEST NOTES

A proposal which would require an agency to RIF part-time employees before full-time employees is nonnegotiable because it directly interferes with the Agency's discretion to determine to lay offs pursuant to § 7106(a)(2)(A). The Authority held that the proposal would have the effect of determining the particular positions management would be obligated to abolish in a given RIF.

A proposal which would require an agency to RIF part-time employees before full-time employees is not an appropriate arrangement because it would excessively interfere with management's right to layoff and retain employees under § 7106(a)(2)(A). The proposal seeks to ameliorate the adverse effects of a RIF on full-time employees by requiring that part-time employees be RIFed first. The Authority found that the proposed amelioration could totally eliminate the agency's discretion with regard to the exercise of its right to layoff employees. While full-time employees might arguably benefit from the provision, on balance, that benefit is outweighed by the fact that the proposal would require the agency to eliminate part-time positions in circumstances where it might otherwise choose to eliminate a full-time positions. The agency would have no discretion as to the type of position to be eliminated.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 84

Federal Labor Relations Authority

GSA and AFGE, Council 236 (Bussey, Arbitrator), Case No. 0-AR-905 (Decided July 28, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to FSLMR Statute
      § 7106(a)(2)(B)
  Contracting Out
    Subject to Grievance Procedure
OMB Circular A-76
41 U.S.C. § 46-48c
	7106(a)(2)(B)
	7122(a)

DIGEST NOTES

In one of two grievances filed and submitted to arbitration, the Union contended that the activity's determination to contract out a certain custodial activity pursuant to 41 U.S.C. § 46-48c, was not in accordance with OMB Circular A-76. The arbitrator found that the grievance was arbitrable but denied it on the merits.

In its exception the agency contends that the arbitrator's finding that the grievance was arbitrable is contrary to management's right to make determinations with respect to contracting out, pursuant to § 7106(a)(2)(B). The Authority found that a grievance claiming that a procurement action failed to comply with OMB Circular A-76, is within the broad scope grievance procedure prescribed by the Statute and is not precluded by management's right under § 7106(a)(2)(B) to make determinations with respect to contracting out. The agency's exception provides no basis for finding the awards deficient and there is no basis for reconsidering the awards or finding them inapplicable because the procurement action was pursuant to 41 U.S.C. § 46-48c. The agency's argument that the procurement action was exempted by these statutory provisions from the disputed requirements of Circular A-76 bears on the resolution of the grievance on the merits and not whether the grievance is grievable and arbitrable under the Statute.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 85

Federal Labor Relations Authority

AFSCME Local 2477 and Tyrone M. Bryant, an Individual, Case No. 3-CO-40033 (Decided July 28, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Remedy
    Legal Representation Without Regard to Employee Activities in Support of a Rival Labor Organization
  Union Rights, Responsibilities and Representation
    Duty of Fair Representation
      Denial of Legal Representation because of Employee Activities in Support of a Rival Labor Organization
      Past Practice
  Union Violations
    Refuse to Comply with the Statute
      7114(a)(1)

STATUTE

7114(a)(1)
7116(b)(1) and (8)
7118

DIGEST NOTES

The union violated § 7116(b)(1) and (8) when in response to an employee's exercise of the statutory right to support a rival labor organization, it ceased to provide to the employee continued representation in an adverse action proceeding held pursuant to the agency's regulations. The Judge held in a decision adopted by the Authority that the union, contrary to its past practice, denied the employee representation equal to that afforded other unit employees in adverse action proceedings. The fact that the union might not be able to use its statutory § 7114(b) rights to information in a forum where its standing is merely that of a personal representative is no defense to its failure to abide by its past practice of providing legal counsel to unit employees in adverse actions. The Authority noted further that the Judge's finding of a § 7116(b)(8) violation is based upon the union's failure to comply with the duty of fair representation set forth in § 7114(a)(1).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 86

Federal Labor Relations Authority

Dep't of Energy, Western Area Power Administration, Golden, Colo. and International Brotherhood of Electrical Workers, Locals 640, 1245, 1759, 1959 and 2159, Case No. 7-CA-1229 (Decided July 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	
Agency Violations	7116(a)(1) and (5)
Refusal to Negotiate	7118 and 7118(a)(7)(B)
	7135(a)

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Failure to Recognize Employees as Members of Bargaining Unit
      Pay Rates - Prevailing Rate Employees
    Prevailing Rate Employees
      Conditions of Employment Shall Continue to be Negotiated
      Defined - 5 U.S.C. § 5342(a)(2)(A)
      5 U.S.C., Chapter 71 Does Not Prevent Negotiation of Wages
  Remedy
    Apply Negotiated Pay Rates Retroactively
    Bargain Over Conditions of Employment of Unlawfully Excluded Employees
    Bargain Over Pay Rates of Prevailing Rate Employees
    Recognize Union as Exclusive Representative
    Retroactive Application of CBA to Employees Unlawfully Excluded
Executive Orders 10988 and 11491
5 U.S.C. § 5343 note (1982), Civil Service Reform Act of 1978, section 704, 92 Stat. 1218
92 Stat. 1244, Civil Service Reform Act of 1978, section 902(b)

DIGEST NOTES

The Authority concluded, in agreement with the ALJ, that the activity violated § 7116(a)(1) and (5) when it refused to negotiate regarding the wages of employees in "Supervisory Craftsman" positions (who were also prevailing rate employees), and refused to recognize these employees as members of the bargaining unit. The activity's refusal to bargain was clearly unjustified and flies in the face of the statutory requirement to bargain in good faith. The Authority noted particularly that the activity was on notice, as a result of an earlier unit clarification petition, that the excluded positions were required to be included in the bargaining unit, and that a reclassification of the positions in question did not change the appropriateness of their inclusion in the unit.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The Civil Service Reform Act expressly provides that the terms and conditions of employment for prevailing rate employees shall continue to be negotiated as in the past, regardless of contrary provisions in 5 U.S.C., Chapter 71.

The Authority found that the activity's unlawful refusal to negotiate concerning certain prevailing rate employees and its refusal to recognize them as part of the bargaining unit, directly caused the employees to be denied the benefits of exclusive representation. The Authority therefore ordered that the activity apply the terms of any agreement(s) negotiated between the parties covering the bargaining unit to the excluded employees and wherever possible, to apply such terms retroactive to the date of their unlawful exclusion from the unit. Additionally, since the exclusive representative of the unit has been denied the right to negotiate rates of pay for the excluded prevailing rate employees because of their unlawful exclusion, The Authority ordered the activity to negotiate in good faith upon request concerning such rates and apply whatever agreement is reached retroactively.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION

Union

and Case No. O-NG-1242

DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal:

> Section 9. UNION/MANAGEMENT GRIEVANCES
>
> b. Union grievances shall be initiated in writing by the President, NWSEO, and presented to the Assistant Administrator for NWS within thirty (30) calendar days of the action or condition giving rise to the grievance. Decisions by management shall be rendered in writing no later than thirty (30) calendar days following receipt of the grievance. Should the issue remain unresolved, arbitration may be invoked by the union under the provisions of Article 10.

II. Positions of the Parties

Based upon statements made during negotiations,[1] the Agency argues that this proposal "as it is interpreted and intended to be applied by the Union" is contrary to:

1. 5 U.S.C. § 7121(b)(3)(A) because it would not require the Union, when filing a grievance, to identify the grievant;
2. 5 U.S.C. § 7102 because it violates an employee's right to refrain from assisting a union in that a grievance could be filed without an employee's knowledge or consent;
3. 5 U.S.C. § 7701(c)(2) because, if a violation were found, an arbitrator could fashion a "class action" remedy applying to both harmed and unharmed employees;
4. 5 U.S.C. § 7121(b)(3)(B) because it removes an employee's right to file a grievance on that employee's own behalf; and
5. 5 U.S.C. § 7101(b) and 7121(b)(1), which require that a grievance procedure be consistent with an effective and efficient government and that it be "simple", because the Union could file a grievance on behalf of "any number of unidentified employees without specifying what harm to employees has occurred."

The Union contends that the proposal does not concern the scope of the grievance procedure but, rather, only restates the law, i.e., 5. U.S.C. § 7103(a)(9).

III. Analysis

The Union states that this provision simply addresses who may file a grievance on behalf of the Union, and when and where it must be filed. This interpretation is completely consistent with the plain language of the proposal. On its face, therefore, and consistent with the Union's statement of its intent, this proposal would designate the official who will initiate grievances on behalf of the Union and establish time limits within which certain prescribed steps will be taken in the grievance process.

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[1] The Agency states "the Union contended that the only requirement in the law for a negotiated union/management grievance procedure was that mandated by Section 7103(a)(9)." Agency Statement of Position at 4.

In view of this interpretation, the Authority finds that the Agency's arguments regarding the effects of this proposal are, without exception, based upon a misinterpretation of the proposal itself. The proposal does not concern the identification of a grievant, employee rights to file or not file grievances, or any remedy that an arbitrator may or may not fashion. Moreover, no reasonable basis is apparent, either in the proposal or the record, for the Agency's conclusions. Hence, the Agency's arguments regarding this proposal cannot be sustained.

Consequently, as the Agency has failed to establish any basis for finding the proposal, as interpreted by the Union and the Authority, to be outside the duty to bargain, it is negotiable under, and consistent with, section 7121 of the Statute.

IV. Conclusion

Based upon the foregoing analysis, the Authority concludes that the disputed proposal is within the Agency's duty to bargain.2/

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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2/ In finding this proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the disputed proposal.

Issued, Washington, D.C. July 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL UNION OF SCIENTISTS
AND ENGINEERS

Union

and

Case No. 0-NG-1238

DEPARTMENT OF NAVY, NAVAL
UNDERWATER SYSTEMS CENTER

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal.

II. Union Proposal

> In a reduction-in-force, part-time employees shall be subject to RIF first.

III. Positions of the Parties

The Union argues that the proposal is negotiable as either an "appropriate arrangement" under section 7106(b)(3) or "procedure" under section 7106(b)(2) of the Statute.

The Agency contends that this proposal is nonnegotiable because:

1. It interferes with management's right to layoff employees under section 7106(a)(2)(A) of the Statute;

> 2. It interferes with management's right to determine the types of employees assigned to an organizational subdivision, work project or tour of duty, a permissive subject of bargaining under section 7106(b)(1) of the Statute concerning which the Agency has elected not to bargain; and
>
> 3. It excessively interferes with the exercise of management rights and, thus, is inappropriate as an "arrangement" under section 7106(b)(3) of the Statute.

IV. Analysis

The Union explains its intent with regard to the disputed proposal as follows (Union Reply Brief at 3):

> . . . where there is a part-time employee whose duties are not concurrent with those of any full-time employee, and whose duties are necessary for the accomplishment of the Agency's mission, the proposal would not require the layoff of that employee over a full-time employee. Only where the part-time employee's duties can be duplicated by those of a full-time employee would the proposal require the layoff of the part-time employee. [Emphasis added.]

The Authority finds that the Union's explanation of the intent of its proposal is inconsistent with the plain language of the proposed requirement. The language of the proposal is not qualified or limited in any way. Rather, the proposal clearly and simply requires that in a RIF situation, part-time employees will be RIFed first. The question is whether the plain language of the proposal constitutes a negotiable procedure or appropriate arrangement.

A. Whether the Proposal Is a Negotiable Procedure

This proposal would require the Agency to RIF part-time employees before full-time employees. Consequently, the proposal would have the effect of determining the particular positions management would be obligated to abolish in a given RIF. That is, once the Agency decided to abolish a number of employee positions, it would be required to abolish part-time positions first. The proposal thus has the same effect as Union Proposal 8 in American Federation of Government Employees, AFL-CIO, Local 12 and Department of Labor, 18 FLRA No. 58 (1985) which required the Agency to abolish a proportionate number of supervisory and non-supervisory positions in a RIF. In that case, the Authority found that the proposal constituted a direct interference with the Agency's discretion to determine which positions to abolish and which employees to lay off pursuant to section 7106(a)(2)(A) of the Statute. Likewise, the disputed proposal herein also directly interferes with management's section 7106(a)(2)(A) right. It is not, therefore, a negotiable procedure under section 7106(b)(2).

B. Whether The Proposal Constitutes An Appropriate Arrangement

To determine whether a proposal constitutes a negotiable appropriate arrangement within the meaning of section 7106(b)(3), it is necessary to determine whether the proposal "excessively interferes" with the exercise of management's rights. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). In making such a determination, the record in each case will be examined to ascertain as a threshold question whether the proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. If the Authority concludes that the proposal is intended as an arrangement, we will then determine whether the arrangement is appropriate or inappropriate.

In this case, we find that the Union intended the proposal to be an arrangement for employees adversely affected by the Agency's exercise of its rights to layoff employees. The Union's proposal seeks to ameliorate the adverse effects of a RIF on full-time employees by requiring that part-time employees be RIFed first. The Authority finds that the proposed amelioration could totally eliminate the Agency's discretion with regard to the exercise of its right to layoff employees in the circumstances of this case. By way of example, the Agency states as follows (Agency Statement of Position at 4):

> . . . a given project might be staffed by one part-time and three full-time engineers while another project is staffed by one part-time and two full-time physicists. If management decides that the engineering workload can support only two full-time and one part-time employee, logically, one full-time engineer position would be abolished to achieve the desired staffing level. Under the Union's proposal, this action would be prohibited. To achieve a one man year reduction, management would be forced to abolish the part-time engineer position and the part-time physicist position, resulting in an unnecessary undermanning of one function while failing to completely correct the overstaffing in the function originally requiring reduction-in-force. Reassignment of the physicist's duties to the engineering function obviously would not be feasible in view of the differing qualifications required.

While full-time employees might arguably benefit by a provision requiring that part-time employees be RIFed first, on balance, that benefit is outweighed by the fact that the proposal would require the Agency to eliminate part-time positions in circumstances where it might otherwise choose to eliminate a full-time position. The Agency would have no discretion as to the type of position to be eliminated. In thus removing the Agency's discretion to determine which positions to eliminate in a RIF, the proposal excessively interferes with management's right to layoff and retain employees under section 7106(a)(2)(A) of the Statute and is not an appropriate arrangement.

V. Conclusion

Based on the foregoing analysis, the Authority concludes that the disputed proposal does not constitute a negotiable procedure or appropriate arrangement but, rather, that the proposal is outside the duty to bargain as contrary to section 7106(a)(2)(A) of the Statute.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 84

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. 0-AR-905

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Ellen M. Bussey filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

In one of two grievances filed in this case and submitted to arbitration, the Union contended that the Activity's determination to contract out a certain custodial activity to the National Institute of the Severely Handicapped pursuant to 41 U.S.C. §§ 46-48c*/ was not in accordance with OMB Circular A-76 (which prescribes general policies for contracting out). The Arbitrator found that this grievance was arbitrable, but on the merits denied the grievance.

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*/ These provisions provide for procurement of commodities and services by the Federal Government from qualified nonprofit agencies for the blind and the severely handicapped.

III. EXCEPTION

In its exception the Agency contends that the Arbitrator's finding that the grievance was arbitrable is contrary to management's right to make determinations with respect to contracting out pursuant to section 7106(a)(2)(B) of the Statute.

IV. ANALYSIS AND CONCLUSIONS

In Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986), the Authority once again addressed the issue of whether a grievance claiming that a procurement action failed to comply with OMB Circular A-76 was grievable and arbitrable under the Statute. Citing American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (proposal 1), enforced sub nom. EEOC v. FLRA 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986) (per curiam), the Authority again held that such a grievance is within the broad scope grievance procedure prescribed by the Statute and is not precluded by management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out. Consequently, we conclude that the Agency's exception provides no basis for finding the award deficient as contrary to section 7106(a)(2)(B) of the Statute. Furthermore, contrary to the arguments of the Agency, no basis is provided for reconsidering these decisions or finding them inapplicable because the procurement action in this case was pursuant to 41 U.S.C. §§ 46-48c. The Agency's argument that the procurement action was exempted by these statutory provisions from the disputed requirements of Circular A-76 bears on the resolution of the grievance on the merits and not on whether the grievance is grievable and arbitrable under the Statute. See Blytheville Air Force Base, slip op. at 6-7.

V. DECISION

Accordingly, the Agency's exception is denied.

Issued, Washington, D.C., July 28, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 2477,
AFL-CIO

Respondent

and Case No. 3-CO-40033

TYRONE M. BRYANT, an INDIVIDUAL

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions, and recommended Order.*/

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*/ The Authority notes that the Judge's finding of a section 7116(b)(8) violation is based upon a failure to comply with the duty of fair representation set forth in section 7114(a)(1) of the Statute.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority orders that the American Federation of State, County, and Municipal Employees, Local 2477, AFL-CIO, shall:

1. Cease and desist from:

(a) Refusing and/or failing to provide legal representation to Mr. Tyrone M. Bryant or any other unit employee in adverse action proceedings under the Library of Congress' regulations because Mr. Bryant and/or any other employee had exercised their statutory right to support a rival labor organization.

(b) Interfering with, restraining, or coercing Mr. Bryant or any other unit employee in the exercise of their right to support a rival labor organization freely and without fear of penalty or reprisal.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectutate the purposes and policies of the Statute.

(a) Provide legal representation to Mr. Tyrone M. Byrant and all other unit employees in adverse action proceedings without discrimination and without regard to their activities in support of a rival labor organization.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Library of Congress are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the President of Local 2477, American Federation of State, County, and Municipal Employees, AFL-CIO, or his designee, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and to other employees are customarily posted. The President of Local 2477, American Federation of State, County, and Municipal Employees, AFL-CIO, shall take reasonable steps to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Library of Congress, for posting in conspicuous places where the respective unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C. July 28, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 85]

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUTATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 of the

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT refuse or fail to provide legal representation to Mr. Tyrone M. Bryant or any other unit employee in adverse action proceedings under the Library of Congress' regulations because Mr. Bryant or any other unit employee had exercised their statutory rights to support a rival labor organization.

WE WILL NOT interfere with, restrain, or coerce Mr. Bryant or any other unit employee in the exercise of their right to freely and without fear of penalty or reprisal to support a rival labor organization.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide legal representation to Mr. Tyrone M. Bryant and other unit employees in adverse action proceedings without discrimination and without regard to their activities on behalf of a rival labor organization.

____
(Labor Organization)

Dated: ________________ By: ___________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

[22 FLRA No. 85]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 2477,
AFL-CIO

Respondent

and

TYRONE M. BRYANT, An Individual

Charging Party

Case No. 3-CO-40033

Carolyn J. Dixon, Esquire
For the General Counsel

Alice L. Bodley, Esquire
James E. Mundy, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, *et seq*., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on September 20, 1984, by Mr. Tyrone M. Bryant, an individual, a Complaint and Notice of Hearing was issued on November 30, 1984, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the American Federation of State, County, and Municipal Employees, Local 2477, AFL-CIO, (hereinafter called the Union or Respondent), violated Sections 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in refusing to represent Mr. Tyrone M. Bryant in an adverse action proceeding under the Library of Congress Regulations because of Mr. Bryant's activities on behalf of a rival labor organization.

A hearing was held in the captioned matter on February 14, 1985, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post hearing briefs on March 28, 1985, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of the Library of Congress' nonprofessional employees, including the Special Police. The Union is also a member of the District Council 26, which is an organization chartered by the American Federation of State, County and Municipal Employees (AFSCME) to the service the members of its affiliated locals.[1] The functions of the District Council 26 are set forth in its Constitution and include the following: "to assist member locals with grievances, complaints, appeals, negotiations, contracts, organizational matters, recruiting, publicity and promotional work in general; and to obtain and provide adequate legal representation for locals in the processing of grievances, complaints and other appropriate actions on behalf of members." In discharging these responsibilities District Council 26 utilizes the services of an executive director and other support staff.[2] The executive director is the administrative and executive officer of the Council. The Constitution of District Council 26 specifically mandates that the executive director's position be a full time one and further provides for a general description of job duties associated with that position. The executive director and his support staff are paid by and employed by District Council 26. District Council 26 is funded exclusively from the union dues collected from the various affiliated locals.

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[1] The other locals comprising District Council 26 are as follows: Local 2478 - U.S. Commission of Civil Rights; Local 2600 - U.S. Patent Office; Local 2830 - U.S. Justice Department; Local 2910 - Library of Congress (professional employees); Local 3097 - U.S. Justice Department and Local 2027 - ACTION and Peace Corps.

[2] The Constitution of District Council 26 also provides for the election of officers of the District Council by delegates from its constituent locals and the appointment of an Executive Board.

Since November 1981, James E. Mundy has occupied the position of Executive Director of District Council 26.[3] As such, Mr. Mundy performs the duties enumerated for the executive director in the Constitution of District Council 26 which, in pertinent part, include the following: represents unit employees in grievances and adverse actions; represents the constituent locals in representation matters with the Federal Labor Relations Authority (FLRA); and files unfair labor practice charges and appeals with the FLRA on behalf of member locals. Specifically, with respect to adverse actions, Mr. Mundy has admittedly represented numerous unit employees since his tenure as Executive Director of District Council 26 including: Shirley Whetstone, Marzella Rhodes, Roosevelt Davis and Pamela Paris. Former District Council 26 Deputy Director Lynn Sylvester also represented unit employees in adverse actions during her tenure including: Mary Geiger, Marzella Rhodes and Shirley Whetstone. Thus, as described above, the Executive Director and Deputy Director of District Council 26 provides as a service to its member locals, representation for unit employees in grievances and adverse actions.[4] While the evidence establishes that the Union and/or Mr. Mundy and other agents of District Council have consistently represented unit employees in adverse actions held pursuant to the Library of Congress regulations, their representational status was personal to the unit employees involved and did not flow from the union's certification as exclusive representative. In the absence of a request to the Union that it be an employee's personal representative in the adverse action proceeding, it is clear that the Union has no legal standing in adverse action proceeding.

Since August 1968, Tyrone Bryant has been employed as a Special Police Officer at the Library of Congress and has been a member of Respondent's bargaining unit.

On May 31, 1983, Officer Bryant became involved in an incident with his supervisor, Captain Romanelli, over Officer Bryant's use of the Library of Congress parking lot. This incident resulted in Officer Bryant's filing an oral grievance in early June 1983.[5] At Officer

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[3] Mr. Mundy is also an attorney and a member of the District of Columbia Bar. However, neither a law degree nor bar membership is a requirement for the position of executive director with the District Council as that position is described in the Constitution of District Council 26.

[4] In its newsletters, bulletins and flyers, Respondent has detailed and advertised to unit employees that such services of the District Council are available to the local and its unit employees.

[5] The grievance was filed under the parties' negotiated grievance procedure.

Bryant's request, Respondent's Steward Edward Jackson undertook representation of Officer Bryant in the grievance process. The grievance was subsequently denied by the Library of Congress on June 14, 1983.

Two and one-half months after the parking lot incident, on August 15, 1983, Officer Bryant was informed by the Library of Congress that he would receive a proposed adverse action, i.e., reprimand for his participation in the parking lot incident. Officer Bryant immediately contacted Union Steward Edward Jackson and requested union representation. Steward Jackson agreed and accompanied Officer Bryant to the Library of Congress' division office on August 16, 1983, where Officer Bryant was officially served notice of the proposed adverse action.6/ Steward Jackson was also given a copy of the letter of proposed adverse action against Officer Bryant. Steward Jackson then told Officer Bryant that this proposed adverse action would be appealed because it was wrong and constituted nothing but retaliation against Officer Bryant for his involvement in union activities and his filing of complaints against the Library of Congress. A response to the proposed adverse action was prepared and forwarded to the Agency on September 7, 1983. On October 4, 1983, Steward Jackson, forwarded to the Agency a request under section 7114(b)(4) of the Statute for a copy of a counselling memorandum which had been placed in Officer Bryant's personnel file by Captain Romanelli sometime earlier. The Library of Congress responded to Steward Jackson by letter dated October 11, 1983, and requested Officer Bryant's written permission for release of the requested document to Steward Jackson. Officer Bryant then signed a letter prepared by Steward Jackson authorizing release of the document to Steward Jackson. This letter dated October 20, 1983, to the Library of Congress also designated Respondent's Steward Jackson as Officer Bryant's representative in the proposed adverse action. On October 21, 1983, Officer Bryant received the Library of Congress' decision on the proposed adverse action which was the insertion of a reprimand in Officer Bryant's personnel file. The Library of Congress also informed Officer Bryant of his appeal rights. Specifically, Officer Bryant could appeal the reprimand under the Library of Congress' adverse action appeal procedures which would entitle Officer Bryant to a hearing before an independent arbitrator and give him the right to be represented by a representative of his choosing. On October 28, 1983, Officer Bryant filed a notice of appeal of the adverse action and specifically designated Mr. Edward Jackson, AFSCME Local 2477, as his representative. Mr. Jackson also signed this notice of appeal acknowledging himself as representative of Officer Bryant. Subsequently, the Library of Congress issued several communications to Mr. Edward Jackson in his capacity as Union Steward. By letter dated December 27, 1983, the Library of Congress informed Steward

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6/ The notice of proposed adverse action contained provisions for the affected employee to submit an oral or written reply and to have the services of a personal representative in preparing a reply.

Jackson that a list of arbitrators would be forwarded to him for selection in the adverse action hearing. On January 20, 1984, the Library of Congress again wrote to Steward Jackson in order to schedule a time and place for selecting the arbitrator in Officer Bryant's adverse action hearing. When Steward Jackson did not respond to the letter of January 20, 1984,[7] the Library of Congress contacted Marzella Rhodes, the president of the Local Union. In a letter dated April 5, 1984, the Library of Congress notified the Union that unless Respondent contacted the Agency within two weeks, Officer Bryant's case would be placed on the inactive list. Upon receiving a copy of the April 5, 1984 letter to the Union, Officer Bryant wrote to the Union on April 12, 1984, and requested continued representation in connection with his adverse action appeal.[8]

In his letter to Ms. Marzella Rhodes, Officer Bryant referred to evidence given to the Union during a Federal Labor Relations Authority representation hearing in January 1984, namely that the Union was representing him, Officer Bryant, in his appeal of the adverse action. The representation matter referred to by Officer Bryant concerned an RO petition filed with the Washington Regional Office by the Fraternal Order of Police (FOP) in Case No. 3-RO-40001. The FOP was seeking in the RO petition exclusive recognition for a part of the bargaining unit, i.e., the Special Police, currently being represented by the Union. Officer Bryant had signed the RO Petition on behalf of the FOP which was initially filed on October 27, 1983. A hearing on this petition was held before the Washington Regional Office on January 25, 26, 27 and 30, 1984. District Council 26 Executive Director James Mundy represented the Respondent Union at this hearing. One of the issues addressed at the hearing was the adequacy of Respondent's representation of the Special Police as part of Respondent's bargaining unit. Accordingly, Mr. Mundy elicited evidence at the hearing on Respondent's representation of the Special Police Officers. Specifically, evidence was adduced with respect to Respondent's representation of Special Police Officers in adverse action matters. In this regard, Mr. Mundy called as a witness for the Respondent, Ms. Marzella Rhodes, president of the Local Union. In response to questions proferred by Mr. Mundy, Ms. Rhodes testified that the Union, through its Steward, Edward Jackson, was currently representing Officer Bryant in the subject adverse action appeal. Ms. Rhodes further testified that Respondent had just received a letter from the Library of Congress addressed to Steward Jackson concerning the scheduling of a time and place for the selection of an arbitrator for Officer Bryant's hearing. In order to further buttress the claim of Respondent's adequate representation of

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[7] Steward Jackson had been on disability leave since January 1984.

[8] In early April 1984, Officer Bryant received a letter from Steward Jackson. Mr. Jackson, who was then on disability leave, informed Officer Bryant that he might retire from the Government. He subsequently retired from Federal service in late April 1984.

Special Police Officers, Mr. Mundy then called as a witness Banks Johnson, a former shop steward. Mr. Johnson testified that the Union was representing Officer Bryant in the adverse action appeal and that he and Steward Jackson were working on it. In addition, Mr. Mundy submitted into the record of the hearing the notice of appeal of the adverse action filed by Officer Bryant on October 28, 1983, which designated the Union and Steward, Edward Jackson, as his representative. Thus, based on these representations made by Respondent at the hearing, Officer Bryant stated in his letter of April 12, 1984, to Ms. Rhodes that he wanted the Union to pursue its representation of him in the adverse action appeal. Officer Bryant further stated that the Union's failure to continue its representation of him would result in his filing an unfair labor practice charge against the Union. A copy of the letter to Ms. Rhodes was also sent to Mr. Mundy.

Within a week to ten days of the date of Officer Bryant's letter to Ms. Rhodes, the Union contacted Officer Bryant and informed him that Mr. Mundy wanted to meet with him for purposes of discussing his adverse action appeal.9/ A secretary employed by the Union then scheduled a date and time with Officer Bryant for his meeting with Mr. Mundy. Officer Bryant and Mr. Mundy met at the Union's office on or about April 24, 1984.10/ Mr. Mundy began the meeting by asking Officer Bryant if he were a lawyer. Officer Bryant told Mr. Mundy that he was not a lawyer but that he knew a little about the law. Mr. Mundy then asked Officer Bryant why he did not represent himself in this case and Officer Bryant replied, "If I represent myself in this case, then I would have a fool for a client." Whereupon Mr. Mundy remarked that the Union did not have to represent unit members in adverse actions. When Officer Bryant, then asked whose responsibility it was to represent him, Mr. Mundy did not respond. Mr. Mundy then changed the subject and told Officer Bryant he was a traitor for signing the FOP petition. Mr. Mundy further indicated he wanted Officer Bryant to sign some type of disclaimer of responsibility

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9/ Mr. Mundy testified that Officer Bryant's April 12, 1984, letter to Ms. Rhodes was what prompted this contact with Officer Bryant. Mr. Mundy further testified that he picked up several open cases left by Steward Jackson when he retired in late April 1984, one of which was Officer Bryant's adverse action appeal.

10/ Mr. Mundy recalled the date of the first meeting with Officer Bryant as May 6, 1984. Mr. Mundy and Officer Bryant both testified that three meetings were held on this matter, i.e., Mr. Bryant's appeal of the adverse action.

for Mr. Mundy in representing him in the adverse action.[11] Mr. Mundy then asked Officer Bryant to withdraw the FOP petition.[12] Officer Bryant replied, "That is a horse of a different color." Officer Bryant then informed Mr. Mundy that he was there asking for representation and was not there to discuss the petition. At that point, Mr. Mundy dropped his discussion of the FOP petition and began reviewing the documents and discussing the merits of Officer Bryant's adverse action case. He told Officer Bryant after reviewing the evidence that he had a strong case. Mr. Mundy based his opinion on the fact that the Agency had waited two and one-half months after the incident to take the adverse action. Mr. Mundy opined that an arbitrator would take a very hard look at the timeliness of the Agency's actions.

Subsequently, Mr. Mundy initiated and held two more meetings with Officer Bryant in which they reviewed the evidence in the adverse action appeal. During these meetings, Mr. Mundy told Officer Bryant to try to find some witnesses to the parking lot incident who would testify on his behalf at the adverse action hearing. However, Mr. Mundy felt that based on the known facts alone, Officer Bryant's case had merit. These meetings between Mr. Mundy and Officer Bryant occurred in May and June of 1984 and were held at the Union's office in the James Madison Building.

Mr. Mundy was also in contact with the Library of Congress representatives during June and July of 1984, scheduling and rescheduling hearing dates for Officer Bryant's adverse action hearing. The first set of dates (July 26 and 27, 1984) selected by the Library of Congress and Mr. Mundy was cancelled well beforehand due to a scheduling conflict. A second set of dates (August 16 and 17, 1984) were also cancelled. Mr. Mundy and the Agency finally agreed to set the dates of October 4 and 5, 1984, for the adverse action hearing.

During the time Mr. Mundy was representing Officer Bryant, as set forth above, the FOP representation petition was pending before the Washington Regional Office of the FLRA. On July 18, 1984, Region III issued its decision, finding that the FOP petitioned for unit was appropriate and directed an election between the FOP and the Union for the individuals employed as Special Police. The Region's decision was served on the Union's designated representative, Mr. Mundy.

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[11] It was Mr. Mundy's intent to secure an agreement from Officer Bryant that if Officer Bryant's adverse action appeal was lost, then Officer Bryant would not use it as an issue in any Authority ordered election between FOP and Respondent.

[12] The representation petition was still pending at this time as the Regional Director had not yet issued his decision on the matter.

After the Region's decision was issued, Mr. Mundy decided that he would no longer represent Officer Bryant in his adverse action appeal. Mr. Mundy then called Officer Bryant and scheduled a meeting with him for September 12, 1984. At the meeting in the Union's office, Mr. Mundy told Officer Bryant that since his (Mr. Mundy's) salary was paid by the District Council and he represented the Local Union, there was a conflict of interest in his representing Officer Bryant because of Officer Bryant's support of the FOP, a rival labor organization. Mr. Mundy then told Officer Bryant he would no longer represent him in the appeal of his adverse action.[13] Officer Bryant, stunned, asked Mr. Mundy, "Who is going to represent me?" Mr. Mundy replied, "It doesn't matter to me who represent you. I suggest you proceed forward with your case." Thereafter, on October 1 and 9, 1984, Officer Bryant requested the Library of Congress and the arbitrator to grant a postponement of the adverse action hearing as he was left without representation. Officer Bryant's case is currently on indefinite postponement.

Mr. Mundy admits that in certain proceedings, namely those proceedings where the Union has authority to act as principal, Council 26 acts as agent for the Union. However, Mr. Mundy denies acting as agent for the Union in adverse actions since the Union has no standing as principal in such situations. To the extent that he, in the past, represented unit employees in adverse actions under the Library of Congress adverse action regulations, he points out that he was merely acting as the designated representative of the affected employee and not the agent of the Union. Mr. Mundy further admits that the Regional Director's "order of election" prompted him to cease representing Mr. Bryant. In this latter context, he points out that the sole reason he withdrew was his opinion that he would be violating the Cannons of Legal Ethics by representing an individual who had taken a position contrary to that of the Union which employs him.

Discussion and Conclusions

The General Counsel takes the position that the District Council was the agent of the local Union and in such circumstances the Union was responsible for the actions of Mr. Mundy in refusing to represent Mr. Bryant under the Library of Congress' adverse action procedure. Further, according to the General Counsel, since Mr. Mundy, contrary to his past practice, refused to continue to represent Mr. Bryant in the adverse action proceeding because of his, Mr. Bryant's support of a rival union, the Union not only failed in its duty of fair representation, but also interfered with, restrained and coerced Mr. Bryant in the exercise of his rights accorded by the Statute and hence violated Sections 7116(b)(1) and (8) of the Statute.

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[13] In response to a question from his counsel, Mr. Mundy admitted that the Regional Director's order of election was the reason for his decision not to continue representing Mr. Bryant, since "this would mean that I would be representing somebody who is campaigning to get out of the bargaining [unit] that I represent."

The Union takes the position that it has no obligation to represent employees in adverse actions under the Library of Congress regulations since its sole standing in such proceedings is that of the personally selected representative of the affected employee. In support of this position the Union relies on the decision of the undersigned Administrative Law Judge in Library of Congress and American Federation of State, County, and Municipal Employees, Local 2910, Case No. 3-CA-40116, OALJ-84-87, July 12, 1984. To the extent that a contrary conclusion is reached, the Union takes the further position that it was not guilty of an unfair labor practice since the record evidence establishes that Mr. Mundy was not in any event acting as agent of the Union but rather as the employee's personal representative. Finally, the Union takes the position that "even if the Union can or must represent employees in adverse action proceedings, no unfair labor practice occurred in this case" since the record evidence establishes that Mr. Mundy declined to further represent Mr. Bryant not because of his support of a rival labor organization but rather because of his opinion that he would be violating the Cannons of Legal Ethics imposed upon Attorneys if he continued representing an employee who had taken a position contrary to that of a Union which employs him.

Contrary to the contention of the Union, I find that Mr. Mundy was acting as agent for the Union when he refused to continue representing Mr. Bryant. The Union's sole basis for denying the existence of agency status for Mr. Mundy, the Executive Director of the Council, is the Union's absence of any independent standing in adverse action proceedings under the regulations of the Library of Congress. However, the absence of standing in adverse action proceedings does not in and of itself negate a finding of agency. An agency relationship is not determined by the forum that the alleged representative operates in but rather is determined by the powers conferred upon the alleged representative by the principal, here the Union. Where the alleged representative is empowered to act in the principal's stead, the representative becomes the principal's agent and the principal is responsible for the representative's actions. The fact that the principal has no legal standing in a particular forum does not destroy the agency-principal relationship. Of course, the agent standing in the stead of the principal is subject to any restrictions applicable to the principal.

In the instant case, Mr. Bryant was originally represented in the adverse action proceeding by a union steward. Thereafter, due to the retirement of the union steward, and pursuant to a letter from Mr. Bryant to the Union demanding another union representative in the adverse action proceeding under threat of a ULP, the Union, without any further contact with Mr. Bryant, arranged for Mr. Mundy, who was admittedly its agent in other proceedings, to represent Mr. Bryant. Thus, while it is true that no additional money over and above Mr. Mundy's salary as Executive Director of the District Council was charged for such representation, the fact remains that the Union, in accordance with its advertised services to union members, did provide Mr. Bryant with a representative in the adverse action proceeding, namely Mr. Mundy. To the extent that the Union provided Mr. Bryant, as part of its services, Mr. Mundy stood in the Union's stead and became an agent of the Union. Being an agent of the Union, the Union was responsible for Mr. Mundy's subsequent actions in the adverse action proceedings.

The record establishes and I so find, that Mr. Mundy resented the fact that Mr. Bryant had exercised his statutory rights and sponsored and/or assisted a rival labor organization in an attempt to unseat the Union as the exclusive representative of the Special Police employed by the Library of Congress. Subsequently, when the rival labor organization succeeded in its attempt to have an election scheduled, Mr. Mundy admittedly ceased representing Mr. Bryant in the adverse action proceeding on the alleged ground that the continued representation of Mr. Bryant would result in a breach of the Cannons of Legal Ethics. Thereafter, no attempt was made by the Union to secure an alternate representative for Mr. Bryant in his adverse action proceeding.

While I do not quarrel or take issue with Mr. Mundy's conclusion that his continued representation of Mr. Bryant, due to his personal feelings concerning Mr. Bryant's actions in aiding and abetting a rival union, might well constitute a violation of the Cannons of Legal Ethics, the fact remains that Mr. Bryant because of his exercise of a statutory right to support a rival labor organization was, contrary to the past practice of the Union, denied by the Union's agent, Mr. Mundy, representation equal to that afforded by the Union to other unit employees in adverse action proceedings. Inasmuch as Mr. Mundy was the Union's agent, Mr. Mundy's actions, namely refusing to represent a unit employee because of his dissident activity, are attributable to the Union. The Union, cannot escape liability on the ground that its agent's refusal to continue to represent Mr. Bryant was because of the Cannons of Legal Ethics and not Mr. Bryant's dissident activity. Being responsible for its agent's activity, it was incumbent upon the Union to secure the services of another representative for Mr. Bryant who would not be encumbered by loyalty to the Union and animosity to Mr. Bryant for his participation in activities protected by the Statute.

Inasmuch as the record makes it clear that the reason Mr. Bryant was denied continued representation in his adverse action proceeding was his support for a rival union, I am constrained to find based upon applicable Authority precedent that the Union breached its duty of fair representation in violation of Sections 8(b)(1) and (8) of the Statute when it ceased giving Mr. Bryant representation in the adverse action proceedings being held pursuant to the Library of Congress' regulations. American Federation of Government Employees and SSA, 17 FLRA No. 72.

To the extent that the Union relies on my recommended decision in Library of Congress and American Federation of State, County, and Municipal Employees, Local 2910, supra, as a defense to its actions, I find such case to be distinguishable. The aforementioned case dealt solely with the question of whether the Union's right to information under Section 7114(b) of the Statute was applicable to an adverse action proceeding held pursuant to the Library of Congress' regulations wherein the Union's presence was not based upon its standing as the exclusive representative but rather its selection by the affected employee as his personal representative.

Here the sole issue is the denial of fair representation because of a unit employee's activities on behalf of a rival union and not what statutory rights are available to a union once it undertakes the representation of an employee in a forum where its standing is merely that of a personal representative. The fact that a union might not be able to utilize its statutory Section 7114(b) rights to information in such forum is no defense to its failure to abide by its past practice of providing legal counsel to unit employees in adverse actions. A dissident unit employee is entitled to the same representation from its exclusive representative as a loyal unit employee. To the extent that the union representative's status is confined to that of a personal representative with no Section 7114(b) rights, then, that is all the representation the affected employee is entitled to.

Having found that the Union violated Sections 7116(b(1) and (8) of the Statute, it is hereby recommended that the Federal Labor Relations Authority, issue the following:

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the American Federation of State, County, and Municipal Employees, Local 2477, AFL-CIO, shall:

1. Cease and desist from:

   (a) Refusing and/or failing to provide legal representation to Mr. Tyrone M. Bryant or any other unit employee in adverse action proceedings under the Library of Congress' regulations because Mr. Bryant and/or any other employee had exercised their statutory right to support a rival labor organization.

   (b) Interfering with, restraining, or coercing Mr. Bryant or any other unit employee in the exercise of their right to support a rival labor organization freely and without fear of penalty or reprisal.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Provide legal representation to Mr. Tyrone M. Bryant and all other unit employees in adverse action proceedings without discrimination and without regard to their activities in support of a rival labor organization.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Library of Congress are customarily posted, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the President of Local 2477, American Federation of State, County, and Municipal Employees, AFL-CIO, or his designee and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members and to other employees are customarily posted. The President of Local 2477, American Federation of State, County, and Municipal Employees, AFL-CIO, shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Library of Congress, for posting in conspicuous places where the respective unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: May 15, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to provide legal representation to Mr. Tyrone M. Bryant or any other unit employee in adverse action proceedings under the Library of Congress' Regulations because Mr. Bryant or any other unit employee had exercised their statutory rights to support a rival labor organization.

WE WILL NOT interfere with, restrain, or coerce Mr. Bryant or any other unit employee in the exercise of their right to freely and without fear of penalty or reprisal to support a rival labor organization.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide legal representation to Mr. Tyrone M. Bryant and other unit employees in adverse action proceedings without discrimination and without regard to their activities on behalf of a rival labor organization.

____
(Labor Organization)

Dated: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF ENERGY
WESTERN AREA POWER ADMINISTRATION
GOLDEN, COLORADO

Respondent

and

Case No. 7-CA-1229

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCALS 640, 1245, 1759, 1959
AND 2159

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondent and cross-exceptions filed by the Charging Party (Union) and the General Counsel. The Union also filed an opposition to the Respondent's exceptions. The complaint alleged that the Respondent had violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to bargain with the Union over pay rates for prevailing rate employees in Supervisory Craftsman positions.

II. Background

In 1977, Wage Board employees who were involved in the transmission and marketing of electrical power, generated at Federal power projects throughout a 15-state area in the western part of the country, were transferred from the Department of the Interior's Bureau of Reclamation to the Western Area Power Administration in the newly created Department of Energy. The Wage Board employees who were involved in the power production function remained with the Bureau of Reclamation. At the Bureau of Reclamation, the employees who were transferred and the employees who remained had been members of a total of six different bargaining units which were located in the six different organizational sub-elements of the Bureau of Reclamation. Those bargaining units were represented by the International Brotherhood of Electrical Workers (IBEW).

In Department of Energy, Western Area Power Administration (WAPA 1), 3 FLRA 76 (1980), the Authority found that the appropriate bargaining unit for those employees transferred from the Department of the Interior's Bureau of Reclamation to the Department of Energy's Western Area Power Administration (WAPA) should be an activity-wide unit at WAPA, as contended by the Agency in that case. However, contrary to WAPA's assertion that the employees classified as Foreman I, II, and III should be excluded from the bargaining unit as supervisors under Executive Order 11491, as amended, the Authority found that those employees should be included in the unit. Id. at 80.

The Authority noted in WAPA 1 that the incumbents of the Foreman I, II, and III positions had been included in the bargaining units at the Bureau of Reclamation from a date prior to 1962, and that a primary reason for their inclusion was that historically their rates of pay were negotiated by IBEW and the Bureau of Reclamation in the same manner as the wage rates of other employees in the units. Id. at 79-80. Further, the Authority noted that Congress had expressed approval of those bargaining practices through the enactment of section 704 of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1218 (codified at 5 U.S.C. § 5343 note (1982)),[1] and through the legislative history attendant to its enactment. WAPA 1 at 80-81.

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[1] Section 704 of the Civil Service Reform Act, codified at 5 U.S.C. § 5343 note (1982), provides as follows:

> (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

(Continued)

In addition to the terms of the statutory provision, the Authority noted more specifically that Congressman Ford had stated, with respect to the bargaining practices concerning the "trade and craft employees in units or portions of units" transferred from the Department of the Interior to the Department of Energy, that "[t]his has produced some of the most stable and effective collective bargaining in the history of public employee labor relations." Id. at 78.[2] The Authority therefore concluded that "[t]o disrupt the historical inclusion of Foreman I, II, and III with the nonsupervisory employees in any unit established at WAPA through the period of the Executive Orders and before could frustrate the long history of stable and effective collective bargaining." Id. at 80. Given the special circumstances of these employees, the Authority found the Foreman I, II, and III positions to be appropriately included in the bargaining unit, without consideration of their supervisory status.

On June 29, 1980, one month after the Authority's issuance of its decision in WAPA 1, the Agency reclassified its Foreman II and III positions as Supervisory Craftsman positions. Then, on July 15, 1980, WAPA filed a unit clarification petition with the Authority, seeking to exclude as supervisors those employees in its reclassified Supervisory Craftsman positions. The Regional Director dismissed the unit clarification petition, finding that the evidence on file indicated that the Supervisory Craftsman positions were previously classified as Foreman II and

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(Continued)

(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--

(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;

(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or

(C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code.

[2] Quoting 124 Cong. Rec. H8469, Aug. 11, 1978.

III positions so that their inclusion in the unit was governed by the Authority's earlier decision. WAPA appealed this dismissal to the Authority, and the Authority denied the request for review, finding that WAPA "neither contends nor has it demonstrated that the incumbents of the disputed positions no longer perform the duties of the positions previously classified as Foreman II and III." Department of Energy, Western Area Power Administration, Golden, Colorado (WAPA 2), Case No. 7-CU-24 (February 17, 1981).

After the Authority denied WAPA's request for review, the current dispute arose. WAPA refused to negotiate with regard to wages for employees in Supervisory Craftsman positions, and refused to recognize these employees as members of the bargaining unit.

III. Decision of the Administrative Law Judge

The Judge found that the inclusion of "prevailing rate" foremen and supervisors, like the Respondent's Foreman II and III employees and its reclassified Supervisory Craftsman employees, in bargaining units with other "prevailing rate" employees occurred regularly since as early as 1969, and was condoned under Executive Orders 10988 [3] and 11491.[4] The Judge noted, further, that continuation of this practice is permitted under section 7135(a) of the Statute and section 704 of the CSRA.[5] He held, therefore, that the Respondent's improper refusal to bargain with its Supervisory Craftsman employees constituted an unfair labor practice under section 7116(a)(1) and (5) of the Statute.

IV. Positions of the Parties

In support of its position that the Judge erred in finding that its Supervisory Craftsman employees must be included in the bargaining unit, the Respondent argues that the Authority's decision in WAPA 1 is not binding here because it was decided under Executive Order 11491, and not under the Statute. The Respondent argues further that the more recently established Supervisory Craftsman positions are clearly "supervisory" positions to be excluded from the bargaining unit under the Statute, notwithstanding other provisions in title 5 of the U.S. Code regarding "prevailing rate employees," as these positions are categorized. The Respondent argues finally that the Authority's official notice in WAPA 1 that the past inclusion of the Foreman II and III positions in bargaining units resulted in a stable bargaining history is factually inaccurate and, even if accurate, it does not suffice to override the specific prohibition against including supervisors in bargaining units under both Executive Order 11491 and the Statute.

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[3] 1962 U.S. Code Cong. & Ad. News 4269.

[4] 1969 U.S. Code Cong. & Ad. News 2948.

[5] See footnote 1.

In its opposition to these contentions by the Respondent, the Union argues that the Judge committed no such errors in his legal analysis of this case. The Union also submitted a cross-exception, however, asserting that the Judge erred in his factual determination that the Respondent "substantially changed" the range of supervisory responsibility in the Supervisory Craftsman positions compared with that of the former Foreman II and III positions. The Union further argues that, in any event, this alleged error has no real significance because the Judge correctly found that the Supervisory Craftsman positions were properly included in the bargaining unit for other reasons.

The General Counsel filed a brief in support of the Union's limited factual cross-exception, arguing that any distinctions in supervisory duties between the Foreman II and III positions and the Supervisory Craftsman positions "involve the method or degree of performing a given function rather than significant variance in substantive functions or responsibilities."

V. Analysis

The issue before the Authority is whether the Respondent's refusal to negotiate with regard to wages for employees in the reclassified Supervisory Craftsman positions, and its refusal to recognize these employees as members of the bargaining unit, violate section 7116(a)(1) and (5) of the Statute. In making such a determination, the Authority must decide whether these positions continue to be sufficiently analogous to the Foreman II and III positions to warrant their historical inclusion within the unit, as found appropriate in WAPA 1 and WAPA 2.

The Judge found in this case that "Supervisory Craftsmen perform all the duties they previously performed as Foreman II or Foreman III," and that "the record does not show any duty now performed by Supervisory Craftsmen which was not performed by Foreman III and, in most respects by Foreman II." He found further that, although the range of supervisory responsibility did increase "substantially," it was "principally because WAPA [had] unified the duties of Supervisory Craftsmen so that each Supervisory Craftsman . . . perform[ed] the full range of duties previously performed by Foreman II and III."

The Judge went on to note that the Statute generally prohibits the inclusion of supervisors in bargaining units. However, he noted further, as the CSRA expressly provides, the terms and conditions of employment for "prevailing rate employees" shall continue to be negotiated as in the past, regardless of contrary provisions in the United States Code at title 5, chapter 71.6/ He noted additionally that "prevailing rate employees" have been defined by statute to include "a foreman and a supervisor . . . in a position having trade, craft, or laboring experience and knowledge as a paramount requirement . . . ." 5 U.S.C. § 5342(a)(2)(A).7/ The Judge then found that the record in this case demonstrates clearly that both the Foreman II and III positions and the Supervisory Craftsman positions were "prevailing rate" positions covered by these statutory provisions. He therefore concluded that, under the terms of these provisions, employees in Supervisory Craftsman positions cannot be excluded from the bargaining unit. We adopt these findings by the Judge, and find that they control the disposition of the case.

Finally, the Respondent challenges the factual accuracy of a statement in the legislative history of the Statute which the Authority discussed, and relied on in part, in the earlier WAPA 1 decision as indicative of legislative intent

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6/ See footnote 1.

7/ The Authority relies on this statutory definition of "prevailing rate employee" because the CSRA uses the term in the same title of the U.S. Code without defining it, and we can discern no more appropriate definition. See Sutherland Statutory Construction § 27.02 (4th Ed).

to exempt certain supervisory employees from the general prohibition against their inclusion in bargaining units. We find in the context of this case that the accuracy of the statement at issue is irrelevant; it is not determinative of the legislative intent of the Statute. The challenged statement--whether accurate or inaccurate factually--simply reflects the legislative intent in the enactment of the Statute. See Sutherland Statutory Construction § 48.02 (4th Ed).

VI. Conclusion

Based on the considerations set forth above, the Authority concludes that the Respondent's refusal to negotiate with regard to wages for employees in Supervisory Craftsman positions, and to recognize these employees as members of the bargaining unit, constitutes a violation of section 7116(a)(1) and (5) of the Statute. We find further that the Respondent's refusal to bargain was clearly unjustified and flies in the face of the statutory requirement to bargain in good faith.

In reaching this conclusion, we note particularly that the Respondent was on notice, as the result of its earlier unit clarification petition, that the excluded positions were required to be included in the bargaining unit, and that the reclassification of those positions to Supervisory Craftsman did not change the appropriateness of their inclusion in the unit. Department of Energy, Western Area Power Administration, 3 FLRA 76, 80 (1980).[8/] The Respondent has not demonstrated that the duties of the Supervisory Craftsman positions had changed to such an extent that it was justified in ignoring the Authority's

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[8/] In that case, the Authority's unit determination was based solely on Executive Order 11491, as amended, consistent with section 902(b) of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1224. Nothing in the Statute alters the inclusion of Foreman II and III employees in the unit. To the contrary, the fact that Foreman II and III employees come within the protection of section 704 of the CSRA (see note 1 above) is not in dispute in any of these cases. Whether or not these employees are supervisors within the meaning of the Statute, their entitlement to certain collective bargaining rights continues without regard to any inconsistent provision in the Statute.

previous holdings regarding the same positions and in refusing to recognize employees in Supervisory Craftsman positions as members of the bargaining unit. The Authority will not condone such activity which only serves to impede the collective bargaining process and frustrate our goal of efficient and effective government operations.

Having found that the Respondent's unilateral exclusion of the Supervisory Craftsman positions from the bargaining unit constituted a violation of section 7116(a)(1) and (5) of the Statute, we next consider what remedial order will best effectuate the purposes and policies of the Statute. In our opinion, the Respondent's unlawful conduct directly caused the incumbents of the excluded positions to be denied the benefits of exclusive representation, specifically the benefits of coverage under the collective bargaining agreement(s) applicable to the bargaining unit ever since their exclusion in 1982. Therefore, we shall order the Respondent to apply the terms of any agreement(s) negotiated between the parties covering the bargaining unit to the incumbents of the Supervisory Craftsman positions and, wherever possible, to apply such terms retroactive to the date of their unlawful exclusion from the unit.

Additionally, since the incumbents of the Supervisory Craftsman positions excluded from the unit are prevailing wage employees whose rates of pay are negotiable under section 704 of the Civil Service Reform Act of 1978 (see note 1), and the exclusive representative of the unit has been denied the right to negotiate rates of pay for the Supervisory Craftsman positions since 1982 because of their unlawful exclusion from the unit, we shall order the Respondent to negotiate in good faith upon request concerning such rates of pay and apply whatever agreement is reached retroactive to 1982. In our opinion, this is the only way that the affected employees can be made whole for the losses caused by the Respondent's unlawful conduct, and such an order is consistent with remedies provided in analogous circumstances. See, for example, Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington and Office of the Secretary, Department of the Interior, Washington, D.C., 9 FLRA 385, 388-89 (1982), in which the agency was ordered to permit negotiations at the level of exclusive recognition concerning wage rate increases for prevailing rate employees and to adjust their negotiated wage rate retroactively to the date of its unlawful refusal to permit such negotiations, consistent with a memorandum of understanding between the parties.[9]

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the United States Department of Energy, Western Area Power Administration, Golden, Colorado, shall:

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[9] As the Authority recently stated in its decision and order on remand in Environmental Protection Agency, 21 FLRA No. 98 (1986), slip op. at 5, while the Authority need not--and generally does not--order parties to give retroactive effect to the provisions of a collective bargaining agreement, the Authority will exercise its discretion under section 7118(a)(7)(B) of the Statute to order such a remedy in appropriate circumstances. One such circumstance is where an agency has refused to bargain on a specific proposal which was substantially identical to a proposal previously found by the Authority to be within the duty to bargain. Veterans Administration Regional Office (Buffalo, New York), 10 FLRA 167 (1982). We view the situation in this case as analogous, since the Respondent's unlawful conduct similarly has deprived the exclusive representative of an opportunity to bargain in a timely manner over clearly negotiable conditions of employment affecting some bargaining unit employees. As stated above, such an order is required here if the affected employees are to be made whole for the Respondent's unlawful conduct. Moreover, unlike the circumstances in Environmental Protection Agency, such an order here would not disrupt the agency's operations because it would merely require retroactive application of negotiated wage rates for a relatively few individuals in the Supervisory Craftsman positions.

1. Cease and desist from:

(a) Refusing to negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, the exclusive representative of its employees, concerning the conditions of employment of employees in Supervisory Craftsman positions.

(b) Refusing to recognize employees in Supervisory Craftsman positions as being included in the unit previously determined to be appropriate by the Federal Labor Relations Authority in Department of Energy, Western Area Power Administration, 3 FLRA 76 (1980), and in Department of Energy, Western Area Power Administration, Golden, Colorado, Case No. 7-CU-24 (February 17, 1981).

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Recognize the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, as the exclusive representative of all of the employees in the unit where it has been granted exclusive recognition, including the employees in the Supervisory Craftsman positions.

(b) Apply retroactively to the incumbents of the Supervisory Craftsman positions who have been unlawfully excluded since 1982 from the bargaining unit exclusively represented by the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, the terms of any agreement(s) reached between the Respondent and the exclusive representative applicable to that bargaining unit, to the extent that the retroactive application of such terms to the Supervisory Craftsman positions is possible.

(c) Upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, about the rate(s) of pay applicable to the prevailing wage employees in the

Supervisory Craftsman positions who were unlawfully excluded from the bargaining unit since 1982, and apply whatever agreement is reached concerning their pay retroactive to the date of their unlawful exclusion from the bargaining unit in 1982.

(d) Upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959, and 2159, the exclusive representative of a unit of its employees, concerning the conditions of employment of all its employees in that unit, including those employees in Supervisory Craftsman positions.

(e) Post at its facilities in Golden, Colorado, and at its facilities in each District of the Western Area Power Administration, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed personally by the Administrator, Western Area Power Administration, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., July 29, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY AND IN ORDER TO EFFECTUATE THE POLICIES OF CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 1159 (IBEW), the exclusive representative of our employees, concerning the conditions of employment of employees in Supervisory Craftsman positions.

WE WILL NOT refuse to recognize employees in Supervisory Craftsman positions as being included in the unit previously determined to be appropriate by the Federal Labor Relations Authority in *Department of Energy, Western Area Power Administration*, 3 FLRA 76 (1980), and in *Department of Energy, Western Area Power Administration, Golden, Colorado*, Case No. 7-CU-24 (February 23, 1981).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL recognize the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159 as the exclusive representative of all of the employees in the unit where it has been granted exclusive recognition, including those employees in the Supervisory Craftsman positions.

WE WILL apply retroactively to the incumbents of the Supervisory Craftsman positions who have been unlawfully excluded since 1982 from the bargaining unit exclusively represented by the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, the terms of any agreement(s) reached between the Respondent and the exclusive representative applicable to that bargaining unit, to the extent that the retroactive application of such terms to the Supervisory Craftsman positions is possible.

WE WILL, upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159, about the rate(s) of pay applicable to the prevailing wage employees in the Supervisory Craftsman positions who were unlawfully excluded from the bargaining unit since 1982, and apply whatever agreement is reached concerning their pay retroactive to the date of their unlawful exclusion from the bargaining unit in 1982.

WE WILL, upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959, and 2159, the exclusive representative of a unit of our employees, concerning the conditions of employment of all the employees in that unit, including those employees in Supervisory Craftsman positions.

____
(Activity)

Dated: __________ By: __________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202, and whose telephone number is: (303) 837-5224.

[22 FLRA No. 86]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. DEPARTMENT OF ENERGY :
WESTERN AREA POWER ADMINISTRATION :
GOLDEN, COLORADO :
:
Respondent :
:
and : Case No.: 7-CA-1229
:
INTERNATIONAL BROTHERHOOD OF :
ELECTRICAL WORKERS, AFL-CIO, LOCALS :
640, 1245, 1759, 1959 and 2159 :
:
Charging Party :
:

. . . .

David A. Fontanella, Esquire
Christine Krithades, Esquire
Mr. Buster B. Boatman
For the Respondent

Donald P. MacDonald, Esquire
Patricia Coan, Esquire
For the Charging Party

Nicholas J. LoBurgio, Esquire
James J. Gonzales, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(5) will be referred to, simply as "16(a)(5)".

§2423.1, et seq., was initiated by a charge filed on May 29, 1981 (G.C. Exh. 21). The Complaint and Notice of Hearing issued on August 31, 1981 (G.C. Exh. 24), the hearing being set for November 18, 1981. By Order dated October 28, 1981 (G.C. Exh. 26), the hearing was postponed indefinitely. By Order dated January 20, 1982, this case, together with other cases, was set for calendar call and for hearing on April 19, 1982 (G.C. Exh. 27). By letter dated February 3, 1982, Counsel for the Charging Party, International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159 (hereinafter referred to as "IBEW" or the "Union"), filed a Motion For Summary Judgment (G.C. Exh. 28); by Order dated March 1, 1982, the Acting Regional Director transferred Charging Party's Motion For Summary Judgment to the Authority (G.C. Exh. 29); by notice dated March 1, 1982, the General Counsel stated that he ". . . takes no position regarding the merits of the above cited Motion filed by Charging Party" (G.C. Exh. 29); by letter dated February 19, 1982, Respondent filed a Response to the Motion For Summary Judgment (G.C. Exh 30); on, or about, March 9, 1982, Counsel for Charging Party filed a Memorandum In Reply To Respondent's Response (G.C. Exh. 31); by letter dated March 22, 1982, Respondent filed a response to Charging Party's memorandum (G.C. Exh 32); on March 26, 1982, Respondent filed a Motion for a More Specific Hearing Date (G.C. Exh. 34). By Order dated March 31, 1982, the Authority transferred Charging Party's Motion For Summary Judgment to this Office. By Petition dated April 2, 1982, Charging Party requested revocation of the Subpoena Duces Tecum dated March 24, 1982; by Order dated April 6, 1982, said Petition was transferred to this Office; and by Order dated April 12, 1982, the Petition to Revoke was granted and the Subpoena Duces Tecum dated March 24, 1982, was revoked (G.C. Exh 37). In a conference call with counsel for all parties, the undersigned granted Respondent's Motion for a More Specific Hearing Date and fixed April 20 as the date for the commencement of the hearing in this matter and only counsel would be required to appear at the Calendar Call on April 19, and orally advised the parties that Charging Party's Motion For Summary Judgment would not be granted. At the Calendar Call on April 19, 1982, Council for General Counsel filed a further Motion for Summary Judgment which was taken under advisement and after argument on April 20, 1982, after the opening of the hearing, was denied (Tr. 20).

All parties were represented at the hearing by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues as delineated by the undersigned, and were afforded opportunity to present oral argument. At the close of the hearing, May 21, 1982, was fixed as the date for mailing, or filing, post-hearing briefs and counsel for each party has timely filed, or mailed, an excellent brief, received on or before May 25, 1982; however, counsel for General Counsel, by letter dated May 24, 1982, noted the inadvertent ommission of pages 19-23 of his brief and counsel for Respondent by notice dated May 26, 1982, noted an error in citations and submitted corrected pages 6 and 7 of its brief. Each request is granted and each brief has been corrected by inserting the missing or corrected pages as requested. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Background

Prior to 1977 the activities involved were under the Department of Interior's Bureau of Reclamation (hereinafter referred to as "BR"). In 1977, Congress created the Department of Energy and the Department of Energy Organization Act, P.L. 95-91, transferred various operations, functions and responsibilities from numerous Departments and bodies to the Department of Energy, including all functions of the Secretary of the Interior with respect to:

> "(E) the power marketing function of the Bureau of Reclamation, including the construction, operation, and maintenance of transmission lines and attendant functions." (P.L. 95-91, Sec. 302(a)(1)(E)).

The Department of Energy in turn created the Western Area Power Administration (hereinafter also referred to as "WAPA") to which this power marketing function was delegated. BR had operated through five separate and autonomous regions in a fifteen state area. Although IBEW had a long-standing collective bargaining relationship with the BR, there were a variety of bargaining units, a number of different wage scales, etc. On October 23, 1978, WAPA filed a representation petition (G.C. Exh. 1); and on November 7, 1978, WAPA filed an amended petition (Case No. 61-4217(RA) (G.C. Exh. 2)). Although filed under the Executive Order, the Federal Service Labor-Management Relations Statute, P.L. 95-454, had been enacted October 13, 1978, effective 90 days after the date of enactment, and on April 18 and May 29,[2] 1980, the Authority issued its decision in Case No. 61-4217(RA), 3 FLRA No. 12, 3 FLRA 76 (1980). In agreement with WAPA, the Authority concluded that,

> ". . . WAPA is not the successor employer to the bargaining relationship between Intervenors and the USBR. . . ."

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[2] In its initial decision, although the Authority stated, in part, that ". . . there are no current WAPA employees who were previously in the bargaining unit . . . represented by Local 611", a footnote stating that "*Accordingly, IBEW Local 611 will not appear on the ballot as described in the Direction of Election" was inadvertently omitted and, accordingly, a corrected decision issued on May 29, 1980.

And, in further agreement with WAPA, concluded,

> "that an activity-wide unit of all WB [Wage Board] employees would be appropriate."

However, in disagreement with WAPA, the Authority held that Foreman I, II, and III should be included in the unit found appropriate. Although the Authority stated,

> "The record herein does not set forth the duties, authority and responsibilities of employees in the disputed classifications." (3 FLRA at 79)

and,

> "The record evidence is insufficient upon which a determination of the supervisory status of Foreman I, II, and III can be based." (3 FLRA at 80)

the Authority concluded that,

> ". . . we include Foreman I, II, and III in the unit here found appropriate, without passing upon their supervisory status." (3 FLRA at 80),

for the reasons, inter alia, that,

> ". . . these workers were included as members of the bargaining units at USBR since before 1962 and their wage rates were negotiated in the same manner as the wage rates of other personnel in the units. Congressman Ford stated with respect to the bargaining practices concerning these 'trade and craft employees in units or positions of units' transferred from Interior to DOE that: 'This has produced some of the most stable and effective collective bargaining in the history of public employee labor relations' (124 Cong. Rec. H8469, Aug. 11, 1981) [Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Comm. Print No. 96-7 (hereinafter referred to as "Legislative History") at page 857] To disrupt the historical inclusion of Foreman I, II, and III with the nonsupervisory employees . . . could frustrate the long history of stable and effective collective bargaining. . . ." (3 FLRA at 80)

. . .

". . . The legislative history of the Civil Service Reform Act of 1978 shows the intent of Congress that the wage board employees transferred from Interior to DOE should continue to enjoy the broad scope of bargaining at DOE similar to that which has existed at Interior. Thus, the Conference Committee, in discussing §704 of Title VII of the CSRA (92 Stat. 1218), as subsequently enacted, stated:

> As revised, [section 704] overrules the decision of the Comptroller General . . . relating to certain negotiated contracts applicable to employees under the Department of the Interior and the Department of Energy. This section also provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy (H. Rep. No. 95-1717, Oct. 5, 1978, at 159) [Legislative History, p. 827]

"Similarly, Congressman Ford, in explaining his proposed amendment of the House bill which lead (sic) to the adoption of §704, stated:

> "During committee markup, I offered an amendment . . . which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. . . ." (124 Cong. Rec. H8468, Aug. 11, 1978) [Legislative History, p. 857]. 3 FLRA at 80-81.

Notwithstanding that the decision of the Authority made reference to the 1978 legislative history of the Civil Service Reform Act, the case arose under, and was decided under, the Executive Order as the Authority specifically stated as follows:

> ". . . the Authority finds the following to constitute an appropriate unit for the purpose of exclusive recognition under Executive Order 11491, as amended:*

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*In conformity with §902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and direction of election does not prejudge in any manner either the meaning or application

> of related provisions in the new Statute or the result which would be reached by the Authority if the case had risen under the Statute rather than the Executive Order." (3 FLRA at 80).

The unit found appropriate by the Authority was as follows:

> "All Wage Board (WB) employees of the Department of Energy, Western Area Power Administration, including employees classified as Foreman I, Foreman II or Foreman III, excluding management officials, confidential employees, employees engaged in federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order." (3 FLRA at 80).

By letter dated June 16, 1980, Respondent requested reconsideration of the inclusion of Foreman I, II and III (G.C. Exh. 5) which was denied by Order dated June 30, 1980 (G.C. Exh. 7). Certification of IBEW issued on July 15, 1980 (G.C. Exh. 10) and on July 15, 1980, Respondent filed a Unit Clarification Petition, dated July 7, 1980 (7-CU-24) (G.C. Exh. 11) which sought clarification of "the status of certain persons employed by this agency for the purpose of performing supervisory duties as defined in the Federal Service Labor-Management Relations Statute" namely, "Supervisory Electrician; Supervisory Lineman; Supervisory Mechanic, Meter and Relay; Supervisory Mechanic, Electronic Equipment; Supervisory Substation Operator; and Supervisory Communications and Instrumentation Mechanic are clearly supervisory . . . and therefore are excluded from the unit described in 3 FLRA 12."[3] By letter dated September 30, 1980 (G.C. Exh. 14), the Regional Director dismissed the unit clarification petition for the reason, in essence, that, "The evidence on file indicates that the positions listed . . . were previously classified as Foreman I, Foreman II or Foreman III positions" and, accordingly, their inclusion was governed by the Authority's prior decisions, including its denial of WAPA's Motion for Reconsideration.

Respondent appealed the dismissal to the Authority (G.C. Exh. 15) and the Authority, by Decision dated February 17, 1981 (G.C. Exh. 17), denied the request for review and stated, in part, as follows:

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[3] Strictly speaking, the Authority had excluded, inter alia, "supervisors as defined in the Order." The definition of "Supervisor" in Section 2(c) of the Order is somewhat different from the definition of "supervisor" as defined in §3(a)(10) of the Statute; however, as the general effect of each definition is the same, the differences are not material for present purposes.

"In its request for review of the Regional Director's dismissal, the Activity/Petitioner contends . . . that the Foreman II and III positions have been reclassified and that the incumbents of those positions are currently in new classifications with changed duties which meet the statutory criteria for determining supervisory status. (Neither in its petition nor in the request for review did the Agency dispute the unit inclusion status of employees classified as Foreman I.) The Activity/Petitioner further contends that the Regional Director improperly refused to permit the presentation of evidence concerning the issue of supervisory status and ignored the Activity/Petitioner's offer of proof in this regard, and requests that the case be remanded for a hearing. . .

"The Authority concludes that the Activity/Petitioner's request for review herein must be denied. In this regard, the Activity/Petitioner has failed to make a specific offer of proof, either before the Regional Director or on appeal, to support its assertion that the duties performed by the incumbents of the disputed positions have changed significantly . . . More specifically, the Activity/Petitioner neither contends nor has it demonstrated that the incumbents of the disputed positions no longer perform the duties of the positions previously classified as Foreman II and III. Further, the Activity/Petitioner has failed to set forth what specific new duties currently performed . . . require their exclusion from the unit as supervisors within the meaning of section 7103(a)(10) of the Statute. Under the foregoing circumstances, the Authority concludes that no basis has been established to remand the subject case for a hearing . . .

"Accordingly, the request for review, seeking reversal of the Regional Director's dismissal of the . . . Petition for Clarification of Unit, is denied." (G.C. Exh. 17).

THE ISSUE

The issue, of course, is whether, as Paragraphs 4 and 5 of the Complaint alleges, WAPA refused to negotiate for employees "currently classified as Supervisory Craftsmen, and . . . has refused to recognize said employees as members of the bargaining unit. . . ." in violation of §§16(a)(5) and (1) of the Statute. WAPA denied the allegations of Paragraphs 4 and 5 of the Complaint (G.C. Exh. 25). As to Foreman I, II, and III, which the Authority included in the bargaining unit, WAPA asserts that it did bargain and that the agreement of the parties reflects the wage rates agreed upon for Foremen I, II and III (G.C. Exh. 18, Supplementary Labor Agreement #3, Wage Schedules). If WAPA refused to negotiate as to employees classified as Supervisory Craftsmen and refused to recognize Supervisory Craftsmen as members of the bargaining unit, as alleged in the Complaint, and, notwithstanding WAPA's denial, the record shows, as the findings hereinafter demonstrate, it did; nevertheless, an unfair labor practice may be found only if: a) there was interference, restraint, or coercion of "any employee in the exercise by the employee of any right under this chapter" (§16(a)(1)); or b) a refusal to consult or negotiate "with a labor organization as required by this chapter" (§16(a)(5)). While the Authority included in the unit found appropriate, "All Wage Board (WB) employees . . . including employees classified as Foreman I, Foreman II or Foreman III" the Authority excluded, inter alia, "supervisors as defined in the Order." (3 FLRA at 80). WAPA asserts that Supervisory Craftsmen are supervisors within the meaning of §3(10) of the Statute and that Supervisory Craftsmen are expressly excluded as employees by §3(a)(2)(iii) of the Statute.

Initially, the Charging Party and, subsequently, the General Counsel, at the hearing, moved for Summary Judgment on the ground, in essence, that in litigation before the Authority it had been determined that Supervisory Craftsmen were not excluded as supervisors within the meaning of §3(10) of the Statute and that there was no genuine issue as to any material fact.

Appropriate unit determinations of the Authority are not, pursuant to §23(a)(2), subject to direct review. In like manner, certifications and/or appropriate unit determinations by the National Labor Relations Board under the National Labor Relations Act are not subject to direct review. American Federation of Labor v. NLRB, 308 U.S. 401 (1940); Pittsburgh Plate Glass Company v. NLRB, 313 U.S. 146 (1941). Appropriate unit determinations of the Board under the National Labor Relations Act are, however, subject to challenge when a complaint of unfair labor practice is made predicated upon such determination, Pittsburgh Plate Glass Company, supra; and, by like token, appropriate unit determinations of the Authority are subject to challenge when, as here, a complaint of unfair labor practice is made predicated upon such determination.

As to the threshold question as to whether a determination of the Authority in a representation case may be relitigated in an unfair labor practice proceeding predicated thereon, I have no doubt or reservation that it may not, both because, as the Supreme Court stated, as to a like situation under the National Labor Relations Act where the Trial Examiner had refused to admit certain proof and the Board had affirmed the ruling because it was not shown that the evidence sought to be admitted was unavailable at, discovered since, or not introduced in, the representation hearing,

> ". . . If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wanted to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough." (Pittsburgh Plate Glass Company, supra, 313 U.S. at 162.

and because decisions of the Authority are, of course, controlling in subsequent litigation before the Authority. The fallacy of applying this principle here is, quite simply, that the Authority has not determined that Supervisory Craftsmen are, or are not, excluded as supervisors within the meaning of §3(10) of the Statute. In its decision determining the appropriate unit, the Authority had before it, considered, and decided the status of Foreman I, II and III. Indeed, the classification of "Supervisory Craftsmen" did not exist at the time of the Authority's unit determination. It is quite true that on July 15, 1980, WAPA filed a unit clarification petition which sought clarification of the status of certain persons, namely Supervisory Craftsmen, who were asserted "are clearly supervisory . . . and therefore are excluded from the unit described in 3 FLRA 12." The Regional Director dismissed this petition on September 30, 1980, and the Authority denied WAPA's request for review on February 17, 1981.

Although the Authority stated, inter alia, that WAPA had "failed to make a specific offer of proof . . . to support its assertion that the duties performed . . . have changed significantly" and that WAPA "has failed to set forth what specific new duties . . . require their exclusion from the unit as supervisors within the meaning of section 7103(a)(10) of the Statute", the Authority made no determination that Supervisory Craftsmen either are, or are not, supervisors within the meaning of §3(a)(10) of the Statute and its unit determination in 3 FLRA No. 12, 3 FLRA 76. In its unit determination decision, the Authority had stated,

> "The record herein does not set forth the duties, authority and responsibilities of employees in the disputed classifications" [Foreman I, II and III]

and,

> "The record evidence is insufficient upon which a determination of the supervisory status of Foreman I, II, and III can be based."

The Authority, quite properly, in view of the provisions of 5 U.S.C. §5342(a)(2) which defines "prevailing rate employee" as "an individual employed in or under an agency in a recognized trade or craft . . . including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement", the bargaining history as to such "prevailing rate employees", and the expressed

Congressional approval of such practice, simply excluded Foreman I, II and III, notwithstanding that the record was "insufficient upon which a determination of the supervisory status of Foreman I, II and III can be based", since, whether they were, or were not, supervisors, the statute defines "prevailing rate employees" as "including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement."

Nevertheless, the Authority made no determination of the supervisory status of Foreman I, II and III. By including Foreman I, II and III in the appropriate unit, obviously, the Authority by its exclusion of "supervisors as defined in the Order" excluded supervisors other than "employees classified as Foreman I, Foreman II, or Foreman III", if Foreman I, II and III were, in fact, supervisors, which, as noted, the Authority did not, and could not because of insufficient record evidence, determine. Thereafter, WAPA eliminated the classification of Foreman II and III and reclassified the incumbents as Supervisory Craftsmen who, it asserts, are supervisory and therefore excluded from the unit described in 3 FLRA No. 12. Had WAPA simply refused to bargain as to Supervisory Craftsmen, it would have been necessary, to establish an unfair labor practice, to determine in the complaint proceeding whether they were supervisors inasmuch as the representation proceeding had not considered the status of Supervisory Craftsmen and supervisors were excluded from the unit found appropriate. WAPA did not, however, do this; rather, it filed its unit clarification petition. Had the Authority determined that Supervisory Craftsmen were not supervisors within the meaning of its exclusion of supervisors from the appropriate unit, I would quite agree that WAPA could not relitigate issues which were litigated in a prior representation proceeding, cf. ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland-Forwarding Corporation, 194 NLRB 179 (1971); but I can not agree that WAPA may not litigate an issue which, admittedly, could have been litigated in the unit clarification proceeding, but was not because the petition was dismissed. Stated otherwise, summary judgment would be appropriate if the status of Supervisory Craftsmen had been fully litigated. As the Court of Appeals stated in Linn Gear Company v. NLRB, 608 F 2d 791, 103 LRRM 2021 (9th Cir. 1979),

> ". . . In Pittsburgh Plate Glass, in contrast to the case before us, the parties had a full and complete hearing. The court observed that the Union (1) participated in the hearing, (2) called witnesses, and (3) cross-examined those called by other parties. Pittsburgh Plate Glass, supra, [313 U.S. 146, 61 S. Ct. 908, 85 L. Ed. 1251 (1941)] at 162 . . . Here, the only affirmative action taken by Linn Gear was to consent to the holding of the election. Nowhere did it waive its right to be heard on the question of which employees were qualified to vote in the election. Clearly,

> Pittsburgh Plate Glass is not controlling on the record before us." (103 LRRM at 2022)
>
> . . .
>
> ". . . the entry of summary judgment was improper and the case must be remanded for a hearing before the Board." (103 LRRM at 2023)
>
>> [There were challenged ballots sufficient in number to affect the outcome of the election. The Regional Director "investigated" but did not hold a formal hearing. Whether the Regional Director resolved the challenge of eight other ballots or, sustained the union's challenge as to Hartl, and, therefore, did not reach the other eight since they would then not have been sufficient to affect the outcome, it is clear that the disposition of the challenge of this one ballot, Hartl's, was pivotal; the Regional Director sustained the union's challenge of Hartl's ballot; employer, Linn Gear, refused to bargain; unfair labor practice complaint issued and Board granted summary judgment on the basis that ". . . a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding", citing Pittsburgh Plate Glass. 236 NLRB 64 (1978)]

See, also, Henderson Trumbull Supply Corporation v. NLRB, 501 F. 2d 1224, 86 LRRM 3121 (2d Cir. 1974).

Similarly, although not involving objections to an election, this case involves material and substantial issues of fact which were wholly unresolved in the representation proceeding, namely: a) the duties of Foreman II and III; and b) the duties of Supervisory Craftsmen. Moreover, as "supervisors as defined in the Order" were excluded from the unit and WAPA asserts that Supervisory Craftsmen are now supervisors, it would be both appropriate and necessary to determine in the complaint proceedings whether, even though the Authority found that WAPA "failed to set forth what specific new duties . . . require their exclusion from the unit as supervisors. . . .", their duties now remove them from the unit as supervisors within the meaning of the Statute. Accordingly, the motions for summary judgment were denied and, the status of Supervisory Craftsmen having been litigated, the renewed motion for summary judgment is denied and the case will be determined on the record.

The factual issues delineated for litigation were: the duties of Foreman II and III and the duties of Supervisory Craftsmen. The prior unit determination was not relitigated and it was made abundantly clear that the Authority's prior unit determination was controlling and that Supervisory Craftsmen would be included in the bargaining unit, as Foreman II and III had been included in the bargaining unit, unless it was shown that their duties now remove them from the bargaining unit as supervisors within the meaning of the Statute.

Findings

1. Effective June 29, 1980, WAPA redescribed and reclassified "craft supervisory positions" in a memorandum, "Subject: Classification and Pay Rate - Wage Board Supervisory Positions" (G.C. Exhs. 8 and 9). Wage board supervisory positions were titled "Supervisory Lineman, Supervisory Electrician, Supervisory Mechanic, Meter & Relay", as applicable; and Pay was fixed at two increments:

> "a. 120 percent over highest rate supervised - applicable when the supervisory position exercises full supervisory responsibility for more than one crew, and each crew consists of three or more employees.
>
> "b. 115 percent over highest rate supervised - applicable if criteria for the 120 percent rate is not met, but criteria for classification as a supervisory wage board position is badly met (see 1 above).
>
> ["1. Classification . . . The administrative policy and criteria for allocation of a wage board supervisory position are:
>
> > "a. The position must meet the minimum supervisory responsibilities and functions of work planning, work direction, administration, personnel, equal employment opportunity, and safety. . .
> >
> > "b. The position must exercise the responsibilities contained in "a" above over three or more trade and craft employees on a regular, continuing basis.
> >
> > . . . ."]

2. By memorandum dated March 17, 1982, to Area Managers, to be disseminated to all wage board supervisors on March 26, 1982, WAPA announced its decision to adopt a single pay rate for all supervisory wage board

positions, "Our single rate is temporarily established at 115 percent over the highest journeyman craft supervised. The final rate will be established from wage survey data collected from utilities in the Western Area" (Res. Exh. 9). However, "During the interim between adoption of the single pay rate and implementation of appropriate adjustments consistent with the industry, the existing pay for all supervisory wage board employees will be continued without change" (Res. Exh. 9).

3. On January 13, 1981, the parties entered into a "Memo of Understanding" which provided as follows:

> "The question of whether employees formerly classified as Foremen II and III and now classified as Supervisory Electrician, Supervisory Linemen, etc. is presently in litigation. Should the final decision in this case include these classifications within the unit covered by this Agreement, the provisions of this agreement will apply to them and their rates of pay shall be subject to negotiation." (G.C. Exh. 18).

The Agreement, referred to in the Memo of Understanding, effective January 18, 1981, contained wage rates for Foreman I, II and III and for "Acting Supervisory Craftsmen" (G.C. Exh. 18, Supplementary Labor Agreement #3, Wage Schedules).

4. By letter dated March 30, 1981, IBEW notified WAPA of its desire to reopen bargaining, ". . . to amend our Agreement to include the proper job titles, job descriptions, and wages for all supervisory classifications included in our bargaining unit . . ." (G.C. Exh. 19).

5. By letter dated April 13, 1981, WAPA refused IBEW's request to reopen bargaining,[4] stating, in part, as follows:

> "It is our view that the supervisory craftsmen are excluded from the bargaining unit . . . Accordingly, I must respectfully decline your request to reopen bargaining. . . ." (G.C. Exh. 20).

6. The testimony, as more fully set forth hereinafter, shows that Foreman II and III were supervisors, both within the meaning of Section 2(c) of the Order,

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[4] By letter dated September 5, 1980, WAPA had agreed to continue to honor dues deduction authorizations from Supervisory Craftsmen (Res. Exh. 18) and, while stated to be a "purely temporary accomodation" pending "decision on the clarification of unit (CU) petition", Mr. Boatman, Chief of Labor/Employee Relations Branch, testified that "They are still being deducted" (Tr. 49).

> "(c) 'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" (E.O. 11491, as amended, Section 2(c)).

and within the meaning of §3(a)(10) of the Statute,

> "(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority." (5 U.S.C. §7103(a)(10)).

Thus, as the testimony set forth hereinafter shows, both Foreman II and Foreman III had responsibility for assigning work, assuring work completion, responsibility to recommend employees for hire, promotion, awards, or discipline, the responsibility to approve or disapprove leave, responsibility for training, and responsibility for safety. The record shows little about the exercise of authority by Foreman II to adjust grievances at the informal level, but the testimony showed, at the least, that they believed they had the authority to do so had they been confronted with such a problem;[5] but Foreman III did have, and did exercise, such authority, even if, as WAPA asserts, such authority was not exercised when the grievance was against management. Both Foreman II and Foreman III consistently exercised independent judgment in the exercise of their authority. The Authority has held that employees who perform such duties are supervisors within the meaning of §3(a)(10) of the Statute. See, Department of Defense, Department of the Army, Headquarters, U.S.

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[5] The absence of "grievances" over extended periods strongly suggests, as the testimony of Mr. Lockwood shows, Tr.228, that problems which others might well have considered "grievances" were resolved without being considered to have been "grievances".

Army Armament, Materials Readiness Command, Rock Island Arsenal, Illinois, 8 FLRA No. 127 (1982); National Guard Bureau, State of New York, Division of Military and Naval Affairs, Albany, New York, 9 FLRA No. 2 (1982). Indeed, WAPA both conceded and asserts that Foreman II and III were supervisors.

The record further shows beyond any possible doubt that personnel administration under WAPA has changed substantially and, clearly, there have been significant changes as to Supervisory Craftsmen. Supervisory Craftsmen have greater independence and supervisory responsibility, in part, because under WAPA certain engineers and managers utilized by BR were eliminated (Tr. 161); but principally because WAPA has unified the duties of Supervisory Craftsmen so that each Supervisory Craftsman now performs the full range of duties previously performed by Foreman II and III. Although duties and functions which were more informal under BR as to Foreman II and III have been formalized under WAPA, such as more detailed performance appraisals, the record does not show any duty now performed by Supervisory Craftsmen which was not performed by Foreman III and, in most respects by Foreman II. It is certainly true that some Foreman II may not have had, or exercised, significant responsibility for long-range planning but some did and all had responsibility, at the least, as Mr. Lighty, stated, for "short term" planning, i.e., monthly planning, albeit in accordance with long range goals; that some Foreman II had less responsibility for hiring new employees than Foreman III; that Foreman II did not prepare performance appraisals, as Foreman III did; nevertheless, the record shows that Foreman II had input on long-range planning, did express preference for selection of new employees and did give their rating of employees. On the other hand, it can not be seriously questioned that under WAPA the supervisory authority and responsibilities of each Supervisory Craftsman have been clearly set forth in WAPA's master position description (G.C. Exh. 11) and that as the result of assigning crews to each Supervisory Craftsman, Supervisory Craftsmen were given responsibilities that some had not had as Foremen II.

Mr. Boatman testified that craft duties performed by Supervisory Craftsmen were the same as the craft duties performed by Foreman II and Foreman III, i.e., as Mr. Boatman stated:

> "A For the journeymen duties, yes. That's right. Depending on the craft. An electrician performs electrician duties." (Tr. 49).

Although Mr. Boatman testified that under BR standards, Foreman II could perform journeymen duties up to 50 per cent of their duty time and Foreman III up to 15 per cent of the time (Tr. 50), from the record it does not appear that either Foreman II or III "worked with the tools" except on occasion. Certainly, the record does not support WAPA's assertion that "Foreman II were required to perform journeymen tasks" (Respondent Brief, p. 5).

a. Mr. Dennis Lenz, Chief, Operations Branch, Division of Organization and Personnel.

Mr. Lenz's task was to re-examine and re-certify all position descriptions transferred from BR. I do not question that, from a classification standpoint, he found inconsistencies and discrepancies (Tr. 65-70); however, for the purpose of this proceeding, only the duties actually performed by Foreman II and III, whether these duties changed under WAPA, and whether any change occurred after the representation hearing, are material. Mr. Lenz was largely without personal knowledge of the duties actually performed by Foreman II and III. With respect to various functions, Mr. Lenz testified that, from their job descriptions, Foreman II and III did not have "formal" responsibility (Tr. 101), for example to recommend training for their employees, but he understood "that they did speak to the second level of supervisors and make suggestions and recommendations" (Tr. 80); he[6] was not the "official rater of employee performance" but he would have recommended (Tr. 89); he would not have formally selected any employee on his crew, but "would have more or less advised . . . his supervisor, his GS supervisor on what he wanted to do." (Tr. 89); if he had a problem on his crew with one of his employees, that would "99 times out of a hundred, elevate to the GS supervisor rather than being resolved by the employee on site with is (sic) crew." (Tr. 89); he would "normally have had a very limited counseling role" (Tr. 89); he would "normally not have been involved in the grievance process under our agreement, that would have normally elevated immediately to the GS supervisor from a practical stand point irrespective of what the paper said."[7] (Tr. 89). With respect to Foreman II and III generally, Mr. Lenz testified that he believed they recommended for training. Thus, he stated,

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[6] At this point, Mr. Lenz was specifically referring to a desk audit of Supervisory Lineman Alvin Klaus (Tr. 89). Whether Mr. Klaus had been a Foreman II or a Foreman III was not shown.

[7] Article 15, Section 15.5, of the current agreement provides, in part, as follows:

> ". . . employees will be encouraged to act promptly either directly or through their representatives in bringing to the attention of their immediate supervisors, through informal discussion, any act, condition or circumstance which is causing employee dissatisfaction and to thereby seek supervisory explanation or action to remove the element of dissatisfaction before it serves as the basis for a formal grievance . . . ." Section 15.6 places disposition of formal grievances in supervisors other than Foreman or Supervisory Craftsmen.

> "A I believe they recommended for training but the three that I'm most familiar with did, in fact, make recommendations to their GS supervisor that this employee needs hot line training, that employee needs GMSC training." (Tr. 98).

Mr. Lenz testified that it was his understanding that some BR Foreman II and III made recommendations for promotion and some did not (Tr. 99). Although a GS supervisor actually prepared the paper and was the certifying official, Mr. Lenz stated,

> ". . . I think it would be unrealistic to assume that a GS supervisor who actually prepares the paper and is the certifying official, for, in pragmatic terms, would do that without talking to the people who are actually out there doing the work for him --
>
> . . .
>
> "A I think from my personal knowledge now the GS supervisor, in fact, rarely do not accept the recommendation. . . ." (Tr. 101).

As to Supervisory Craftsmen, Mr. Lenz testified that their responsibility as supervisors has been clearly set forth. For example, as to Mr. Klaus, who is a Supervisory C & I [Communications and instrument] Mechanic (Tr. 85), Mr. Klaus has 4 to 6 lineman working under him; that he is in direct charge; he assigns work; plans the work; hires them; hasn't had occasion to discharge; imposes discipline; makes out performance appraisals - he is first line rater (Tr. 86-87).

b) Mr. David Onstad, District Manager, Phoenix District

Mr. Onstad began employment with the BR as a Staff Engineer in 1963 and has held his present position with WAPA since September, 1978 (Tr. 117, 150). Mr. Onstad explained the organizational chart for the Phoenix District (Res. Exh. 1). He stated that there was only one Supervisory Craftsman who had been a legitimate Foreman III and this is Mr. Lenny Ward, although two others have been "grandfathered" (Tr. 119). As Foreman III, Mr. Ward had been in charge of the line crews and as Supervisory Craftsman he not only directly supervises one Lineman and four General Equipment Operators but also supervises three Supervisory Linemen each of whom directly supervises a line crew (Tr. 119). Mr. Ward is paid at 120 per cent of the journeyman rate and the other three Supervisory Linemen in the Transmission Lines Branch are paid at 115 per cent of the journeyman rate (Tr. 119). Mr. Ward's immediate supervisor is Mr. Dale Fowler, Chief of the Transmission Lines Branch, who in turn reports to Mr. Roy Lucas, Director of Transmission Lines and Substation Maintenance Division, and Mr. Lucas reports to Mr. Onstad (Tr. 120).

Mr. Onstad testified that Supervisory Craftsmen assign and direct work; and are responsible for long range planning, "They are responsible for figuring out what they are going to be doing the next year, the next week and the next months or so." (Tr. 120). When asked whether the Foreman had the same responsibility prior to 1980, Mr. Onstad testified that they did. He stated,

> "A Well, they've probably been in charge of most of the long range planning for quite some time prior to my coming to Phoenix. They worked together with the branch chiefs to figure out what maintenance would be done during the next year in different areas of responsibility.
>
> "Q What is the change then from what they are doing now with regard to long range planning and the way it was earlier?
>
> "A Probably not much in the area of long range planning.
>
> "Q Any other changes with regard to their assignment and direction of work?
>
> "A In regard to those two areas there hasn't been much change as far as what they do." (Tr. 120-121).

Mr. Onstad testified that all Supervisory Craftsmen approve leave (Tr. 121); that on the transmission line crew prior to May or June of 1980, the three Foreman II's "did not approve leave for people that worked for them.

8/ I am aware of the April 21, 1980, "sick-out" incident when about one-half of the wage board work force assigned to the Phoenix District Office failed to report for work and WAPA's assertion that some Foremen had both participated in the sick-out and had improperly approved leave for absentees which "resulted in five proposed letters of reprimand. In two cases leave granting authority has been withdrawn for an indefinite period." (Res. Exh. 22; Tr. 131). Although Mr. Onstad referred to "supervisory craftsmen" (Tr. 131), as the reclassification occurred later, it is apparent that his terminology was in error as Respondent Exhibit 22 confirms.

While Respondent points to this incident and the action of certain Foremen as showing a conflict in interest, it also confirms the leave granting authority possessed and exercised by Foremen.

Only the foremen III in charge of the entire crew approved leave and he did it for the whole crew." (Tr. 121); however, Mr. Onstad stated that Foremen II's, other than the three on the line crew, did approve leave[8] (Tr. 141), "I believe that the ones for the meter-relay mechanics and the electronic equipment mechanics and the automotive mechanics I believe that they did have [leave granting authority]" (Tr. 142). Mr. Onstad stated that when Foremen were reclassified as Supervisory Craftsmen, "we made a change in their responsibilities [speaking specifically of the Foreman II's on the line crew] and assigned people directly to them and they now have the leave approving authority for those people. They also do performance appraisals and anything else that goes along with being a supervisor for those people." (Tr. 121-122).

Mr. Onstad testified that there "was never a performance appraisal made as long as I was in Phoenix until last fall [1981] . . . there was an informal system in practice before but it was really on an exception basis. If there was something wrong somebody would bring something forward . . . there was never anything put in the record on a satisfactory performance." (Tr. 122).

Mr. Onstad further testified that Supervisory Craftsmen recommend promotions (Tr. 122; Res. Exh. 13) and that he did not believe that Foreman II or III did (Tr. 124); that Supervisory Craftsmen make recommendations for special achievement awards (Tr. 125; Res. Exh. 14); and that he was not aware of a similar responsibility of Foreman II or III (Tr. 126); that Supervisory Craftsmen certify position descriptions (Tr. 127-128; Res. Exh. 15); that he was not aware that Foreman II or III did so (Tr. 128); that Supervisory Craftsmen recommend training (Tr. 129; Res. Exh. 12) and that to his knowledge Foreman II and III did not. Mr. Onstad further testified that Supervisory Craftsmen attend management staff meetings (Tr. 130) but also conceded that Foreman II and III attended the "first formal staff meeting" in April, 1980 (Tr. 130-131).

c) Mr. Orlan O. Lighty, Director, Transmission Line and Substation Maintenance Division, Sacramento, California

Mr. Lighty was initially employed by the BR as a GS supervisor at Shasta Dam where he supervised one line crew, two electrician crews and one electronics crew (Tr. 158). There were three Foreman III's and one Foreman II. He began his present duties with WAPA in 1978 (Tr. 159).

Mr. Lighty testified that considerably more tasks are performed by the supervisor now than previously with the BR because of the reduction of levels of supervision,

> "A Previously with the Bureau if you took from the crafts supervisor up through the regional director

> there were six levels of supervision where with us there were only four.
>
> "Q Is that one of the reasons why these supervisors now have more supervisory responsibilities?
>
> "A They have a wider range of supervisory level and as I do myself." (Tr. 161).

Mr. Lighty testified that, ". . . our supervisors do not perform hands-on work." (Tr. 168; see, also, Tr. 177). He continued,

> "A . . . I'm not saying that if an emergency would occur on a tower that a foreman might go assist to get the man off. I'm saying they are not working supervisors.
>
> "Q . . . Did the foremen II's and III's prior to the creation of supervisory craftsmen do hands-on work?
>
> "A No.
>
> "Q So there has been no change as far as that goes?
>
> "A In the day-to-day direction of the job it's similar but the supervisory responsibility in management and long range planning has increased.
>
> "Q Okay. You stated that as to this planning aspect under U.S.B.R. there was a supervisory engineer there and he did the planning. You said to a degree. Now, did Foreman II and III's also get involved in long range planning?
>
> "A It was more or less layed (sic) out as long range plans by the GS supervisor and the foremen III's that you referred to would be more of a monthly planning, if you call it long range. I would call it short range myself.
>
> "Q So he did planning for the up coming month, that type of planning?
>
> "A Based on the long range plans set up the supervisor.
>
> "Q Did they participate in the development of long range planning?

"A Yeah, I think most GS supervisors would like input from those foremen.

"Q So they did participate in the development of the long range planning?

"A To some degree, yes. Not totally.

"Q On the hiring aspect . . . you mentioned that today qualified applicants were sent to the craft supervisors, they review, interview and make a recommendation.

"When you worked for the U.S.B.R. did your foremen III's make recommendations as to whether or not an individual should be hired?

"A The way I personally conducted it was the personnel returned to me a list of applicants. I reviewed and made a tenative selection, if need be call the applicant's supervisor and ascertain what I thought was the best man for the position. At that point I reviewed with the foremen his feeling on that man or another man -- let's say the better choices within the selection.

"Q You prefaced all that by saying the way you did it.

"A I can only speak for myself and as far as I know the others did the same." (Tr. 168-170).

As to performance appraisals, Mr. Lighty testified that under the BR Foreman II and III made appraisals but they were more informal and the Foreman II and III were not involved in setting up the standards by which his people were to be rated as is true with Supervisory Craftsmen . Thus, he testified, in part, as follows:

"Q . . . Now, the primary difference what was done under U.S.B.R. and what is done now under the Department of Energy, Western Area, is that primary difference that the supervisors are looking at more things because there are now performance standards. . . .

"A . . . generally what you're saying is true, however, the consequences of their rating is much more important. . . .

. . .

> "A . . . the present craft supervisor is involved in setting up those standards by which his people be rated which is a very critical thing. He has to be knowledgeable with what functions need to be performed much more than before when somebody just said here is the thing you go rate your people against. Does he report to work on time, is he cooperating with the other employees. Anybody could hand him that. Now he has to set up a specific performance standard that is based on his technical knowledge.
>
> "A Are those standards the same for each craft?
>
> "A No. It may be similar but there are different performance standards for different crafts." (Tr. 172-173).

With regard to awards, Mr. Lighty stated that Supervisory Craftsmen definitely make recommendations for awards (Tr. 163) and when asked how it was handled in the BR, stated,

> "A I think there were occasions where they did make recommendations for approval. They may or may not have written it up. In many cases they recommended their people verbally and the GS supervisor wrote up the recommendation." (Tr. 163).

With regard to the Foreman II and Foreman III handling grievances, Mr. Lighty stated, in part, as follows:

> "WITNESS: The particular example, sir, was between two employees that were within his own crew he would probably try to resolve it himself. If it were between himself and a member of his crew or between two crew then he would obviously want support from somebody above him. . . ." (Tr. 164).

When a grievance was between an employee and management, Mr. Lighty said the Foreman would, "More likely refer it." (Tr. 165). Mr. Lighty testified that Supervisory Craftsmen,

> "A Because of the remoteness of some of these crews and the lack of a GS supervisor in that area, they would attempt to resolve everything at the lowest possible level. That is our policy." (Tr. 166).

Mr. Lighty stated that Supervisory Craftsmen regularly attend steward-management meetings (Tr. 166). While Foremen, prior to 1980, attended "by invitation rather than on a regular schedule" (Tr. 166); that Supervisory Craftsmen regularly attend monthly management meetings (Tr. 166); but that such meetings were not "a regularly scheduled thing" under the BR; however, Foreman II and Foreman III would, by invitation, attend certain ones (Tr. 167).

d) Mr. William R. Miller, Supervisory Craftsmen

Mr. Miller began employment with the BR in 1957 as a lineman. He was promoted to Foreman III in 1967 (Tr. 184). His title is now Supervisory Craftsman (Tr. 185). Both as a Foreman III and now as a Supervisory Craftsman he had four linemen under him and at one time also had a groundman (Tr. 185). He stated that he did not have as Foreman III, and does not have as Supervisory Craftsman, any authority to furlough, layoff, or to recall employees (Tr. 185).

Mr. Miller stated that as a Foreman III with the BR he rated employees,

> "A We had a performance appraisal that we did once a year and it had various categories layed (sic) out. You would judge a man on how he mastered his capabilities or didn't master them. When you were through with it you sat down and talked to the individual and he either agreed or disagreed with your appraisal." (Tr. 186).

Mr. Miller stated that these appraisals continued until 1977 when he became an employee of WAPA; that from that time, 1977, until 1980, no performance appraisals were made, ". . . because we didn't have the organization to do it", not a lack of authority (Tr. 197). As a Supervisory Craftsman, he has made one appraisal of employees working for him,

> "A We have another type of appraisal form and we also have the critical elements and you judge the man on the elements . . . and you sit down with him and go over it with him and explain it to him and he signs it." (Tr. 186).

Mr. Miller stated that both as a Foreman III with the BR and now as a Supervisory Craftsman: he granted annual leave; vacation leave requests; sick leave (Tr. 187-188). With respect to informal grievances he did the same as Foreman III as he does as a Supervisory Craftsman (Tr. 188). Thus, he stated,

> "A I would say if a man came to me and was unhappy about the overtime I gave him the day before and he and I would sit down and talk about it and I would decide in his favor of if I was still convinced he didn't have it coming I would send him to talk to his shop steward.
>
> "Q Is that any different now in your capacity as a supervisory craftsman at Western. Do you do the same thing?
>
> "A No different." (Tr. 188).

Miller testified that as a Foreman III with the BR he had had occasion to recommend disciplinary action to his supervisor (Tr. 191); and that as Supervisory Craftsman he has the same authority to recommend disciplinary action to his supervisor. Mr. Miller stated that as a Foreman III he had recommended hiring and firing of an employee; that he hired two apprentices and two or three linemen and he let a man go on his probationary period (Tr. 191). More accurately, Mr. Miller said he shouldn't say he hired them, he decided on which one was the man he wanted and told his supervisor this was the man he would like to have (Tr. 191-192); that this is the same procedure he now follows as a Supervisory Craftsman, "I hired two the same way . . . . I read their application and their form and talked to them, recommended to my supervisor this is the man I want." (Tr. 192). Mr. Miller stated that he had, both as a Foreman III with the BR and as Supervisory Craftsman, recommended promotion to acting foreman (Tr. 192). He has never recommended promotion of apprentices to journeymen because that is done by the apprenticeship committee (Tr. 192); and while he has authority to recommend that somebody be held back he had never done so. (Tr. 192-193). He stated that as a Foreman III he "recommended to my supervisor that there was a craftsman I thought should get an award and he processed it." (Tr. 193); that it is done the same way now (Tr. 193).

As a Foreman III he did receive required supervisory training,

> "A I took training on how to listen, to talk to people and role playing and how to settle grievance and work out problems.
>
> "Q Who else attended the supervisory training courses besides foremen III?
>
> "A GS people.
>
> "Q Did other foremen participate?

"A Yes.

. . .

"Q Just the foremen III?

"A Yes." (Tr. 193-194).

Mr. Miller, when asked if he certified position descriptions at the BR said, "I'm sure I did, but I don't remember any certain instances but I'm sure I did." (Tr. 195). He further stated that he had done so as a Supervisory Craftsmen (Tr. 195).

When asked whether there was any change in his function as a Supervisory Craftsman as compared to Foreman III with the BR, Mr. Miller testified as follows:

> "Q Now you were asked about a number of specific supervisory duties. Just as a general question do you have more supervisory responsibilities today with Western than you had with the Bureau of Reclamation?
>
> "A No.
>
> "Q Unchanged?
>
> "A I have -- the only more responsibilities I have are because I'm in a remote area now. I don't have any supervision at Tracy. I used to be able to walk across the street and see my boss now I have to call him on the telephone or drive to Sacramento.
>
> . . .
>
> "Q . . . Could you tell us specific examples, for example, the long range planning, do you have more responsibility now than you had with the Bureau?
>
> "A No, it's the same.
>
> "Q But there is a difference of supervisory responsibilities?
>
> "A I don't say responsibility, I'd say duties.
>
> "Q For example?
>
> "A Well, something might come up, say a line come down, and I had to go on and work on it right away. I could not reach my supervisor to authorize the overtime. I would go ahead and exercise my own judgment and do the work without prior approval.

> "Q What would you have done at the Bureau of Reclamation?
>
> "A My boss would have been right there and I would have asked him. If he wasn't there there would have been a succession that I could have talked to." (Tr. 201-202).

When asked if he performed any craft duties as a Supervisory Craftsman, Mr. Miller said, "Very small. For all intents and purpose I don't perform any" and he did not as a Foreman III with the BR (Tr. 202-203).

As to long range planning with the BR, Mr. Miller stated it was accomplished by,

> "A Attending meetings with the other craft supervisors, other craft foremen III's and our supervisors.
>
> "Q How do you do it now?
>
> "A We do the same thing now." (Tr. 203).

e) Mr. Norman Miller, Supervisory Craftsman

Mr. Norman Miller (hereinafter referred to as "N. Miller" to distinguish him from Mr. William R. Miller), was employed in 1960 by the BR as a communication and instrumentation mechanic at Folsom (Tr. 204). He had a four year apprenticeship before becoming a journeyman electrician (Tr. 205). In 1979, Mr. N. Miller became a Foreman II with WAPA (Tr. 204, 205, and 219) and is now a Supervisory Craftsman (Tr. 205). Mr. N. Miller is now located at Alberta and has three crews in three different areas, one at Alberta, one at Keswick and one at Tracy (Tr. 205). He has under him communication and instrumentation mechanics, meter and relay mechanics. There are two employees in two of the crews and three in the other, a total of seven (Tr. 205). He has performed an annual performance evaluation as Supervisory Craftsman (Tr. 205), but had no official evaluation program while he was a Foreman II with WAPA, "just talked to them once in a while and told them how they were doing or what was expected of them" (Tr. 206) and informally told his supervisor "the people were doing fine or weren't doing fine." (Tr. 206). Mr. N. Miller stated that there had been no change except "now, ... we have paper that we do use and there's, as I understand it, at least once a year we sit down and do it formally." (Tr. 206).

While a journeyman with the BR his supervisor was a Foreman II (Tr. 207) and the Foreman II evaluated him, "The same way, he sat down with me with a form and we went throught it and I signed it and he signed it." (Tr. 207).

As a Foreman II with WAPA, Mr. N. Miller had, and exercised, authority to grant annual and sick leave (Tr. 207) and approved vacation leave (Tr. 208). While a journeyman with the BR, his Foreman II approved leave the same way (Tr. 208). As a Foreman II with WAPA, Mr. N. Miller never had a grievance (Tr. 208). While he was a journeymen with the BR, Mr. N. Miller stated that the Foreman II did participate in informal grievance proceedings (Tr. 208-209). As a Foreman II with WAPA he recommended hiring, "looked at the applications and rated them informally and recommended who I thought was best" (Tr. 210); made the recommendation to his immediate supervisor and does the same thing as a Supervisory Craftsman (Tr. 210). Mr. N. Miller has never exercised authority with respect to promotions and did not know whether there had been any change (Tr. 212); and he has never taken disciplinary action although he "felt" he could recommend discipline both as a Foreman II and as a Supervisory Craftsman (Tr. 212). Mr. N. Miller had 40 hours introduction to supervision under OPM and later went to a supervisory training seminar for 40 hours (Tr. 213) but the record does not show when he received this training.

Mr. N. Miller stated that he did not "believe" he had any authority "even to recommend" furlough, layoff or recall (Tr. 214). Mr. N. Miller stated that he is now involved in long range planning (Tr. 215) and that, in the same manner, he had been involved in long range planning as a Foreman II (Tr. 215); that he "planned the various jobs and maintenance, ordered equipment and supplies and scheduled." (Tr. 215; 216); that as a Supervisory Craftsman there has been no change (Tr. 216). Mr. N. Miller stated there had been no change in his supervisory duties since he became a Supervisory Craftsman (Tr. 214, 215). As a Supervisory Craftsman, Mr. N. Miller performs craft duties about 10 per cent of the time. When asked if there were any difference in the amount of time he spent performing craft duties as a Foreman II with WAPA, Mr. N. Miller replied,

> "A Yes and no. Part of the -- I performed more when I was a foreman II because I only had one meter relay mechanic under me originally and a lot of the work was done by contract by the Bureau of Reclamation C and I crews and I advised their foremen, their C and I foreman as to the work I would like to have them do and I picked up part of it myself but then when they hired an additional six people I did less and less work." (Tr. 217-218).

f) Mr. Lyle Lockwood, Supervisory Craftsman

Mr. Lockwood was initially employed by the BR in 1950 (Tr. 223), became a Foreman III in 1966 (Tr. 223), and had been a Foreman II for some period (Tr. 234). He is a journeyman electrician (Tr. 223). He has been employed by WAPA since its inception and is now Electrical Supervisor (Tr. 223, 224). As a Foreman III at the BR he was involved in long range planning, "I planned our maintenance work at least a year ahead, I had a year's schedule" (Tr. 224). He filled out the work schedule and it was approved by his supervisor (Tr. 224). As a Supervisory Electrician long-range planning has not changed at all, "It's just the same as it was when I was with the Bureau." (Tr. 224). As a Foreman III he did not work with the tools nor does he now work with the tools (Tr. 224-225).

As a Foreman III he evaluated or rated employees and does so now. He stated, "Under the Bureau we had . . . a performance appraisal system and later WAPA put in or has instituted a new system . . ." He explained that under WAPA, "We have a set of duties that are involved with a certain craft. We follow through those duties and counsel him or talk to him about those duties and whether or not he is fulfilling his duties. If not we counsel him as to why and then we do the formal appraisal and that is sent in to my supervisor for approval. . . ." (Tr. 226); he stated that with the BR he did, "The same but the format was a little bit different but as far as evaluations were concerned it was the same." (Tr. 226; 227).

He granted annual and sick leave as a Foreman III with the BR and does so now as a Supervisory Craftsman (Tr. 227-228) and there has been no change. With respect to grievances, Mr. Lockwood, stated,

> "A Well, if a person has a problem or whatever he comes to me as his supervisor first and we discuss it. If I can't resolve it, and normally we can, but if I can't resolve it it goes to the shop steward and then, as far as I'm concerned, is when the grievance procedure starts. He goes on up. I'm no longer involved in it. He goes on up to my supervisor.
>
> "Q Was that the case at the Bureau of Reclamation?
>
> "A Yes.
>
> "Q Is that the case now at Western?
>
> "A Yes.
>
> "Q Has there been any change in your function since you became a supervisory electrician?
>
> "A No." (Tr. 228).

Mr. Lockwood testified that he had recommended disciplinary action as a Foreman III with the BR (Tr. 228) and had done so with WAPA (Tr. 229). In each instance, the recommendation was to his supervisor (Tr. 228, 229). Mr. Lockwood said he did not have authority to hire and fire as a Foreman III but could, and did, recommend "from looking at the job applications the person I felt was best qualified." (Tr. 229); that this has not changed (Tr. 229). Mr. Lockwood stated that he had never had occasion to recommend promotions (Tr. 229) but both as Foreman III and as Supervisory Craftsman he has appointed acting foreman (Tr. 229-230). He has recommended that employees be given awards both as Supervisory Craftsman and at the BR and in each instance he made the recommendation to his supervisor (Tr. 230). He had supervisory training as a Foreman III with the BR as did Foremen I's and II's (Tr. 231); that he had had further training with WAPA (Tr. 231). As a Supervisory Craftsman he did object to certain position descriptions; his objections were made to his supervisor and the position descriptions were changed (Tr. 232). He never had "an occasion to at Reclamation" (Tr. 232). Mr. Lockwood said there were no changes in his supervisory duties as a Supervisory Craftsman (Tr. 232). Indeed, he further stated that there had been no change in his duties when he went from Foreman II to Foreman III (Tr. 234), the only distinction being that as Foreman II he could, and did on occasion, work with the tools (Tr. 234) but did not as a Foreman III (Tr. 235). Mr. Lockwood testified that as a Foreman II he engaged in the same kind of performance appraisal as he did as a Foreman III (Tr. 235); that Foreman II at the BR interviewed applicants for jobs and made recommendations in regard to selections (Tr. 235-236).

g) Mr. Vincente Abeyta, Supervisory Craftsman

Mr. Abeyta was initially employed by the BR as an apprentice in 1947 (Tr. 239), worked as a journeyman electrician from 1951 until 1979 when he became a Foreman II with WAPA (Tr. 239-241). Mr. Abeyta stated that the Branch Chief and he, as a Supervisory Craftsman, met with the administrative officer and set up standards for an electrician, heavy duty mechanic and then rated employees by that (Tr. 242); that while a Foreman II with WAPA, "We didn't use to do it except -- we just said efficiency rating." (Tr. 242).

Both as a Foreman II and now as a Supervisory Craftsman, Mr. Abeyta approved annual and sick leave (Tr. 242); that there has been no change (Tr. 242). He had supervisory training when he became a Foreman II (Tr. 243). He has not as a Foreman II or Supervisory Craftsman been involved in handling informal grievances (Tr. 244); however, he testified that,

> "A Well, as a steward I was called in to try and resolve a grievance and I went to the first line supervisor which if it was a journeyman, it would be a foreman and most were resolved right there. There were a few that went into a formal grievance and as steward I filled out the form and turned it over to the assistant manager and it left my hands. I was out of it. . . ." (Tr. 250).

As a Foreman II he did not have authority to hire new employees but had authority to recommend which he did only once (Tr. 245), and he has the same authority as Supervisory Craftsman (Tr. 245). He has never recommended disciplinary action (Tr. 245) but such recommendation would be made to his supervisor (Tr. 245). He also has not recommended any awards (Tr. 246).

h) Mr. Ronald D. Dockins, Journeyman

Mr. Dockins was hired by the BR as a journeyman lineman in about 1975 (Tr. 267); has been a lineman with WAPA since its inception; and is President and Business Manager of Local 1759, IBEW. When hired, he worked under a Foreman II; when he transferred to Casper, he worked under a Foreman III; and he now works under a Supervisory Craftsman (Tr. 267-268). Mr. Dockins testified that he had observed no change in the duties of the supervisor (Tr. 269). All kept time and attendance records, approved leave, assigned work (Tr. 269-270). He stated, as to assignment of work,

> "A The foreman would line out the work in the morning, regardless Foreman II, Foreman III. There really wasn't that much difference. Foreman II was allowed to work; Foreman III wasn't allowed to do as much work as a Foreman II.
>
> "The difference in the application or the way they give me duties, they would instruct you on what we had to do everyday at the beginning of the day and you'd go do your job. And I seen no difference in their duties in the transition.
>
> "Q That is still the way its done, to your knowledge?
>
> "A Yes." (Tr. 270).

Mr. Dockins said, "Well, the Foreman II was more or less classified as a working foreman" (Tr. 275) and "what they did before they're still doing, the same with the Foreman III. The title changed, it made no difference, really, in work." (Tr. 275).

CONCLUSIONS

Foreman II and Foreman III were supervisors within the meaning of Section 2(c) of Executive Order 11491. The fact that some Foreman II's did not have certain authority, for example, to approve leave, did not mean that they were not supervisors. The Council had made clear that Section 2(c) must be applied in the disjunctive and that, ". . . and individual who possesses the authority to perform a single function described in section 2(c), provided he does so in a manner requiring the use of independent judgment, is a supervisor. . . ." United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11, 1 FLRC 404; A/SLMR No. 297, 3 A/SLMR 459 (1973); see, also, Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12, 1 FLRC 410; A/SLMR No. 298, 3 A/SLMR 464

(1973), and the record is clear, as Mr. Onstad conceded and as the record otherwise shows, that all Foreman II were in charge of crews, assigned and directed work, and participated in planning "to figure out what maintenance would be done. . . ." Nor were they "working foremen" in the usual sense of the term as the record shows that, while Foremen II were permitted to "work with the tools", most Foremen II's did not "work with the tools" at all and, so far as the record shows, those who did, did not spend more than 10 per cent of their duty time in performing craft work. Thus, Foreman II were principally, if not exclusively, supervisors. Accordingly, because they possessed one or more of the characteristics described in Section 2(c) and consistently exercised independent judgment in the performance of their duties, Foremen II were supervisors. Accord, Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 1151, 8 A/SLMR 1246 (1978). Of course, Foreman III possessed all of the authority of Foreman II and in some respects broader authority and responsibility and they did not "work with the tools". They too, consistently exercised independent judgment in the performance of their duties and were supervisors within the meaning of Section 2(c) of the Executive Order.

WAPA, effective June 29, 1980, reclassified Foreman II and III as Supervisory Craftsmen. The record is clear that Supervisory Craftsmen are supervisors within the meaning of §3(a)(10) of the Statute. While Supervisory Craftsmen perform all duties they previously performed as Foreman II or Foreman III, the record shows that the range of supervisory responsibility has substantially changed. Thus, crews were directly assigned to each Supervisory Craftsman and each Supervisory Craftsman performs the full range of supervisory functions including: granting of leave, initiating recommendations for awards or for discipline, performance appraisals, recommends hiring, participates fully in long range planning. As Supervisory Craftsmen, they participated, beginning in 1981, in the development of performance standards, pursuant to 5 U.S.C. §4302, and appraised employees assigned to them in the fall of 1981. WAPA has reduced the levels of supervision that previously existed and Supervisory Craftsmen have greater supervisory responsibility than Foremen II's and III's had under the BR. WAPA on March 17, 1982, further unified the duties of Supervisory Craftsmen by adopting a single pay rate for all supervisory wage board positions.

Consequently, the record does show: a) that Supervisory Craftsmen are supervisors within the meaning of §3(a)(10) of the Statute; b) that supervisory duties of Supervisory Craftsmen have been substantially broadened so as to include all supervisory responsibility previously performed by both Foremen II and Foremen III; c) that WAPA's reduction of the levels of supervision has resulted in increased supervisory responsibility of Supervisory Craftsmen; and d) that as Supervisory Craftsmen they not only make performance appraisals, as Foremen II and III had done with the BR, but they participate in the development of performance standards, including the critical elements of the positions under their supervision.

Do the present duties of Supervisory Craftsmen constitute them "supervisors" which were excluded by the Authority from the bargaining unit or are they included in the bargaining unit because they are craft supervisors whose duties are so essentially like the duties of Foreman II and Foreman III that they are, and remain, the class of supervisors which the Authority included in the bargaining unit as Foreman II and Foreman III? For reasons set forth hereinafter, I conclude that Supervisory Craftsmen are included in the bargaining unit as the same class of supervisors which the Authority included as Foreman II and Foreman III and that they are not "supervisors as defined in the Order" which the Authority excluded from the bargaining unit. Moreover, as set forth hereinafter, the Statute expressly authorizes the inclusion of such supervisors in bargaining units, notwithstanding that, except under very narrow exceptions as provided in the Statute, supervisors must be excluded from appropriate bargaining units.

At least as early as 1949, Congress in the Classification Act of 1949 removed "employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual labor occupations . . ." (P.L. 429, Chapter 782, 63 Stat. 954) from the plan for classification of positions and for rates of basic compensation and provided that their "compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" (P.L. 429). The Classification Act of 1949 did not, with respect to prevailing wage employees, specifically refer to foremen or supervisors; but Congress did so in 1954 when Paragraph (7), above, was amended as follows:

> "(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement . . . The compensation of such employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. . . ." (P.L. 763, Chapter 1208, 68 Stat. 1106)

This language, as pertinent, is continued in 5 U.S.C. §5102(c)(7) and, further, is part of the definition of "prevailing rate employee" in 5 U.S.C. §5342(a)(2)(A).

Of course, directly, Congressional authorization to include foremen and supervisors as prevailing rate employees did not treat with their inclusion in bargaining units. Indeed, there was no general program for federal employee labor relations until January 17, 1962, when Executive Order 10988 became effective; nevertheless, the BR, among others, voluntarily bargained, in the case of the BR with IBEW, and prevailing wage, i.e. craft, supervisors were included in bargaining units, as the Assistant Secretary found, in Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 1151, 8 A/SLMR 1246 (1978), "since the late 1940's". Executive Order 10988 did not define "supervisor"; permitted any employee to be an officer or representative, except where there was a conflict of interest or to do so would otherwise be incompatible with law or official duties (Sec. 1(b)); provided that supervisor organizations may be recognized as "employee organizations" (Secs. 1, 2); and authorized continuation or renewal of lawful agreements between agencies and organizations entered into prior to January 17, 1962 (Sec. 15).

Executive Order 11491, October 29, 1969, made changes with respect to supervisors, including: prohibition by a supervisor of participation in the management or representation of a labor organization except as provided in Section 24 of the Order (Sec. 1(b)); defined supervisor (Sec. 2(c)); Labor organization defined to exclude management officials or supervisors (Sec. 2(e)); separate intra-management communication and consultation with its supervisors or associations of supervisors provided for (Sec. 7(e)); however, the Order continued the same authorization for continuance or renewal of lawful agreements entered into prior to January 17, 1962 (Sec 24(a)(1)) which was stated,

> "Continues 'grandfather' provision of Executive Order 10988. Currently applicable to TVA and certain agreements in Interior and Transportation." (Comparative Analysis, Labor-Management Relations In The Federal Service, Report and Recommendations, Executive Order 11491, October 29, 1969).

Executive Order 10988 had provided that except where required by established practice, prior agreement or special circumstances, no unit shall be established for exclusive recognition which includes any managerial executive or both supervisors and the employees whom they supervise (Sec. 6(a)). Executive Order 11491 permitted the continuation of this exception which was stated was intended,

> ". . . for managerial and supervisory representation by labor organizations in maritime industry which represent officers and crews of vessels. Applicable to MEBA, MMP, NMU, SIU, and UTW." (Comparative Analysis, supra).

The two exceptions of Executive Order 11491 provided as follows:

> "Sec. 24. Savings clauses. (a) This Order does not preclude --

> (1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962); or
>
> (2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order." (E.O. 11491, Section 24(a)(1) and (2)).

Although E.O. 11491 was subsequently amended, Section 24, as set forth above, remained unchanged.

In 1972, Congress enacted P.L. 92-392, entitled "Government Employees - Prevailing Rate System" which extensively revised the Prevailing Rate Program, authorized, as noted above, at least as early as 1949; however, Congress specifically provided that agreements negotiated prior thereto were not to be abrogated, modified or affected. Thus, Subchapter IV, Section 9(b) of P.L. 92-392, provided, in part, as follows:

> "(b) The amendments made by this Act shall not be construed to --
>
> (1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act [August 19, 1972] pertaining to the wages, the terms and conditions of employment, and other employment benefits, . . . for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;
>
> (2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act [August 19, 1972] for the renewal, extension, modification, or improvement of . . . such contract or for the replacement of such contract with a new contract; or
>
> (3) nullify, change, or otherwise affect in any way after such date of enactment [August 19, 1972] any agreement, arrangement, or understanding

> in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, on the replacement of such contract with a new contract, after such date." (P.L. 92-392, Subchapter IV, Section 9(b); 5 U.S.C.A. §5343, note).

In 1978, as part of the Civil Service Reform Act, P.L. 94-454, 92 Stat. 1111 et seq., Congress enacted Section 704 which provides, in part, as follows:

> "Sec. 704. (a) Those terms and conditions of employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiations in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of Chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.
>
> (b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of --
>
> > "(A) Chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph; . . . ." (P.L. 95-454, 92 Stat. 1218)

The Statute (Title VII, Chapter 71) includes the following provisions which are directly of interest:

§12(b) provides, in part, as follows:

> "(b) . . . nor shall a unit be determined to be appropriate if it includes -

> "(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;
> . . . ." (5 U.S.C. §7112(b); P.L. 95-454, 92 Stat. 1200).

§35 provides, in part, as follows:

> "(a) Nothing contained in this chapter shall preclude--
>
> "(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or
>
> (2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.
> . . . ." (5 U.S.C. §7135(a); P.L. 95-454, 92 Stat. 1215)

From the foregoing, it is plain that "prevailing rate employee" has specifically included since 1954, and apparently by implication and practice since at least 1949, "a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement" (5 U.S.C. §5342(a)(2)(A); P.L. 763, Chapter 1208, 68 Stat. 1106; P.L. 429, Chapter 782, 63 Stat. 954). Both Executive Order 10988 and Executive Order 11491 specifically authorized the continuation or renewal of agreements between agencies and unions entered into prior to January 17, 1962, the date that Executive Order 10988 became effective; and both Executive Order 10988 and Executive Order 11491 had specifically authorized inclusion of supervisors in appropriate units with employees supervised where required by established practice, prior agreement or special circumstances (E.O. 10988) or "for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry. . . ." (E.O. 11491). Not only are both of these exceptions carried over in §35 of the Statute, but §12(b) of the Statute which provides that a unit shall not be determined to be appropriate if it includes "any management official or supervisor, expressly excepts management official or supervisor as provided under §35(a)(2) of the Statute. As noted above, the Assistant Secretary, in Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra, with respect to the exception of Section 24 of Executive Order 11491, held, in pertinent part, that,

> ". . . noting particularly the history of representation by the IBEW of the employees at issue in a mixed unit, their coverage under a succession of lawful agreements since the late 1940's, and the fact that historically the IBEW has represented similar employees in private industry, I find that the IBEW's unit herein, containing both supervisory and nonsupervisory employees, continues to be viable pursuant to Section 24 of the Order." (8 A/SLMR at 1248).

If there were any doubt as to Congressional intent concerning negotiation as to Government "prevailing rate employees" it was certainly removed by the enactment of Section 704 of P.L. 95-454 which specifically provided that "The pay and pay practices . . . shall be negotiated in accordance with prevailing rates and pay practices without regard to any provisions of - (A) Chapter 71 of title 5 . . . to the extent that any such provision is inconsistent with this paragraph".

The Authority in the representation proceeding in this case stated, in part, as follows:

> ". . . it appears from the record that, prior to the establishment of DOE and WAPA, and dating back to the 1950's the wages of these employees [Foremen] were determined by negotiation on a prevailing wage basis, that is, by wage survey of identical craft positions within the area of jurisdiction of the respective IBEW locals here involved. This scope of bargaining enabled USBR to compete with private industry in attracting employees with the high degree of competence required for the fulfillment of the agency's mission. . . ." (3 FLRA at 80).

Obviously, from the Authority's discussion, the supervisors in question were prevailing rate foremen or supervisors who, by statutory definition, were foremen or supervisors "having trade, craft, or laboring experience and knowledge as the paramount requirement." Although then designated Foreman II and III (Foreman I are not in dispute), the supervisors included by the Authority in the appropriate unit were prevailing rate supervisors and while now designated Supervisory Craftsmen, Supervisory

Craftsmen plainly are prevailing rate supervisors "having trade, craft, or laboring experience and knowledge as the paramount requirement" precisely as were Foreman II and III.

The fact that Supervisory Craftsmen have different duties, which has resulted in many having substantially greater supervisory responsibility than possessed by Foreman II's in particular, has not altered in any manner their status as prevailing rate employees. That they are prevailing rate employees, namely supervisors "having trade, craft, or laboring experience and knowledge as the paramount requirement" is shown, inter alia, by their title; by the fact craft duties performed by Supervisory Craftsmen are journeymen's duties of the craft, "An electrician performs electrician duties"; by the fact that they are wage board employees; and by the fact that they continue to perform all the duties previously performed by Foreman II and Foreman III. And that they are prevailing rate employees is firmly shown by WAPA's determination of March 17, 1982, that "The final rate will be established from wage survey data collected from within utilities in the Western Area" as well as by WAPA's initial determination of two pay increments based on percentages "over highest rate supervised" which, in turn were prevailing rates determined on a prevailing wage basis by wage survey as authorized by statute. Indeed, if Supervisory Craftsmen were not prevailing rate employees, their rates of basic pay would be governed by the General Schedule and WAPA would be without authority to vary from the General Schedule.

Nothing in the Statute precludes the inclusion of supervisors in the bargaining unit pursuant to §35(a) where the exclusive recognition or certification preceded the effective date of the Statute; or for the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of the Statute; however, even if the Statute, i.e. Chapter 71 of P.L. 95-454, did preclude the inclusion of supervisors in the bargaining unit, Congress, by Section 704 of P.L. 95-454, expressly qualified the provisions of Chapter 71 so that, notwithstanding any provision of Chapter 71, terms and conditions of Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applied which were the subject of negotiations in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of enactment of this Act [October 13, 1978] in accordance with the provision of section 9(b) of Public Law 92-392.

I conclude that the authority's exclusion of "supervisors as defined in the Order" meant supervisors other than prevailing rate supervisors; and that the Authority, by its inclusion of Foreman I, II and III in the bargaining unit, included all prevailing rate supervisors. Supervisory Craftsmen are craft supervisors, are wage board employees, have "trade, craft, or laboring experience and knowledge as the paramount requirement", are prevailing wage employees, and prior to August 19, 1972, craft supervisors, then designated Foreman I, II and III, were covered by collective bargaining agreements and they were subject to negotiations within the meaning of Section 9(b) of Public Law 92-392. As prevailing wage employees, Supervisory Craftsmen are not excluded as "supervisors as defined in the Order" [now the Statute]; and as prevailing wage employees they are included in the bargaining unit as if they were Foreman II and III since their status as prevailing rate employees, namely foremen or supervisors "having trade, craft, or laboring experience and knowledge as the paramount requirement", is precisely the same as it had been when they were designated Foreman II and Foreman III.

Accordingly, having found that Supervisory Craftsmen, previously designated Foreman II and Foreman III, were included by the Authority in the appropriate bargaining unit and, conversely, that the Authority excluded only non-prevailing rate supervisors, WAPA's refusal to bargain concerning Supervisory Craftsmen violated §§16(a)(5) and (1) of the Statute.

IBEW, but not General Counsel, has requested that, as part of the remedy, "any agreement reached . . . be given retroative effect to April 18, 1980, the date of the initial determination by the Authority of the appropriate bargaining unit." (IBEW Brief pp. 20-21). IBEW did not request that bargaining be reopened until March 30, 1981, and WAPA did not refuse to bargain as to Supervisory Craftsmen until April 13, 1981; but, in any event I deem any requirement that any agreement reached be given retroactive effect to be both unnecessary and inappropriate. As part of the remedy, WAPA will be ordered to negotiate, upon request, concerning conditions of employment of Supervisory Craftsmen and retroactivity of any agreement, under the circumstances of this case, should be resolved through the bargaining process.

Having found that the appropriate unit determined by the Authority included prevailing rate supervisory employees, then designated Foreman I, II and III, and that Supervisory Craftsmen are precisely the same class of prevailing rate supervisors included in the appropriate unit as Foreman II and III, and having found that WAPA violated §§16(a)(5) and (1) of the Statute by its failure and refusal to bargain as to Supervisory Craftsmen, I recommend that the Authority adopt the following:

ORDER

Pursuant to §2423.29 of the Regulations 5 C.F.R. §2423.29, and §18 of the Statute, 5 U.S.C. §7118, the Authority hereby orders that the United States Department of Energy, Western Area Power Administration, Golden, Colorado, shall:

1. Cease and desist from:

a) Refusing to negotiate with the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as the "Union"), the exclusive representative of its employees, to the extent consonant with law, regulations and the Statute, concerning the conditions of employment of Supervisory Craftsmen.

b) Refusing to recognize Supervisory Craftsmen as being within the unit determined to be appropriate by the Authority in Case No. 3 FLRA No. 12, 3 FLRA 76.

c) In any like or related manner, interferring with, restraining, or coercing its employees in the rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

a) Upon request, negotiate in good faith with the Union concerning the conditions of employment of Supervisory Craftsmen.

b) Post at its facilities in Golden, Colorado, and at its facilities in each District of the Western Area Power Administration, copies of the attached notice marked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrator, Western Area Power Administration, and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c) Notify the Regional Director of the Federal Labor Relations Authority for Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado, 80202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 4, 1982
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to recognize Supervisory Craftsmen as being within the unit determined to be appropriate by the Authority in Case No. 3 FLRA No. 12, 3 FLRA 76.

WE WILL NOT refuse to negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, the exclusive representatives of our employees, to the extent consonant with law and regulation, concerning the conditions of employment of Supervisory Craftsmen.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Services Labor-Management Relations Statute.

WE WILL, upon request, negotiate in good faith with the International Brotherhood of Electrical Workers, AFL-CIO, concerning the conditions of employment of Supervisory Craftsmen.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 7, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado, 80202, and whose telephone number is: (303) 327-5224.

9/Case No. 382

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 382 **REPORT OF CASE DECISIONS** **August 12, 1986**

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REPRESENTATION CASE

22 FLRA No. 87 (July 29, 1986)

U.S. Naval Hospital, Great Lakes, Ill[illegible]erican Federation of Government Employees, Local 2107, AFL-CIO and National Federation of Federal Employees, Local 167, Case No. 5-RO-60005

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 89 (July 29, 1986)

Department of the Treasury and Internal Revenue Service and National Treasury Employees, Case No. 3-CA-2228

22 FLRA No. 90 (July 29, 1986)

National Guard Bureau and National Association of Government Employees, SEIU, Case No. 3-CA-50534

22 FLRA No. 91 (July 30, 1986)

Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California and American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO, Case No. 8-CA-40473

NEGOTIABILITY CASES

22 FLRA No. 88 (July 29, 1986)

Fort Knox Teachers Association and Fort Knox Dependent Schools, Case No. 0-NG-978

22 FLRA No. 92 (July 30, 1986)

American Federation of Government Employees, Local 3231 and Social Security Administration, Case No. 0-NG-1023

Y3.F 31/21-3:

ARBITRATION CASES

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

July 29, 1986

0-AR-1071 0-AR-1079

July 30, 1986

0-AR-1151 0-AR-1161

Federal Labor Relations Authority

22 FLRA No. 87

U.S. Naval Hospital, Great Lakes, Ill. and AFGE, Local 2107 and NFFE, Local 167, Case No. 5-RO-60005
(Decided July 29, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Representation
  Petition for Certification
    Request to Set Aside Regional Director's Decision and Order
      No Compelling Reason - Mere Disagreement with RD's Findings

DIGEST NOTES

A union filed an application for review pursuant to § 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's decision and order on a petition for certification. A second union filed a request for a stay in the same matter contending that compelling reasons exist within the meaning of § 2422.17(c) of the Authority's Rules and Regulations to support the application for review. The Authority concluded that no compelling reason existed for granting the application. Rather, the application expresses mere disagreement with the Regional Director's findings which were based on the Authority's Rules and Regulations and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Federal
Labor Relations
Authority

22 FLRA No. 88

Fort Knox Teachers Assn.
and Fort Knox Dependent
Schools, Case No. 0-NG-978
(Decided July 29, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Work
      - Allocation of Specific Time for Specific Work
      - Assign Specific Duties to Specific Employees
        - Composition of Management Committee
      - Prescribe Duties
        - Proposal Eliminates Performance of Assigned Duties
    - Freely Deliberate
      - Union Representation on Management Committee
  - Petition for Review
    - Absence of Proposal: Specificity
      - No Record of Intent or Operative Effect
  - Subjects of Bargaining
    - At Election of Agency
      - Methods and Means of Performing Work
        - Committee to Study and Recommend Matters Affecting "Means" of Performing Work

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(1) and (2)

DIGEST NOTES

A proposal which seeks to eliminate the requirement that teachers be assigned to remain with their classes during art instruction would directly interfere with management's right to assign work under § 7106(a)(2)(B). In eliminating the performance by employees of various assigned duties, the proposal seeks to prescribe the duties employees will perform. (proposal 1)

A proposal which provides for an additional planning period per day for certain employees, directly interferes with management's right to assign work by allocating a specific amount of time for the accomplishment of a specific duty. The proposal is inconsistent with § 7106(a)(2)(B). (proposal 2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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A proposal which prescribes the make-up of a committee appointed by management "to study and make recommendations concerning curriculum, pilot programs, selection of textbooks and teaching materials" is inconsistent with management's right to assign work. The Authority found the committee to be an integral part of the process by which management determines the "means" of performing its work, the task associated with carrying out the functions of the committee involves the assignment of work. By mandating the composition of such committees the proposal effectively requires an assignment of specific duties to particular employees in violation of management's right under § 7106(a)(2)(B). (proposal 3)

A committee appointed by management "to study and make recommendations concerning curriculum, pilot programs, selection of textbooks and teaching materials" was an integral part of the process by which management determined the "means" of performing its work under § 7106(b)(1). Such matters are negotiable only at the election of management. Management's option not bargain over a § 7106(b)(1) right is equally applicable to bargaining over a committee concerned with deciding and acting on a § 7106(b)(1) right. Negotiation over the composition of a committee established to facilitate decisionmaking on a § 7106(b)(1) matter is equivalent to bargaining over the matter itself. A proposal which prescribes the make-up of the committee, therefore, concerns management's right under § 7106(b)(1) and is negotiable only at the agency's election. (proposal 3)

A proposal is not sufficiently specific and delimited in form and content to permit a negotiability determination where there is nothing in the proposal or the accompanying record to indicate how, or to what extent the proposal would affect employees' conditions of employment. In the absence of information concerning the intent and operative effect of the proposal, the Authority has no basis for determining whether it is consistent with applicable law and regulation. (proposal 4)

22 FLRA No. 89

Federal Labor Relations Authority

Dep't of Treasury and IRS and NTEU, Case No. 3-CA-2228 (Decided July 29, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Interference
      - Higher Level Management
        - Disapproval of Panel Imposed Provisions
    - Refusal to Cooperate in Impasse Proceedings
      - Agency Head's Disapproval of Panel Imposed Provisions
    - Refusal to Negotiate
      - Subordinate Activity's Ministerial Act Not Violative of Statute
      - Travel and Per Diem
    - Remedy
      - Apply Panel Provision Retroactively
      - Approve and Comply With Panel Provision
      - Make Whole Union
      - Reimburse Employees For Expenses Properly Incurred
- Federal Travel Regulations

STATUTE

7106(a)(1)
7114(c) and (c)(2)
7116(a)(1), (5), (6) and (8)
7119(c)(1) and (5)(C)
7131

DIGEST NOTES

The agency violated § 7116(a)(1) and (6) when the agency head refused to approve provisions directed by the Federal Service Impasse Panel (Panel) for incorporation into the parties' agreement. The provisions provided for the payment of travel and per diem expenses for union negotiators and were fully consistent with applicable law, rule and regulation and thus within the duty to bargain. The agency head's disapproval constituted a failure or refusal to cooperate in impasse decisions.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A subordinate activity did not violate the Statute by engaging in the ministerial act of forwarding the FSIP-directed language to higher-level management for agency head review and thereafter failing to incorporate the FSIP-directed language into its collective bargaining agreement subsequent to the determination by the agency head to disapprove the language.

The Authority ordered an agency to approve and comply with a FSIP decision and order directing the incorporation of contract language, providing for the payment of travel and per diem expenses for union negotiators, into the parties' agreement. The provision was to have retroactive effect. The Authority also order the agency to (1) make whole the union for the expenses it incurred in paying the travel and per diem expenses of unit employees attending negotiations, which payments otherwise would have been made by the agency; and (2) reimburse employees who either did not receive payments to which they were entitled or were not compensated fully for such expenses. The payments must be consistent with law and regulations including the Federal Travel Regulations.

22 FLRA No. 90

National Guard Bureau and NAGE, SEIU, Case No. 3-CA-50534 (Decided July 24, 1986)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7103(a)(2)(B)(ii)
Agency Violations	7103(a)(14)
Refusal to Negotiate	7113 and 7113(b)(1) and (2)
Conditions of Employment	7116(a)(1) and (5)

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Conditions of Employment
        Substantive Change in Personnel Policy
      Expansion of Agency Policy to Fill Positions
        Military vs. Bargaining Unit Personnel
      National Consultation Rights
  National Guard Technicians
    Expansion of Agency Policy to Fill Positions
      Military vs. Bargaining Unit Personnel
    National Consultation Rights
  Remedy
    Provide Union Opportunity to Present Views and Recommendations

DIGEST NOTES

The agency failed to fulfill its obligation to consult with the union pursuant to § 7113(b)(1) prior to issuing its Memorandum expanding its Mix-of-the-Force policy --the policy allowed non-bargaining unit Active Guard/Reserve military personnel to fill certain bargaining unit technicians positions formerly occupied solely by civilian technicians-- and thus, violated § 7116(a)(1) and (5). Section 7113(b)(1) requires an agency to inform a labor organization having national consultation rights with the agency of any substantive changes in conditions of employment proposed by the agency. The agency must provide the labor organization with reasonable time to present its views and recommendations regarding the changes and consider such views and a recommendations before taking final action. The Authority concluded that the agency's memorandum was an implementation of a change in personnel policies in that, position classifications previously reserved to civilian technicians were opened to occupancy by active military personnel. The change affected the working conditions of bargaining unit employees inasmuch as (1) such an expansion materially affected the availability of promotional and career development opportunities for bargaining unit employees eligible for those positions; and (2) the change may result in a decrease in the size of the bargaining unit since bargaining unit positions if filled by military personnel, will become military positions which are excluded from coverage under the Statute by § 7103(a)(2)(B)(ii). The policy announcement constituted a substantive change in personnel policy and since the union had national consultation rights the National Guard Bureau was obligated to comply with the provisions of § 7113(b)(1).

Federal Labor Relations Authority

22 FLRA No. 91

Dep't of the Air Force, 63rd Civil Engineers Squadron, Norton AFB, Cal. and AFGE Interdepartmental Local 3854, Case No. 8-CA-40473 (Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Discrimination [§ 7116(a)(2)]
      - Reassignment to New Work Location
        - Not in Retaliation
        - for Filing Grievance
    - Interference [§ 7116(a)(1)]
      - Statements by Agency Officials
        - Not Directed at Union Activity
    - Otherwise Refuse to Comply with Statute [§ 7116(a)(8)]
      - 7114(a)(2)(A)
    - Refusal to Negotiate [§ 7116(a)(5)]
      - Reassignment to New Location
        - *De Minimus* Impact
  - Formal Discussions
    - Criteria
      - Concerning a Grievance
    - Failure to Comply with § 7114(a)(2)(A)
      - No Advance Notice
      - No Opportunity for Union to be Represented
  - Procedure
    - Timeliness
      - Amended Charge Timely: It Did Not Raise New Cause of Action
  - Union Representation
      - Formal Discussions

STATUTE

7114(a)(2)(A)
7116(a)(1), (2), (5), and (8)
7118
7118(a)(4)(A)

DIGEST NOTES

The complaint contained four separate allegations arising out of a meeting held between two management representatives of the agency and the union's local representative. The Authority adopted the Judge's findings, conclusions, and supporting rationale with respect to all four allegations in the complaint.

The meeting was a formal discussion within the meaning of § 7114(a)(2)(A) as it involved discussion of an actual grievance with the employee grievant and was initiated and conducted by two management representatives. Because the local union representative was placed in the position, without prior notification, of representing himself in his own grievance, and as the agency neither notified the union nor provided an opportunity for it to be represented at the formal discussion, the agency failed to comply with § 7114(a)(2)(A) in violation of § 7116(a)(1) and (8).

The agency did not violate § 7116(a)(1) based on a statement made to a grievant by one of the management representatives during a formal discussion. The basis for the intemperate language directed to grievant was the misdirection by the grievant of his request for an extension to pursue the grievance. The statement was focused on the misdirection of the extension request and the resulting consternation up and down the agency chain of command rather than directed at the grievant's filing or processing the grievance.

The agency did not violate § 7116(a)(1) and (2) based on its reassignment of a grievant to another work location. The record does not support the inference that management's decision to make the reassignment was effected in retaliation for the grievant's zeal in pursuing his grievance.

The impact of the agency's reassignment of a grievant did not create a bargaining obligation. Therefore, the agency's failure to give notice to the union of the reassignment and to afford it an opportunity to request bargaining concerning its impact was not violative of § 7116(a)(1) and (5). Finally, although this allegation of the complaint was alleged by the agency to have been untimely filed under § 7118(a)(4)(A), the amended charge, while filed more than six months after the alleged unilateral change, was not not untimely in that it did not raise a new cause of action.

22 FLRA No. 92

Federal Labor Relations Authority

AFGE, Local 3231 and Social Security Administration, Case No. 0-NG-1023 (Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Hours of Work
    - Limit Certain Duties to Certain Hours
  - Management Rights
    - Assign Employees [§ 7106(a)(2)(A)]
      - Written Notice of Changes in Work Procedures
    - Assign Work [§ 7106(a)(2)(B)]
      - Adequate Training during Duty Time
      - Limit Certain Duties to Certain Hours
      - Written Notice of Changes in Work Procedures
    - Determine Mission [§ 7106(a)(1)]
      - Limit Certain Duties to Certain Hours
  - Subjects of Bargaining
    - At Election of Agency [§ 7106(b)(1)]
      - Methods and Means of Performing Work
        - Written Notice of Changes in Work Procedures
      - Technology of Performing Work
        - Written Notice of Changes in Work Procedures
    - Mandatory Subjects of Bargaining
      - Appropriate Arrangements [§ 7106(b)(3)]
        - Amelioration of Adverse Effects on Employees
          - Adequate Training during Duty Time
            - Passes Excessive Interference Test
      - Procedures [§ 7106(b)(2)]
        - Written Notice of Changes in Work Procedures
  - Training
    - Adequate Training during Duty Time
  - Procedure
    - Allegation of Nonnegotiability
      - Withdrawal of Allegation
    - Contentions of Parties
      - Disposition of Proposal Renders Unnecessary Addressing Agency's Contentions
    - Moot
      - Agency Withdrew Allegation of Nonnegotiability
    - Proposals Withdrawn and Not Considered
    - Timeliness
      - Initial Deficiency of Service on Agency Head Cured

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2)(A) & (B)
7106(b)(1), (2), & (3)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A proposal which determines an activity's office hours is nonnegotiable. Part of the mission of the agency is to provide services to the public, management decisions regarding the particular hours when an office is to be open to the public is mission related. The proposal setting office hours therefore, violates management's right, under § 7106(a)(1), to determine its mission. (proposal 1)

A proposal is nonnegotiable that would require the agency to refrain from assigning certain duties during specific office hours. The proposal violates management's right to assign work under § 7106(a)(2)(B) inasmuch as it requires management to refrain from assigning certain duties (work) to employees during a specified time, it is outside the duty to bargain. (proposal 1

A proposal is negotiable that would require the agency to provide written notice to employees of changes in work procedures The proposal is not inconsistent with the agency's right under § 7106(b)(1) to determine the technology, methods, and means of performing work. Further, because nothing in the proposal can be construed as preventing the agency from making changes and requiring compliance with them, the proposal is not inconsistent with the agency's right to assign employees under § 7106(a)(2)(A) or with the agency's right to assign work under § 7106(a)(2)(B). Rather, the proposal constitutes a negotiable procedure under § 7106(b)(2). (proposal 2)

A proposal is negotiable that would require the agency to provide adequate training during duty time to employees who will be assigned duties in a speciality area in which they previously had received only limited training. The negative impact of this proposal on management's right under § 7106(a)(2)(B) to assign work is not so significant as to outweigh: (1)the disruption to employees caused by being assigned duties outside the area in which they received intensive training; and (2) the benefit of an opportunity for employees to receive adequate training so that they may perform the new duties satisfactorily. Therefore, the proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of management's rights within the meaning of § 7106(b)(3). (proposal 3)

The Authority did not sustain the agency's contention that the union's petition for review should be dismissed for failure to timely serve the head of the agency. The Authority found that while the union initially mailed a copy of its petition for revie to local management and the headquarters of the agency, the union subsequently served a copy of its petition and response on the agency head's designee.

22 FLRA No. 87

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL HOSPITAL
GREAT LAKES, ILLINOIS

Activity

and Case No. 5-RO-60005

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2107, AFL-CIO

Labor Organization/Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 167

Labor Organization/Intervenor

ORDER DENYING APPLICATION FOR REVIEW AND REQUEST FOR STAY

On June 5, 1986, the National Federation of Federal Employees (NFFE) filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petition for Certification of Representative in the above-named case. NFFE also filed a request for a stay of such Decision and Order on Petition for Certification of Representative. NFFE contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations to support the application for review.*/

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*/ Section 2422.17(c) provides:

> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:
> (Continued)

Upon consideration of NFFE's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on the Authority's Rules and Regulations and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review and request for a stay of the Regional Director's Decision and Order on Petition for Certification of Representative be, and it hereby is, denied.

Issued, Washington, D.C., July 29, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ (Continued)

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent;

(2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

22 FLRA No. 88

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FORT KNOX TEACHERS
ASSOCIATION

Union

and Case No. O-NG-978

FORT KNOX DEPENDENT SCHOOLS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of four Union proposals.

II. Union Proposal 1

> Unit members will be permitted to use the period during the instruction of Art for (but not limited to) planning time, parent conferences and any other duties as assigned by the building principal.

A. Positions of the Parties

The Agency contends that the proposal would change the current requirement that teachers remain with their classes during art instruction even though they do not participate in the instruction itself. It argues that the proposal therefore interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute.

The Union contends that the proposal allows teachers to perform other assigned duties during the time they now spend in accompanying students to art instruction. It relies on

American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals and Department of Agriculture, Food Safety and Quality Service, Washington, D.C., 9 FLRA 663 (1982) to support its view that Union Proposal 1 is within the duty to bargain.

B. Analysis and Conclusion

Union Proposal 1 is distinguishable from the proposal found negotiable in Food Safety and Quality Service which only sought to identify the employee or employees who would be assigned overtime work when such work was deemed necessary by management. This proposal, however, seeks to prescribe duties employees will perform. Specifically, it would eliminate the requirement that teachers be assigned to remain with their classes during art instruction. Thus it is to the same effect as Union Proposals 23-28 found nonnegotiable in American Federation of Government Employees, AFL-CIO, Local 3511 and Veterans Administration Hospital, San Antonio, Texas, 12 FLRA 76 (1983). The Authority found those proposals "would directly interfere with the right to assign work" because they sought to eliminate the performance by employees of various assigned duties. Thus, based on the reasoning expressed in Veterans Administration Hospital, San Antonio Union Proposal 1 is inconsistent with management's right under section 7106(a)(2)(B) of the Statute to assign work.

III. Union Proposal 2

> Librarians and Department heads whose Media Center or Department has a Merit Rating shall be given an additional planning period per day.

A. Position of the Parties

The Agency contends that Union Proposal 2 would interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute. In support the Agency cites National Federation of Federal Employees, Local 1263 and Defense Language Institute, Foreign Language Center, Presidio of Monterey, California, 7 FLRA 723 (1982).

The Union argues that the proposal does not interfere with management's right to assign work as it only "requests negotiations over additional time to perform these already assigned tasks."

B. Analysis and Conclusion

Union Proposal 2 is to the same effect as the group of proposals found nonnegotiable in Defense Language Institute. In that case, the Authority held the proposals directly interfered with the management right to assign work "by allocating a specific amount of time for the accomplishment of a specific duty." Union Proposal 2, by providing for an additional period to be devoted to planning, also seeks to allocate a specific amount of time to accomplish certain work. Thus, based on the reasons and case cited in Defense Language Institute it is inconsistent with the management right to assign work under section 7106(a)(2)(B) of the Statute.

IV. Union Proposal 3

> When the district sets up committees to make recommendations on textbook adoptions, grade cards, parent conference forms, and other items or programs to be implemented in the district, the make-up of the committee shall consist of an equal number of representatives from all departments or organizational levels concerned.

A. Position of the Parties

The Agency describes the committees which are the subject of Union Proposal 3 as groups appointed from time to time by the superintendent to study and make recommendations concerning the adoption of textbooks, grade cards, parent conference forms and other items, programs or materials to be used in the school district. The Agency argues that Union representation on such committees concerns the methods and means of performing work and is therefore negotiable only at the discretion of the Agency under section 7106(b)(1). The Agency contends this proposal also conflicts with management's right to assign work under section 7106(a)(2)(B) to the extent that it specifies that there be an equal number of representatives from all departments or organizational levels.

The Union contends that the proposal sets out a procedure to be used in appointing members to these committees and thus it is negotiable under section 7106(b)(2).

B. Analysis and Conclusion

As set out above, the Agency describes the committees in Union Proposal 3 as groups periodically appointed by the superintendent responsible for studying and recommending adoption of textbooks, various forms, programs and materials used for teaching students in the district. The Union did not dispute that description. As described, the committees have responsibilities similar to those assigned to the committees or groups addressed by Union Proposals 1 and 8, held nonnegotiable in Panama Canal Federation of Teachers, Local 29 and Department of Defense Dependents Schools, Panama Region, 19 FLRA No. 99 (1985). The committees in the cited case were appointed to study and make recommendations concerning curriculum, pilot programs, selection of textbooks and teaching materials. The Authority found that the work of the committees concerned the "means" by which agency work would be carried out within the meaning of section 7106(b)(1) of the Statute. Because the committees in Union Proposal 3 are appointed by the superintendent to study and to recommend on similar matters, their work likewise falls within the scope of section 7106(b)(1).

It is by now well established that a proposal seeking union participation in the deliberative process leading to the exercise of rights reserved to management by section 7106 of the Statute is outside the duty to bargain. See, for example, National Federation of Federal Employees, Local 1431 and Veterans Administration Medical Center, East Orange, New Jersey, 9 FLRA 998 (1982) and the cases cited there. In VA Medical Center, East Orange, the Authority observed that, "when management establishes formal organization structures to undertake such deliberations as an integral part of its substantive decision-making process, a proposal which would require union participation would have the effect of directly interfering with management's statutory right to make the decisions involved."

As with Department of Defense Dependents Schools, Panama Region, the proposal in this case presents issues slightly different from those before the Authority in VA Medical Center, East Orange: (1) the right with which the committees are concerned falls within the scope of section 7106(b)(1) of the Statute and may be the subject of bargaining at the Agency's election; (2) the proposal does not expressly seek Union representation on the committee but, rather, is concerned with the committee's composition. Those distinctions were examined in Department of Defense Dependents Schools, Panama Region. The Authority held, in effect, that management's option not to bargain over a section 7106(b)(1) right was equally applicable to bargaining over a committee concerned with deciding and acting on a section 7106(b)(1) right. The Authority also stated in that decision, "where the matter concerned is encompassed within section 7106(b)(1), . . . and the committee involved is established to facilitate decision-making related to that matter, negotiation over composition of the committee is equivalent to bargaining over the matter itself." Consequently, based on the reasons and cases cited in VA Medical Center, East Orange and Department of Defense Dependents Schools, Panama Region, Union Proposal 3 concerns a management right under section 7106(b)(1) and is negotiable only at the Agency's election.

Since these committees are an integral part of the process by which management determines the "means" of performing its work, the tasks associated with carrying out the functions of those committees involve the assignment of work. See American Federation of Government Employees, AFL-CIO, Local 2787 and Defense Mapping Agency, 20 FLRA No. 26 (1985) (Provision 3). Consequently, by mandating the composition of such committees this proposal effectively requires an assignment of specific duties to particular employees in violation of management's right to assign work under section 7106(a)(2)(B) of the Statute. See, for example, National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 7 FLRA 235, 240 (1981). Since the proposal directly interferes with the exercise of the management rights discussed, it is not a negotiable "procedure" under section 7106(b)(2).

This case may be compared with the Authority's decision in National Federation of Federal Employees, Local 2059 and U. S. Department of Justice, U.S. Attorney's Office, Southern District of New York, New York, New York, 22 FLRA No. 13 (1986). In that case, the committee on which the union sought representation was an "uncertified" safety and health committee, established as a "constructive forum" for the expression of concerns over health and safety matters. Unlike the committees in this case, it was not intended to bypass management in its area of interest nor was it authorized to interject itself into management's deliberative decision-making process. It was therefore concluded that participation by union representatives on the committee did not concern assignment of the agency's work.

V. Union Proposal 4

> Unit members shall receive 1/2 year's credit for pay purposes. For this purpose 1/2 year

> shall be defined as any period of 100 days or more of teaching in this or any other school system.

A. Position of the Parties

The Agency contends that the Authority cannot make a determination on the negotiability of Union Proposal 4 because the proposal is not sufficiently specific and delimited in form and content.

The Union maintains that the proposal is sufficiently specific and that the Authority should find it negotiable.

B. Analysis and Conclusion

While this proposal requires that bargaining unit employees receive 1/2 year credit "for pay purposes" there is nothing in the proposal or the accompanying record to indicate how, or to what extent this 1/2 year credit would affect employee pay. In the absence of information concerning the intent and operative effect of this proposal, we have no basis for determining whether it is consistent with applicable law and regulation. Thus, this proposal is not sufficiently specific and delimited in form and content to permit a determination on its negotiability. *See Association of Civilian Technicians, ACT and State of Alabama National Guard*, 2 FLRA 314, 317 (1979).

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., July 29, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 89

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
AND INTERNAL REVENUE SERVICE

Respondents

and Case No. 3-CA-2228

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The complaint alleges that Respondent Department of the Treasury (Treasury) and Respondent Internal Revenue Service (IRS) violated section 7116(a)(1), (5), (6) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by refusing to cooperate in impasse procedures and impasse decisions and by failing to negotiate in good faith with the National Treasury Employees Union (NTEU), the exclusive bargaining representative of certain IRS employees.

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[1] Section 7116(a)(1), (5), (6) and (8) of the Statute provides:

> § 7116. Unfair labor practices
>
> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .

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II. Facts

As more fully set forth in the stipulated record, the IRS and NTEU failed to reach agreement on proposals that union negotiators would be granted official time, travel and per diem expenses for national and local mid-term contract negotiations. Once the parties reached impasse, the NTEU submitted these proposals to the Federal Service Impasses Panel (the Panel) for resolution. Respondent IRS never declared the Union's proposals to be nonnegotiable or illegal prior to the proceedings before the Panel. On or about December 24, 1980, the Panel issued a Decision and Order in Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, Case No. 80 FSIP 68 (1980), which directed Respondent IRS to incorporate into its collective bargaining agreement with NTEU the following provisions approved by the Panel:

> Section 3 - Mid-Term Negotiations
>
> . . . .
>
> C. If the parties enter into mid-contract negotiations during the life of this agreement, the following ground rules will apply:
>
> 1. For nationally implemented changes referred to in Section 2A above:
>
> . . . . . .

(Continued)

> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
>
> . . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter[.]

> c. a number of bargaining unit employees equal to the number of management's representatives shall be given administrative time and paid travel and per diem to attend all mid-term bargaining sessions; provided, however, the union shall be allowed no more than four bargaining unit employees.
>
> . . . . . .
>
> 2. For locally negotiated changes referred to in Section 4B1 above:
>
> . . . .
>
> b. a number of bargaining unit employees equal to the number of management's representatives shall be given administrative time and paid travel and per diem to attend all mid-term bargaining sessions; provided, however, the union shall be allowed no more than four bargaining unit employees.

Subsequent to its receipt of the Panel's Order, IRS notified its parent agency, Treasury, of the Panel's action and informed NTEU that it would incorporate the contract provisions directed by the Panel once that language had been approved by Treasury in accordance with agency head review under section 7114(c) of the Statute.[2] On February 24, 1981, Treasury notified IRS and NTEU that the provisions directed by to the Panel's Order had been reviewed and were disapproved in accordance with the Agency's previously stated position that travel and per diem expenses for employee union negotiators were illegal and nonnegotiable under section 7106(a)(1) of the Statute.[3] On March 5, 1981, IRS advised NTEU that it would not incorporate the language ordered by the Panel because of the agency head's disapproval of those provisions pursuant to section 7114(c) of the Statute, and that it would not pay employee travel and per diem requests submitted under the disapproved provisions. Following Respondent Treasury's disapproval of the provisions, Respondent IRS has not incorporated the contract provisions as ordered by the Panel and has not reimbursed employees who have claimed travel and per diem expenses pursuant to the contract provisions directed by the Panel.

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[2] Section 7114(c) of the Statute provides:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.
>
> (2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in

(Continued)

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> accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).
>
> (3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.
>
> (4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

[3] Section 7106(a)(1) of the Statute provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency[.]

III. Positions of the Parties

A. Respondents IRS and Treasury

Respondent Treasury contends that the underlying decision and order of the Panel is unlawful and that a Federal agency cannot be ordered or required to implement an unlawful provision. It further argues that the Panel's requirement that provisions be incorporated into the collective bargaining agreement between IRS and NTEU is subject to review by the agency head under its interpretation of section 7114(c) of the Statute, and that the Panel's decision is properly reviewable by the Authority in an unfair labor practice proceeding such as this case. Respondent Treasury further asserts that the Panel's decision was addressed only to IRS and thus may not serve as a basis for a charge or complaint against Treasury. Additionally, Treasury contends that it has committed no violation of section 7116(a)(1), since it has not interfered with, restrained or coerced employees, and since NTEU represents no Treasury employees but represents only IRS employees. Treasury also contends that section 7116(a)(5) has not been violated since it has no duty to negotiate with NTEU because NTEU has exclusive representative status at IRS and not at Treasury; that it did not violate section 7116(a)(6), since it was not a party to the Panel proceeding; and that it did not violate section 7116(a)(8) because Treasury was never a party in the matters alleged within the instant complaint. Finally, Treasury contends that section 7119(c)(5)(C) of the Statute[4] is not applicable to it since Treasury was never a party to any final action of the Panel.

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[4] Section 7119(c)(5)(C) of the Statute provides:

§ 7119. Negotiation impasses; Federal Service Impasses Panel

. . . .

> (c)(5)(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

Respondent IRS contends that the Panel should not have asserted jurisdiction over this matter since it was not conclusively shown that an impasse existed,[5] and since the Authority was concurrently reviewing unfair labor practice cases involving identical subject matter. Assuming that the Panel properly asserted jurisdiction, however, IRS argues that the Authority is empowered to review the Panel's action in this unfair labor practice proceeding and should reverse that action. IRS further raises as a defense the argument that it properly submitted the contract provisions to Treasury under section 7114(c) of the Statute and properly relied on the agency head's determination that those provisions were illegal and nonnegotiable.

B. The General Counsel

The General Counsel contends that Respondent IRS violated section 7116(a)(1), (5), (6) and (8) of the Statute when it failed to comply with the final Order of the Panel and incorporate the language directed by the Panel into its agreement with NTEU. The General Counsel argues that since orders of the Panel are not subject to appeal, any failure to comply with such orders constitutes a violation of section 7116(a)(1) and (6) of the Statute. The General Counsel argues that IRS also violated section 7116(a)(1) and (8) of the Statute by its failure to comply with section 7119(c) (5)(C) of the Statute because, under that section, final action of the Panel is binding on the parties during the term of their negotiated agreement, unless the parties agree otherwise. Finally, the General Counsel argues that IRS violated section 7116(a)(1) and (5) of the Statute because its failure to incorporate the provisions into its negotiated agreement as directed by the Panel constituted a unilateral change in a condition of employment established by the Panel.

The General Counsel alleges that Respondent Treasury violated section 7116(a)(1), (5), (6) and (8) of the Statute when it directed Respondent IRS not to abide by the final

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[5] Section 7119(c)(1) provides that the function of the Panel is "to provide assistance in resolving negotiation impasses."

Order of the Panel.[6] The General Counsel argues that Respondent Treasury has utilized section 7114(c) of the Statute to review and disapprove a final decision of the Panel, a right, the General Counsel asserts, Respondent Treasury does not have. Moreover, the General Counsel argues that Respondent Treasury's reasons for failing to approve the subject provisions are inappropriate in that Respondent IRS never challenged the negotiability of the Union's proposals prior to the Panel's ruling. Thus, the General Counsel argues that Respondent Treasury violated the above sections of the Statute when it directed Respondent IRS not to comply with the Panel's Order.

C. The Charging Party

The Charging Party argues essentially the same points raised by the General Counsel with the exception of one argument which the Charging Party is alone in raising: that inasmuch as Panel regulations require Respondent IRS to inform the Panel of its acceptance of the Panel's decision within 30 days, the IRS rejection of the Panel's Order was untimely.[7] The Charging Party requests, as part of the remedy, that IRS be required to accept and process all claims for travel and per diem reimbursement from the effective date of the contract.

IV. Analysis

It is well established that section 7114(c) of the Statute authorizes an agency head to review provisions of a collective bargaining agreement, including those imposed on the parties by the Panel, and to disapprove provisions which the agency head determines are not in accordance with the Statute and other applicable law, rule, or regulation. Interpretation and Guidance, 15 FLRA 564 (1984), aff'd., sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 778 F.2d 850 (D.C. Cir. 1985). An agency head does not violate the Statute merely by reviewing and disapproving provisions imposed by the Panel. However, an agency head's decision to disapprove a provision imposed by the Panel is subject to review either through a negotiability appeal or, as here, in an unfair labor practice proceeding and, if the Authority finds that the provision is not contrary to the Statute or other applicable law, rule, or regulation, such agency head disapproval would constitute a failure or refusal "to cooperate in . . . impasse decisions" in violation of section 7116(a)(1) and (6) of the Statute. See also U.S. Department of Army, Headquarters, and DARCOM HQ, 17 FLRA 84 (1985), affirmed in relevant part sub nom. National Federation of Federal Employees v. FLRA, 789 F.2d 944 (D.C. Cir. 1986).

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[6] The complaint fails to allege that Respondent Treasury failed and refused to negotiate in good faith. This allegation is made only against Respondent IRS.

[7] This issue, however, does not appear to be raised by the General Counsel's complaint.

The negotiability of the Panel-imposed provisions requiring payment of a union official's travel and per diem expenses in this case was premised upon the Authority's earlier conclusion that employees on "official time" under section 7131 of the Statute were entitled to travel expenses and per diem allowances. See Interpretation and Guidance, 2 FLRA 265 (1979). This interpretation was rejected by the Supreme Court in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983). In footnote 17 of its decision, however, the Supreme Court stated that "unions may presumably negotiate such payments in collective bargaining as they do in the private sector." 464 U.S. at 107. The Authority thereafter held in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986), that a proposal requiring the employer to pay the travel and per diem expenses incurred by employees while on official time was within the duty to bargain. The Authority concluded that the payment of such expenses involved a "condition of employment" since representation of employees in matters concerning their employment affects the "working conditions" of employees. The Authority concluded that since determinations concerning whether to make such payments are within the discretionary administrative authority of an agency, the agency was obligated under the Statute to exercise that discretion through negotiation.

The Authority concludes, based on this precedent, that consistent with the scope of our review discussed in Interpretation and Guidance, 15 FLRA 564 (1984), the provisions which the Panel directed IRS and NTEU to incorporate into their agreement herein are fully consistent with applicable law, rule and regulation and thus within the duty to bargain. Therefore, the agency head's action in refusing to approve these provisions was unlawful, and Respondent Treasury thereby violated section 7116(a)(1) and (6) of the Statute.[8]

With respect to Respondent IRS, the Authority has also previously addressed whether a subordinate activity should be found to have violated the Statute when it fails to implement a provision disapproved by an agency head pursuant to section 7114(c) of the Statute. In Departments of the Army and the Air Force, National Guard Bureau and Montana Air National Guard, 10 FLRA 553 (1982), rev'd on other grounds sub nom. Montana Air National Guard v. FLRA, 730 F.2d 577 (9th Cir. 1984), the Authority held that the Montana Air National Guard did not violate the Statute by its ministerial actions in implementing the directives of higher level management even though it found that the National Guard Bureau's action in disapproving a contractual provision had violated section 7114(c)(2) and section 7116(a)(1), (5), and (8) of the Statute. The Authority concludes, based on the above precedent, that Respondent IRS did not violate the Statute by engaging in the ministerial act of forwarding the Panel-directed language to Respondent Treasury for agency head review and thereafter failing to incorporate the Panel-directed language into its collective bargaining agreement subsequent to the determination by Respondent Treasury to disapprove such language.

IRS's contentions that the Panel should not have asserted jurisdiction because the evidence before it did not establish an impasse, and because identical issues were concurrently

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[8] In finding a violation of the Statute, we recognize that the Respondent Treasury took what it believed to be a justified position that the matter in issue could not legally be included in the collective bargaining agreement. Our finding is to be compared with other recent decisions which also found violations of the Statute, but which were predicated on refusals to pay travel and per diem expenses pursuant to contractually agreed-upon provisions for such payments. See, for example, Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986) and Department of Defense Dependents Schools System, 21 FLRA No. 125 (1986). In view of this finding, it is unnecessary for the Authority to pass upon whether the Department of the

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before the Authority in unfair labor practice proceedings, merely constitute disagreement with the Panel. The Fact-finder's Report, relied upon by the Panel, found that there was an impasse, that the instant case was distinguishable from those concurrently before the Authority; that the Union's proposal was negotiable, and that there was "good reason to adopt the Union's proposal apart from the Authority's ruling in 2 FLRA [No.] 31." Fact-finder Report at 8.

V. Remedy

To remedy the unfair labor practice conduct, the Authority will order the Respondent Treasury to approve and comply with the Panel's Decision and Order, and to give it retroactive effect. See Interpretation and Guidance, 15 FLRA 564 (1984), affirmed sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 778 F.2d 850 (D.C. Cir. 1985). Consistent with the Authority's decisions in Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina, 22 FLRA No. 28 (1986) and Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986), the Authority will further order the Respondent Treasury to make whole the Charging Party for the expenses it incurred in paying the travel and per diem expenses of those bargaining unit employees who attended mid-term bargaining sessions during the period in issue, which payments otherwise would have been made by the Respondent IRS. Additionally, if there are any bargaining unit employees who either did not receive payments to which they were entitled or were not compensated fully for such expenses, the Respondent Treasury also will be ordered to reimburse them for the travel and per diem expenses they incurred upon their submission of properly documented claims for such payments. In ordering such payments, the Authority notes that by not complying with the Panel's decision, the Respondent Treasury assumed a risk that if its position did not prevail, it would be found to have committed an unfair labor practice and be subject to

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Treasury's conduct also violated section 7116(a)(5) and (8) of the Statute since such a finding would provide no additional remedy. U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 16 FLRA 456 (1984); National Aeronautics and Space Administration, Headquarters, Washington, D.C., 12 FLRA 480 (1983); Florida National Guard, 9 FLRA 347 (1982), remanded on other grounds sub nom. Florida Department of Military Affairs v. FLRA, No. 82-5901 (11th Cir. Oct. 27, 1983), supp. dec. on remand, 15 FLRA 896 (1984); State of California National Guard, 8 FLRA 54 (1982); remanded on other grounds sub nom. California National Guard v. FLRA, No. 82-7187 (9th Cir. Jan. 7, 1983), supp. dec. on remand, 15 FLRA 479 (1984).

such a remedy[9]. The payments that are here being ordered must be consistent with law and regulations, including the Federal Travel Regulations.

VI. Conclusion

Based on the stipulated record, the analysis of the facts and the precedent cited above, the Authority concludes that the Internal Revenue Service did not violate the Statute as alleged in the complaint and therefore those allegations are dismissed. However, the Authority concludes that the Department of the Treasury's disapproval of a Panel-imposed provision which was not in fact contrary to the Statute or any other applicable law, rule, or regulation constituted a failure or refusal to cooperate in impasse decisions in violation of section 7116(a)(1) and (6) of the Statute.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Treasury shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68 by failing and refusing to approve the provisions directed by the Panel, which are not contrary to the Statute or other applicable law, rule, or regulation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of the Federal Service Labor-Management Relations Statute:

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[9] If the Respondent Treasury's position ultimately had been sustained, however, it would not have been found in violation of the Statute. See Office of Personnel Management, Washington, D.C., 17 FLRA 302 (1985).

(a) Withdraw and rescind its disapproval of the contractual provisions contained in the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68, which were to be included in the negotiated agreement of the Internal Revenue Service and the National Treasury Employees Union and notify these two parties of such in writing.

(b) Make the National Treasury Employees Union whole for the costs, if any, incurred in paying travel expenses and per diem allowances to all bargaining unit employees who submit or have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, for which the employees otherwise would have been reimbursed by the Internal Revenue Service.

(c) Pay travel expenses and per diem allowances consistent with law and regulation, including the Federal Travel Regulations to all bargaining unit employees who submit or have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.

(d) Provide bargaining unit employees official time while they were engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations, including necessary travel time as occurred during the employees' regular work hours when they would otherwise have been in a work or paid leave status, and make them whole for any annual leave they may have utilized for this purpose.

(e) Post at all Internal Revenue Service facilities wherein there are employees represented by the National Treasury Employees Union, a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary of the Treasury, or his designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of section 7116(a)(1) and (8) of the Statute by the Department of the Treasury and insofar as it alleges a violation of section 7116(a)(1), (5), (6) and (8) of the Statute by the Internal Revenue Service be, and it hereby is, dismissed.

Issued, Washington, D.C. July 29, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68 by failing and refusing to approve the provisions directed by the Panel, which are not contrary to the Statute or other applicable law, rule, or regulation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce IRS employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL withdraw and rescind our disapproval of the contractual provisions contained in the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68 which were to be included in the negotiated agreement of the Internal Revenue Service and the National Treasury Employees Union and notify these two parties of such in writing.

WE WILL make whole the National Treasury Employees Union for the cost, if any, incurred in paying travel expenses and per diem allowances to all bargaining unit employees who submit or have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, for which the employees otherwise would have been reimbursed by the Internal Revenue Service.

WE WILL pay travel expenses and per diem allowances consistent with law and regulation, including the Federal Travel Regulations to all bargaining unit employees who submit or have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.

WE WILL provide bargaining unit employees official time while they were engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations, including necessary travel time as occurred during the employees' regular work hours when they would otherwise have been in a work or paid leave status, and make them whole for any annual leave they may have utilized for this purpose.

____
(Agency)

Dated: ________________ By: ________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is 1111 18th Street, N.W., Room 700 (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

22 FLRA No. 90

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL GUARD BUREAU

Respondent

and

Case No. 3-CA-50534

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU

Charging Party/Union

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and by the General Counsel.

The complaint alleges that the National Guard Bureau (Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by instituting a substantive change in conditions of employment without affording the Charging Party, National Association of Government Employees, SEIU (NAGE), prior notice and a reasonable time to present its views and recommendations regarding the change, pursuant to its previously granted national consultation rights, as required by section 7113 of the Statute.[1] Specifically, by memorandum to all Adjutants General dated June 21, 1985, the Respondent implemented an expansion of its Mix-of-the-Force policy to allow non-bargaining unit Active Guard/Reserve military personnel to fill certain bargaining unit technicians positions formerly occupied solely by civilian technicians without prior notice to NAGE.

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[1] Section 7113 provides in pertinent part:

> § 7113. National consultation rights
>
> (a)(1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency,

(Continued)

II. The Facts

At all times material herein, NAGE has been granted national consultation rights by the National Guard Bureau

---

(Continued)

> as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.
>
> (b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall--
>
> (A) be informed of any substantive change in conditions of employment proposed by the agency, and
>
> (B) be permitted reasonable time to present its views and recommendations regarding the changes.
>
> (2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization--
>
> (A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and
>
> (B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

under section 7113 of the Statute. By memorandum to the Adjutants General of all States, Puerto Rico, the Virgin Islands, Guam and the District of Columbia dated June 21, 1985, the National Guard Bureau implemented an expansion of its Mix-of-the-Force policy. Paragraph 5(b) of the policy announcement listed twelve (12) job classifications which could now be filled by Active Guard/Reserve military personnel. The twelve (12) job classifications were bargaining unit positions which had previously been reserved exclusively for civilian technicians. At the time of the policy change, approximately 136 civilian technicians, located in nineteen different States, were assigned to the twelve job classifications.

III. The Issue

The issue in this case is whether the National Guard Bureau violated section 7116(a)(1) and (5) of the Statute by issuing, without consulting with NAGE under section 7113 of Statute, the June 21, 1985 Memorandum which authorized local State management to fill certain bargaining unit positions with Active Guard/Reserve military personnel.

IV. Positions of the Parties

The Respondent's position is that it was not required to consult with NAGE under section 7113 of the Statute because the June 21, 1985 policy letter had no immediate or foreseeable impact on bargaining unit employees. The Respondent argues that paragraph 5(b) of the policy letter merely provides that a vacant position in the twelve (12) listed classifications may be filled by an Active Guard/Reserve or a civilian technician. Thus, the Respondent argues, in any given State, there will be little if any impact on bargaining unit employees, in view of the limited number of positions in each State and the traditionally low or non-existent attrition in the affected positions.

The General Counsel argues that the Respondent's decision to expand its Mix-of-the-Force policy by providing military personnel with the opportunity to fill positions formerly occupied solely by civilian technicians constituted a substantive change in conditions of employment of certain bargaining unit employees. The General Counsel points out that the subject memorandum explicitly stated that the expansion of the Mix-of-the-Force program was intended to afford greater upward mobility and career progression for Active Guard/Reserve officers. This policy change currently impacts upon bargaining unit employees eligible for the affected positions and foreseeably, will limit career progression for certain unit employees. Thus, the General Counsel argues that the Respondent has instituted a substantive change in conditions of employment of certain bargaining unit employees without fulfilling its obligations under section 7113 of the Statute.

V. Analysis

This case involves the application of section 7113 of the Statute. Section 7113(b)(1) of the Statute requires an agency to inform a labor organization having national consultation rights with the agency of any substantive changes in conditions of employment proposed by the agency and to provide the labor organization with reasonable time to present its views and recommendations regarding the changes and to consider such views and recommendations before taking final action.

In order for the consultation obligation set forth in section 7113(b)(1) of the Statute to apply, there must be a substantive change in conditions of employment. See General Services Administration, 6 FLRA 430 (1981) and National Guard Bureau, 18 FLRA No. 62 (1985). Section 7103(a)(14) of the Statute defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation or otherwise, affecting working conditions . . . ."

In terms of this case, it is clear that the Respondent's June 21, 1985 Memorandum, which expanded the Mix-of-the-Force policy to twelve (12) bargaining unit position classifications, was an implementation of a change in personnel policies in that classifications previously reserved to civilian technicians were opened to occupancy by active military personnel. It is also apparent that this personnel policy change affects the working conditions of bargaining unit employees. The Respondent's stated primary objective in instituting the expansion of the Mix-of-the-Force policy was to provide more high level grades and positions for Active Guard/Reserve military personnel. Such an expansion materially affects the availability of promotional and career development opportunities for bargaining unit employees eligible for those positions. Further, the change may result in a decrease in the size of the bargaining unit since bargaining unit positions if filled by military personnel will become military positions which are excluded from coverage under the Statute by section 7103(a)(2)(B)(ii) of the Statute.

Relying on the rationale set forth above, we find no merit to the Respondent's argument that the change had minimal affect on the working conditions of bargaining unit employees. Accordingly, the Authority concludes that the June 21, 1985 policy announcement issued by the National Guard Bureau clearly constituted a substantive change in personnel policy.

Since NAGE had national consultation rights, the National Guard Bureau was obligated to comply with the provisions of section 7113(b)(1) of the Statute prior to finalizing the changes. Thus, the National Guard Bureau was required to notify NAGE and provide NAGE with the opportunity to present its views and recommendations and to consider such views or recommendations before it issued the June 21, 1985 Memorandum. This was not done. Therefore, the Authority concludes that the National Guard Bureau failed to comply with its obligation to consult under 7113(b)(1) of the Statute. See National Guard Bureau, 18 FLRA No. 62 (1985).

VI. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties. The Authority concludes that the Respondent failed to fulfill its obligation to consult with NAGE pursuant to section 7113(b)(1) of the Statute prior to issuing its June 21, 1985 Memorandum expanding its Mix-of-the-Force policy and thus, the Respondent violated section 7116(a)(1) and (5) of the Statute. Therefore, the Respondent shall be ordered to provide NAGE, pursuant to its national consultation rights under section 7113 of the Statute, with reasonable time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the-Force policy.2/

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the National Guard Bureau shall:

2/ In the absence of a request by the General Counsel or NAGE for a status quo ante remedy herein, and in the circumstances of this case, the Authority concludes that no such remedy is warranted. See National Guard Bureau, 18 FLRA No. 62 n.4 (1985).

1. Cease and desist from:

(a) Failing to inform the National Association of Government Employees, SEIU (NAGE), pursuant to NAGE's national consultation rights under section 7113 of the Statute, of proposed substantive changes in conditions of employment, and failing to provide NAGE with a reasonable period of time to present its views and recommendations regarding the proposed changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the National Association of Government Employees, pursuant to its national consultation rights under section 7113 of the Statute, a reasonable period of time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the-Force policy, and thereafter, comply with the requirements of section 7113(b)(2) of the Statute.

(b) Post at all of its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, Army National Guard, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by the National Guard Bureau to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 29, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT FAIL to inform the National Association of Government Employees, SEIU (NAGE), pursuant to NAGE's national consultation rights under section 7113 of the Statute, of proposed substantive changes in conditions of employment, or fail to provide NAGE with a reasonable period of time to present its views and recommendations regarding the proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide the National Association of Government Employees, pursuant to its national consultation rights under section 7113 of the Statute, a reasonable period of time to present its views and recommendations concerning procedures pertaining to the impact and implementation of the expanded Mix-of-the-Force policy, and thereafter, comply with the requirements of section 7113(b)(2) of the Statute.

____
(Activity)

Dated:______________________ By:____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: P.O. Box 33758, 1111 18th Street, N.W., Room 700, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

22 FLRA No. 91

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
63rd CIVIL ENGINEERS SQUADRON
NORTON AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 8-CA-40473

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, INTERDEPARTMENTAL
LOCAL 3854, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice complaint is before the Authority based on exceptions filed both by the General Counsel to certain aspects of the attached Decision of the Administrative Law Judge and by the Respondent to other aspects of the attached Decision. The complaint contained four separate allegations arising out of a meeting held on May 2, 1984, between two agents of the Respondent and the Charging Party's (the Union's) local representative. The complaint alleged that the meeting was a formal discussion within the meaning of section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute) and that the Respondent's failure to provide the Union with an opportunity to be represented constituted a failure to comply with that section in violation of section 7116(a)(1) and (8) of the Statute. The complaint also alleged that a statement made to the Union's local representative at the meeting constituted interference with his protected rights in violation of section 7116(a)(1) of the Statute and that the decision to reassign the local representative was based on his having engaged in protected activity in violation of section 7116(a)(1) and (2) of the Statute. Finally, the complaint alleged that the reassignment of the local representative constituted a unilateral change in conditions of employment in which the exclusive representative was not notified and afforded an opportunity to bargain concerning its impact and implementation in violation of section 7116(a)(1) and (5) of the Statute.

II. Background

As more fully set forth by the Judge, Howard Wright is the unit vice-president of the Charging Party and its only representative at the Respondent's facility. On November 6, 1983, Wright complained to an agent of the Respondent regarding what he viewed to be inequitable assignment of details. His complaint eventually resulted in a formal grievance filed on his behalf by the President of the Charging Party, who is located at March Air Force Base. His grievance was denied at the second step by Fire Chief Smith in a letter dated April 9, 1984. Wright then requested an extension of time in which to file his grievance at the third step in a letter incorrectly directed to the Wing Commander. As a result of the misdirection, Fire Chief Smith was then contacted by the Base Commander who told him that the Wing Commander was upset because of the misdirection of Wright's extension request. The Chief of Labor and Employee Relations also called Smith and said he had been called by the Base Commander about the misdirected request. He related that they had a problem with Wright not following the contract requirements. On May 2, 1984, Wright was told to report to Deputy Fire Chief Turner's office. There is nothing in the record to indicate that he was told why he should report. When he arrived, Fire Chief Smith was also there. A statement, alleged to be coercive, was made to Wright by Smith, as set forth in the Judge's Decision, which the Judge found to be in reference to the misdirected request for a grievance extension. Wright was then asked how his grievance could be resolved. A discussion of the grievance and its resolution ensued. Wright was ultimately reassigned to Fire Station 2 based on, among other things, his need to get certain training, which was only offered there. The reassignment was made permanent at a later date.

III. Judge's Decision

The Judge concluded, with respect to the first allegation of the complaint, that the May 2, 1984 meeting constituted a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute at which the Respondent failed to provide the exclusive representative an opportunity to be represented thereby failing to comply with that section in violation of section 7116(a)(1) and (8) of the Statute. In response to the Respondent's contention that the meeting was not formal, the Judge noted that it involved the discussion and/or resolution of a grievance, the employee was called to the office by management, the meeting was conducted by two supervisors of the Respondent, one of whom was not merely a first level supervisor, and the meeting was not impromptu or casual. In answer to the question of whether the Union was, in fact, represented by Wright, given his status as an officer of the Union, the Judge noted that Wright was the grievant in this case and should not "be compelled to wear two hats at the same time so as to permit management to avoid its obligation under section 7114(a)(2)(A) of the Statute." Therefore, he concluded that the Union did not receive notification of the meeting in which Wright's grievance was discussed.

With respect to the allegation that the statement made to Wright at the May 2, 1984 meeting was coercive in nature, the Judge found that he was not persuaded that the statement constituted interference with Wright's protected activity. The Judge noted that the statement was specifically related to the misdirected extension request that caused problems within the management chain, and not to Wright's processing of the grievance itself. The Judge did not view the remarks, in these circumstances, as reasonably tending to coerce or intimidate Wright. Therefore, he concluded that the statement was not violative of section 7116(a)(1) of the Statute.

The Judge also was not persuaded that a *prima facie* case of discrimination had been proven regarding the third allegation of the complaint. Thus, the Judge found that there was no basis in the record testimony to establish that Wright's reassignment was in any way intended to thwart the processing of the grievance by Wright. Rather, the Judge noted, a sufficient basis did exist for management's action, particularly Wright's need for certain training, which in his view dispelled any suspicion caused by the timing of the reassignment. Therefore, he concluded that the reassignment of Wright was not discriminatory and thus was not violative of section 7116(a)(1) and (2) of the Statute.

With respect to the final allegation of the complaint, that Wright's reassignment and ultimate transfer to Fire Station 2 constituted a unilateral change in conditions of employment in violation of section 7116(a)(1) and (5) of the Statute, the Judge first discussed the Respondent's contention that this allegation was untimely filed under section 7118(a)(4)(A) of the Statute. He concluded that the amended charge, which was filed more than six months after the alleged unilateral change, was not untimely in that it did not raise a new cause of action. Turning to the merits of the unfair labor practice allegation, the Judge concluded that the reassignment did not give rise to a duty to bargain. Therefore, the Judge dismissed this aspect of the complaint.

IV. Positions of the Parties

The Respondent excepted only to the Judge's conclusion regarding the first allegation of the complaint, contending that the meeting was not a formal discussion. Thus, the Respondent argued that the meeting was not formal in nature and that even if the meeting was a formal discussion, the Union was provided with an opportunity to be represented because its vice-president was notified and attended the meeting. The General Counsel, in opposing the Respondent's exceptions, notes that Wright had no idea what the meeting would be about at the time he was summoned. Moreover, the General Counsel argues in support of the Judge's conclusion that a union official would not necessarily have the interests of all unit employees in mind when the meeting involved his own personal grievance.

The General Counsel excepted to the Judge's dismissal of the unfair labor practice allegations concerning the statement made to Wright at the May 2, 1984 meeting and Wright's alleged discriminatory reassignment. The General Counsel contends that the Judge should have concluded that the statement made to Wright would reasonably have caused him to draw a coercive inference. The General Counsel also contends that a prima facie case of discrimination had been proven with respect to the reassignment. Thus, in the view of the General Counsel, given the timing of the reassignment, and the inference that should have been drawn regarding Smith's statement to Wright, a discriminatory basis for the reassignment had been established.

In its opposition to the General Counsel's exceptions, the Respondent noted that Wright was not an average employee. He was the Union vice-president, and he should have reasonably perceived that the statement made to him by Smith related to his misdirection of the extension request and not to his having engaged in protected activity. The Respondent also contends with respect to the reassignment, that its purpose was to provide Wright with needed training and to put him where he would be subject to less details in response to his grievance.

Neither party filed exceptions with respect to the Judge's dismissal of the final allegation of the unfair labor practice complaint.

V. Analysis

The Authority adopts the Judge's findings, conclusions and supporting rationale with respect to all four of the allegations set forth in the unfair labor practice complaint. Thus, the Authority concludes, in agreement with the Judge, that the May 2, 1984 meeting was a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute inasmuch as it involved the discussion of an actual grievance with the employee grievant and was initiated and conducted by agents of the Respondent. With respect to the Respondent's contentions that the notification and attendance of Wright, a Union officer, at the meeting satisfied the requirements of the Statute that the Union be provided with an opportunity to be represented, the Authority notes that neither Wright nor the President of the Union, who filed the grievance on Wright's behalf, was informed of the purpose of the meeting prior to Wright's arrival at the meeting. Once he arrived and management began discussing resolution of the grievance, Wright was placed in the position of representing himself in his own grievance. Therefore, we conclude, in agreement with the Judge, and in the unique circumstances of this case, that the rationale contained in Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA No. 122 (1985) is distinguishable and, therefore, the Union was neither notified nor provided with an opportunity to be represented at this formal discussion concerning Wright's grievance by the Respondent. Accordingly, the Respondent failed to comply with section 7114(a)(2)(A) of the Statute in violation of section 7116(a)(1) and (8).

The Authority also adopts the Judge's conclusions, and supporting rationale, that the Respondent did not violate section 7116(a)(1) of the Statute based on the statement made to Wright at the May 2, 1984 meeting; nor did it violate section 7116(a)(1) and (2) based on its reassignment of Wright. Thus, the Judge applied appropriate case law to his conclusions and the General Counsel's exceptions constitute mere disagreement with his factual analysis. We find no basis for reversing these conclusions.

Finally, with regard to the final allegation of the unfair labor practice complaint, no exceptions were filed to the Judge's conclusion that the impact of the Respondent's reassignment of Wright did not create a bargaining obligation. We agree with the Judge and conclude that the Respondent's failure to give notice to the Union of the reassignment and afford it an opportunity to request bargaining concerning its impact was not violative of section 7116(a)(1) and (5) of the Statute.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms these rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision and the entire record, and adopts the Judge's findings, conclusions, and recommended Order. We therefore conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute when it failed to afford the Union an opportunity to be represented at a formal discussion conducted on May 2, 1984, thereby failing to comply with section 7114(a)(2)(A) of the Statute. We also conclude that the General Counsel did not establish that the Respondent violated section 7116(a)(1), (2) and (5) of the Statute with respect to other conduct related to the May 2, 1984 meeting. Accordingly, these aspects of the complaint shall be dismissed.

ORDER

Pursuant to section 7118 of the Statute and section 2423.29 of the Rules and Regulations, it is hereby ordered that the Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California, shall:

1. Cease and desist from:

(a) Failing to provide its employees' exclusive representative, American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO, an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Post at its facilities, 63rd Civil Engineers Squadron, Norton Air Force Base, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

IT IS FURTHER ORDERED that the remaining allegations of the complaint in Case No. 8-CA-40473 be, and they hereby are, dismissed.

Issued, Washington, D.C., July 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide our employees' exclusive representative, American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO, an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Activity)

Dated:_______________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF THE AIR FORCE
63rd CIVIL ENGINEERS SQUADRON
NORTON AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No.: 8-CA-40473

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, INTERDEPARTMENTAL LOCAL
3854, AFL-CIO

Charging Party

. . . .

Lt. Col. Wade B. Morrison
For the Respondent

Jonathan S. Levine, Esquire
For the General Counsel

Del Mar Callaway
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

A hearing in the above-entitled case was held before the undersigned on April 18, 1985 at Los Angeles, California. The Complaint and Notice of Hearing was issued on January 11, 1985 by the Regional Director for the Federal Labor Relations Authority, Los Angeles, California.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, et seq. (herein called the Statute). It is based on a first amended charge filed on December 31, 1984 by American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO (herein called the Union) against Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California (herein called Respondent).

The Complaint alleged, in substance, that (a) on or about May 2, 1984 Respondent, via a management official, conducted a meeting with a unit employee concerning the latter's grievance, without affording the Union, the exclusive representative of Respondent's employees, an opportunity to be present;[1] (b) on or about September 13, 1984 Respondent, via a management official, unilaterally changed working conditions of a unit employee by reassigning said employee to Fire Station 2 without first notifying the Union and affording it an opportunity to negotiate re the implementation of the change and its impact on unit employees; (c) on or about September 13, 1984 Respondent permanently reassigned Howard Wright to Station 2 because he engaged in protected union activity on behalf of the Union; (d) on or about May 2, 1984 Respondent, via a management official, made statements to a unit employee to the effect that he would be disciplined or subject to reprisal because he engaged in protected union activity - all in violation of Section 7116(a)(1), (2), (5) and (8) of the Statute.

Respondent's Answer dated January 23, 1985 denied the aforesaid allegations as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.[2]

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and is now, the exclusive representative of all civilian employees of the Fire Protection Branch, 63rd Civil Engineers Squadron of Respondent with specified exclusions from said unit.

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[1] It is alleged that by this conduct Respondent refused to comply with 7114(a)(2)(A) of the Statute in that the exclusive representative was not afforded an opportunity to be present at said meeting which constituted a formal discussion.

[2] Subsequent to the hearing several motions were filed with the undersigned. Respondent moved for the consideration by the Administrative Law Judge of additional citations of cases decided by the Authority. The Charging Party moved for the consideration by the Administrative Law Judge of two provisions of the negotiated agreement between Respondent and the Union. No objection having been interposed by either party, the motions are granted. The cited matters have been considered by the undersigned.

2. Both the Union and Respondent are parties to a written collective bargaining agreement entered into in January 18, 1982.[3] The said agreement provides, inter alia, as follows:

> Article 19
>
> Section 6
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> The Employer and Union agree that any discussion or meeting between stewards and supervisors shall generally be with supervisors up to and including the second-level supervisor. Discussions or meetings with the supervisors above the second-level (or management officials) will normally be restricted to officers of the Union. Officers may be accompanied by the appropriate steward at such meeting if determined necessary.
>
> Section 8
>
> The employer will notify the steward seven (7) days prior to reassignment to another organization.

3. Since 1974 Howard Wright has been employed by Respondent as a firefighter. He was made steward of the Union in 1981, and on February 15, 1983 Wright was designated as unit vice-president for the Union.

4. Until 1984, and for about six years, Wright worked at Fire Station #1 where he was assigned to the primary rescue crew which was responsible for protecting life and property. As a firefighter in that unit Wright was required to know all rescue procedures, and he underwent continuous training in structural and aircraft emergencies. In order to obtain a layout of buildings he was required to pre-fire plan buildings, to learn where chemicals were stored and what hazards existed therein. Wright also received medical training at that station. He was required to maintain equipment, clean the station and cut the grass.

5. In his capacity as union representative, Wright filed grievances for employees as well as unfair labor practice charges. He became involved in membership drives and negotiations on implementing the Air

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[3] Although the agreement was entered into by AFGE, Local 1953, AFL-CIO, the Union herein, which succeeded to Local 1953 as the representative of the unit employees, is admittedly bound by its terms.

Force Regulations. Wright was the only representative at Norton Air Force Base for the local union.[4]

6. On November 6, 1983 Wright spoke to Chief Arnold, a management official, and complained that details of employees were not being distributed or assigned in an equal manner.

7. A series of communications between the Union and Respondent ensued as to whether Wright's complaint was in fact a grievance and properly brought to management's attention. The Union felt that Wright had "grieved" about the inequity of detail assignment, and that Respondent was avoiding its obligation to negotiate the matter. Respondent did not deem the oral complaint or subsequent correspondence to constitute a grievance as required under the collective bargaining agreement.[5]

8. In a letter dated January 27, 1984 the Union filed a grievance with Respondent concerning the allegation that details were being assigned in an inequitable manner.

9. A reply letter dated February 27, 1984[6] was written by Commander George W. Hillyer III to Union President Callaway. It was stated therein that management attempted to assign details in an equitable manner; that Respondent could not take Wright off all details and extra duties as he requested; that it could not expunge the records of any action taken against him by chiefs Arnold or Smith; that disciplinary action would not be taken against the management officials.

10. In an attempt to resolve the grievance Wright met with Smith on April 4, in accord with Step II of the grievance procedure. Thereafter, by letter dated April 9, Smith denied Wright's grievance. The Fire Chief termed this his final decision, and he deemed the matter to be resolved.

11. By letter dated April 22, addressed to the Wing Commander and hand delivered, Wright requested 10 days extension to move his grievance to the next step of the grievance procedure.

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[4] The President of the Union, Del Mar Callaway, is located at March Air Force Base, near Edgemont, California.

[5] Section 10 of the collective bargaining agreement is entitled GRIEVANCE PROCEDURE (Resp. Exhibit 1). It provides for the submission of a grievance by a concerned employee to the first-level supervisor either orally or in writing as Step 1. The grievance must be submitted within 15 days of the incident or the date on which the employee or Union became aware thereof.

[6] All dates hereinafter mentioned, unless otherwise specified, occurred in 1984.

12. Record facts show that shortly thereafter the Base Commander called Smith re the extension request made by Wright. The Base Commander was disturbed because the request had mistakenly been addressed to the Wing Commander, and he told Smith that the Wing Commander was upset because of its misdirection. Further, Donald Larsen, Chief of Labor and Employee Management Relations for Respondent, testified that the Base Commander also called him and stated that the Wing Commander was upset due to the misdirected request. Larsen then phoned Smith and related the fact that the extension request was sent to the Wing Commander in error, and he said they had a problem with Wright not following the requirements of the contract.

13. On May 2 Wright called Larsen to ascertain whether his extension request had been granted. He was told it was rejected. Later that morning Wright was told to report to Deputy Fire Chief Turner's office. He did so and was informed Smith wanted to speak with him. A meeting then took place in Smith's office which was attended by Turner, Wright and Fire Chief Smith.

14. At the outset of the meeting on May 2 Smith told Wright he didn't appreciate the latter calling him a liar. The employee denied doing so. Smith then referred to the request for a grievance extension made by Wright; that how the Wing Commander "chewed out" the Base Commander who "chewed out" Larsen, and that the latter "chewed out" Smith. The Fire Chief then stated that Wright was at the bottom of the ladder and if he's going to "stir shit", plan on getting some on himself.[7/]

Smith asked Wright what he could do to resolve the grievance. The employee replied that there should be an equal distribution of details. The Fire Chief then inquired as to the vehicles Wright was trained to drive at Station 2 and whether he was trained on P2D and P-13. The employee acknowledged that both were on his license. When asked as to P-15, Wright replied that such vehicle was not on his license. Smith said he would be sending Wright to Fire Station 2 for P-15 training and have it put on his license. The employee did not respond. Then Smith asked Wright how much

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[7/] Smith admits to making the statement that if Wright "stirred up shit" some would get on that employee. He testified that this referred to Wright's misdirecting correspondence and sending it to the wrong people; that there was no intent to stop the employee from processing his grievance. Wright's testimony confirms the fact that Smith's comment re "stirring up shit" was in reference to the misdirected request for grievance extension.

notice must be given before transferring the latter to Station 2, and the employee said "two weeks."[8]

15. Turner sent a memo dated May 3 to Assistant Chief Arnold which recited that effective May 13 Wright would be assigned to Fire Station 2 for duties.

16. Wright reported to Fire Station 2 on May 13. He worked a few days but was involved in a motorcycle accident on May 18. After being off for several months due to the accident, Wright was released for work. Upon directions from Smith, the employee reported to Station 1 on August 20 where he worked for several days as a driver on the primary rescue crew, his usual position. Wright reported to Station 2 on August 26 as directed by Arnold. On September 13 Sgt. Ebert informed Wright that after the latter completes his P-15 training he would be permanently assigned to Station 2 as primary driver on that vehicle. The transfer was made permanent on September 13.

17. Both parties stipulated that Respondent did not notify the Union's president, Del Mar Callaway, of the permanent assignment of Wright to Fire Station 2 on September 13.

18. By letter dated September 17 the Union requested that Respondent meet and bargain re the change in Wright's condition of employment, i.e. the transfer from Fire Station 1 to Fire Station 2.

19. In a reply letter dated September 21 Respondent notified the Union that Wright's transfer was not considered a change in condition of employment since he still performed duties of a GS-081-05 Fire Fighter. Further, it was stated the transfer was effected on May 13 as an employer right, and that the transfer did not affect Wright's representational duties.

20. Record facts show both fire stations are located about three-fourths of a mile from each other. Employees are rotated between stations on a daily basis, although only about six permanent transfers are made per

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[8] There is a disparity between the testimonies of Wright and Smith in regard to whether certain other statements were made at this May 2 meeting. Thus, Smith testified that all participants, including Wright, agreed to the transfer of the employee to Station 2; that he asked Wright how the transfer suited him and the employee stated "it would be fine." Wright denies that he accepted the transfer. Turner, who was present at the meeting, did not testify. The version as recited by Wright is credited. Apart from the fact that Turner did not testify at the hearing, Smith's testimony reflects that Turner made the decision and that Wright did not seek or request a transfer. Moreover, Smith's recollection, as he acknowledged, was somewhat deficient.

year. Of the 19 bargaining unit employees there are more located at Station 2. The rescue mission at Station 1 requires that the employees be skilled in various aspects of fire service and a self-development program was in effect to that end. More knowledge of aircraft is required of employees at Station 2.

21. There are about 12-13 vehicles in the fleet at the fire stations and two shifts are in operation thereat. The rescue truck (P-10) has three people per shift assigned thereto. The P-15 is a million dollar fire truck, which is big and bulky, and is strictly a crash-rescue vehicle. All drivers are required to be qualified on all vehicles. Wright was the only driver not qualified to drive the P-15. Inspections in regard to proficiency are made by outside agency personnel on a routine basis.

22. Fire Station 1 acts as a delivery service for the fire department since it is on the main base and has access to most areas needing attention. Fire Station 2 is a more restricted area. It is on the flight line and the noise level is quite high. The record indicates Wright could come and go while at Station 1 with relative ease so as to visit the base and expand his knowledge of what happened thereat. At Station 2 he was quite confined although it appears he could leave if official time was requested.[9] On at least two days of each week, Monday and Wednesday, Station 1 employees come over to Station 2 for training. All of the fire station employees eat meals at the same location.

Conclusions

The principal issues for determination herein are as follows:

1. Whether Respondent conducted a formal discussion on May 2, 1984 and failed to provide the Union with an opportunity to by represented thereat - all in violation of Section 7116(a)(1) and (8) of the Statute.

2. Whether statements made by Respondent's representative to Wright on May 2 constituted a violation of Section 7116(a) of the Statute.

3. Whether Respondent transferred or reassigned Wright from Station 1 to Station 2 because of his protected activity in violation of Sections 7116(a)(1) and (2) of the Statute.

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[9] Wright was not denied official time to represent unit employees. However, Wright testified he could not communicate with employees who did not have clearance to visit Station 2; that he was therefore unaware of a campaign by a rival union to take over the units represented by the Union herein.

> 4(a). Whether the allegation of a violation of 7116(a)(5), based on a unilateral change in Wright's employment conditions, due to Respondent's transferring him from Station 1 to 2, was untimely under Section 7118(a)(4) of the Statute.
>
> (b). If not untimely, whether the transfer or reassignment of Wright was a unilateral change effected without notifying the Union and affording it an opportunity to bargain thereon - all in violation of Section 7116(a)(1) and (5) of the Statute.

(1) Respondent takes the position that its meeting with Howard Wright on May 2 was not "formal" within the meaning of Section 7114(a)(2)(A) of the Statute. It contends that said discussion was an informal attempt to discuss resolution of a grievance already denied.

The aforesaid section of the Statute provides for representation by an exclusive representative of unit employees at any formal discussion concerning any grievance or any personnel policy or practices or other general condition of employment. The obvious purport of the term "formal" is to preclude requiring union representation at casual meetings or discussions. In the case at bar the employee was called to the office by management, the discussion was held with two of the chief supervisors of Respondent, and it was admittedly for the purpose of discussing and/or resolving the employee's grievance. Thus, as the record reflects, Chief Smith initiated the discussion by asking Wright what could be done to resolve the grievance. Further, the subsequent remarks centered around the manner in which the grievance extension had been filed.

It seems quite clear that discussions which center around a grievance already filed, which are initiated by management, are "formal" within the aforesaid statutory language. While distinguishing such provision from 7114(a)(2)(B) of the Statute, the Authority has recognized that discussions re a grievance, which has been filed under the negotiated grievance procedure, comes within the purview of 7114(a)(2)(A). In such instances the discussions are deemed formal in nature and mandate that an agency provide for union representation thereat. See Department of Health and Human Services, Social Security Administration, 18 FLRA No. 7; Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region. 10 FLRA No. 36.

In asserting that no formal discussion occurred on May 2, Respondent lays stress upon the Authority's decision in Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 17 FLRA No. 124. Although adhering to the standards for determining when a union's rights attach under 7114(a)(2)(A) of the Statute, the Authority held in the cited case that a meeting with an employee was not "formal" as contemplated by the statutory language. It emphasized the fact that the meeting with the employee concerning his grievance was held with a first-level supervisor, with no other management officials present; that the meeting was called informally and not scheduled in advance.

There are, however, notable distinctions between the facts present herein and those involved in the cited case. Firstly, the meeting with Wright was held with two management officials: the Base Fire Chief and the Deputy Chief. Thus the discussion was not one merely with a first-level supervisor. Moreover, the discussion concerning Wright's grievance was not called informally. Record facts show it was pre-arranged and not an impromptu or casual meeting.[10] Thus, Smith testified as follows in response to a query as to what transpired thereat:

> "Well, primarily I wanted to talk to Howard about a particular grievance that's been going on for some time. I wanted to find out what we had to do to resolve it to everyone's satisfaction so that we could get about other things, basically.
>
> "Howard's problem was with the details. Chief Turner had another problem. In between the two we made a basic resolution that Mr. Wright, to get out from under the pressure of the details, go to Station 2. . . ." (Tr. 108, 109) (Emphasis supplied).

The foregoing testimony, in addition to the content and manner of the discussion, convinces me that the discussion re Wright's grievance is distinguishable, at least, from the Ogden Air Logistics Center, Hill Air Force Base, Utah case, supra. Further, that the discussion which the management officials had with Wright concerning his grievance on May 2 was formal within the meaning of 7114(a)(2)(A) of the Statute.

In view of certain recent decisions by the Authority, consideration has been given by the undersigned as to whether the Union was in fact represented at the May 2 discussion re Wright's grievance. Thus, the Authority has held that it is not always necessary for an agency to notify union representatives in advance of a formal discussion. It is only necessary that an exclusive representative "be given the opportunity to be present." Accordingly, if union representatives do in fact attend such discussions, no inquiry will be made as to how they were notified or happened to be in attendance. No notice need be given to a union qua union. Where, in such instances, a shop steward or vice-president of a union attended such discussions, no violation existed even though notice was not sent to the union itself. Department of the Treasury, U.S. Customs Service, Miami, Florida, 19 FLRA No. 126; Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma.

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[10] Note is taken of the decision by the U.S. Court of Appeals for the District of Columbia Circuit in National Treasury Employees Union v. Federal Labor Relations Authority, No. 84-1493, October 11, 1985 (renewing 15 FLRA No. 87). The Court stated therein that lack of notice and formal agenda, as relied upon by the Authority, do not always correlate with spontaneity and thus mere absence of notice or an agenda will not necessarily indicate that a meeting is not "formal."

Despite the fact, however, that Wright was the vice-president of the Union herein, it would defy the bounds of logic to conclude that the Union was represented during the discussion with the employee concerning his grievance. Such a conclusion would be equatable with determining that a defendant has received legal representation because he is also a lawyer; that therefore his attorney cannot represent him.

In the case at bar the Union did not receive notification of the meeting or discussion which concerned Wright's grievance. As the exclusive representative of the unit employees its concerns, as well as any presentation to Respondent at the said discussion, might well differ from those advanced by the employee on his own behalf. In this respect Wright cannot be compelled to wear two hats at the same time so as to permit management to avoid its obligation under 7114(a)(2)(A) of the Statute. Thus, reason compels the conclusion by the undersigned that Respondent violated Section 7116(a)(1) and (8) by failing to afford the Union an opportunity to be represented at the formal discussion on May 2 concerning employee Wright's grievance.

(2) Under section 7116(a)(1) of the Statute it is specifically stated that it is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise of any right under this chapter." General Counsel insists that the remarks made by Fire Chief Smith to Wright on May 2, at the meeting in the former's office, were coercive in nature and hence violative of the said statutory proscription. It is argued that the statement to Wright regarding his being at the bottom of the ladder and "if you're going to stir up shit, plan on getting some on you" referred to the grievance filed by the employee and the attendant request by Wright for a grievance extension.

Employees are afforded the right to engage in protected activity without infringement thereon by an agency. They are entitled to engage in such activity freely and without fear of penalty or reprisal therefor. It is also well established that such protected activity includes the processing of a grievance. Federal Election Commission, 6 FLRA No. 59; Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA No. 116.

Turning to the case at bar, I am not persuaded that Smith's statements to Wright constituted an interference with the latter's protected activity or were coercive in nature. While it is true that Smith initiated the discussion by inquiring how to resolve the grievance, his subsequent comments re "stirring up shit" were not referable to Wright's filing or processing the grievance. The basis for Smith's intemperate use of language and remarks to Wright stemmed from the misdirection of the request of extension for pursuing the grievance, and this was admitted by Wright at the hearing. The Wing Commander's irateness was due to the fact that the request was made to him, and he "chewed out" the Base Commander. Thereafter each subordinate supervisor was the recipient of some censure until it reached Wright who was at the bottom of the ladder. There is no indication that management sought to interfere with, or forestall, the processing of the grievance. The record supports the conclusion that Smith, who had been "chewed out" also, was likewise upset because the grievance extension had been sent to the wrong person. Thus I conclude that the statements made by Smith to Wright on May 2 were not intimidating in nature. They neither suggested any reprisal for requesting a grievance extension nor implied that Wright would suffer consequences for continuing to process same.[11/] I conclude said statements by Smith did not violate 7116(a)(1) of the Statute.

(3) It is well established that the burden is on the General Counsel to make a prima facie showing that an employee became engaged in protected activity, which was known to management, and that such conduct was a motivating factor in any action taken against said individual. Internal Revenue Service, Washington, D.C., 6 FLRA No. 23. In the case at bar, General Counsel contends that the filing of a grievance by Wright, and his continued attempt to process it further, motivated Respondent in transferring the employee from Station 1 to Station 2.

While the transfer of Wright may give rise to suspicion in respect to the basis therefor, I am not persuaded that a prima facie case of discrimination has been proven. The record reflects that Wright was not prevented or hindered in the filing of the grievance re the assignment of details. Although the grievance had been rejected through Step 2, it had been processed in the normal manner and in accordance with Section 10 of the collective bargaining agreement. Moreover, it also appears that Wright had, in his capacity as a union representative, filed grievances and unfair labor practice charges in the past without interference, or intimidatory conduct, on the part of management.

[11/] The undersigned is mindful of the adopted standard to determine whether a statement by management constitutes interference, restraint and coercion, as set forth in Federal Mediation and Conciliation Service, 9 FLRA No. 31. However, I am of the opinion that Smith's remarks would not reasonably tend to coerce or intimidate Wright; that the latter was made aware that the statements were not related to his pursuing the grievance or engaging in protected activity; and that the circumstances negate any inference which might be drawn as to a coercive intent.

It is urged that Smith's remarks to Wright on May 2 demonstrate that the exercise of protected activity by the union vice-president was the motivating factor in his transfer. Thus, General Counsel adverts to the statement by the Fire Chief to Wright: "if you're going to stir up shit, plan on getting some on you." However, the record supports the finding that this comment referred to the fact that the request for an extension to pursue the grievance was misdirected. The Wing Commander was upset because he felt the request should have been made elsewhere. His "chewing out" of the Base Commander resulted in the latter doing the same to his subordinate until, as Smith commented, it reached Wright who was at the bottom of the ladder. The testimonies of both Smith and Wright lend credence to the conclusion that the aforesaid comment did not refer to the processing of the grievance by Wright. There is no indication that the statement by Smith on May 2 was an attempt to thwart processing of the grievance which the employee filed. It was, as Wright conceded at the hearing, referable to the disturbance caused by sending the requested extension to the wrong person. As such, I do not conclude that it evinces discriminatory intent on the part of management.

General Counsel also points to the fact that no mention of transferring Wright had been broached prior to May 2; that the employee did not request the transfer; and that it developed only after the discussion re the grievance on that date. While the timing of the decision to make the reassignment might be deemed suspect, sufficient basis did exist for management's actions to dispel such suspicion. Wright had been trained on almost all vehicles except the P-15 truck, and this training was a necessary part of a firefighter's job. His reassignment to Station 2 for such training was not a unique action since others had been assigned or detailed in the past to said station for a similar purpose. While the permanency of Wright's assignment may not have been in accord with the employee's wishes, the decision of management to take such action does not warrant an inference that it was effected in retaliation for Wright's zeal in pursuing his grievance. Although contacts with fellow employees in respect to grievances or union matters may have been somewhat more difficult due to his new location, it does not appear that Wright was prevented or thwarted from such activities by Respondent. Accordingly, I conclude the reassignment of Wright to Station 2 was not discriminatory and violative of 7116(a)(1) and (2) of the Statute.

(4) (a). It is contended by Respondent that the alleged violation of 7116(a)(5) by Respondent, as set forth in the amended charge filed on December 31, 1984, was untimely. This contention is posited on the assertion that the reassignment of Wright to Fire Station 2 took place on May 13, 1984. Thus, Respondent insists, the amended charge raised a new cause of action which was filed more than six months after the conduct alleged, i.e., the reassignment of Wright as a unilateral act and refusal to bargain.

Section 7118(a)(4)(A) states that ". . . no complaint shall be issued based on any alleged unfair labor practice which occurred more than six months before the filing of the charge with the Authority." This statutory proscription was clearly structured in line with Section 10(b) of the NLRA. Its intent was to prevent the litigation of stale charges wherein the recollection of witnesses may be clouded, witnesses not readily available, and documents not at hand. See Lower Colorado Dams Project, Water and Power Resources Services, 14 FLRA No. 81. Moreover, it is well settled that the purpose of the charge is merely to set in motion the machinery of an inquiry. NLRB v. Faut Milting Co., 360 U.S. 301 (1959).

In the case at bar I am not convinced that the amended charge, filed on December 31, 1984, raised a new cause of action as averred by Respondent. Both the original charge, filed on September 18, 1984, and the amended charge alleged that Wright was reassigned on September 13, 1984; that such reassignment changed his working conditions and had an adverse impact on the employee; and isolated him from bargaining unit employees in respect to his representational duties. Thus, there is reference to the reassignment of Wright and to the change in his working conditions in the charges. The addition of an (a)(5) in the amended charge did not change the cause of action. Moreover, the Authority recognized that the General Counsel's authority in issuing a complaint need not be limited to the strict confines of the charge; that the charge merely sets in motion the machinery of an investigation. U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, 9 FLRA No. 65.[12]

(4) (b). It is contended by General Counsel that the transfer of Wright to Fire Station 2 required notification be given to the Union, and that the latter be afforded an opportunity to bargain re the implementation of the change and its foreseeable impact on unit employees. Having failed to do so, it is urged that Respondent violated 7116(a)(1) and (5) of the Statute. Respondent, conceding that prior notice was not given the Union of the assignment, insists that the transfer resulted in no more than a de minimis impact; that, under such circumstances, it was not obligated to notify the Union and bargain as to the change.

12/ The statute of limitations would not apply, in my opinion, even if the alleged refusal to bargain were raised for the first time in the amended charge filed on December 31, 1984. I agree with General Counsel that the transfer of Wright to Station 2 occurred on September 13, 1984 and not on May 13, 1984, and therefore the allegation of (a)(5) was timely under both charges. The record reflects the assignment of Wright in May was to train on the P-15 vehicle; that the transfer of Wright to Station 2 as a permanent employee occurred on September 13. Accordingly, the conduct complained about in the amended charge as well as the original charge - (a)(5) - took place within six months of the filings thereof.

In its latest rationale concerning the issue of whether the impact of a unilateral change in working conditions warrants bargaining, the Authority has concluded that certain factors should be considered. In Department of Health and Human Services, Social Security Administration, Region V, Chicago, Illinois, 19 FLRA No. 101 it looked to: the nature of the change (e.g. the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (i.e., duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past, in determining that the impact, or reasonably foreseeable impact, of the change was not more than de minimis and thus did not give rise to a duty to bargain re procedure and appropriate arrangements.

Subsequent to the cited case the Authority has found certain unilateral action taken by management to have a de minimis impact on employees in light of the new standards promulgated. Thus, in Department of Housing and Urban Development, Columbia Area Office, Columbia, South Carolina, 20 FLRA No. 31 it held that although the work positions and duties of two employees had been altered, the impact was de minimis. It predicated that conclusion on the fact that said employees remained in Columbia, South Carolina, their pay and grade were not affected, and the change by management only affected two employees. Further, where the change in working conditions resulted in assigning extra duties to employees, ordinarily performed by others, the Authority concluded the impact was nevertheless de minimis. Department of Transportation, Federal Aviation Administration, Washington, D.C., 20 FLRA No. 53. The Authority was influenced by the fact that the nature of the duties was substantially the same as performed by the affected employees previously; that no change occurred to any measurable degree in the time required by the employees to complete their duties; that no different skill or experience was needed to handle such added work; and the employees were part of a nationwide unit of 8000 employees.[13]

Applying those standards to the case at bar, I am constrained to conclude that the foreseeable impact of the change effected herein must be termed de minimis. The transfer of Wright to Fire Station 2 from Fire Station 1 caused a change in location of less than one mile. While he drove a P-15 fire truck which was larger than the rescue vehicle driven by Wright at Station 1, the nature of his duties at both stations involved driving fire-fighting vehicles. Neither his pay nor grade was changed by virtue of the transfer, and there is no showing his hours were modified or altered. Although General Counsel adverts to the difficulty imposed upon Wright in communicating with employees due to the fact that Station 2 was not easily accessible to personnel, it appears that the union vice-president could have left that area and represented employees on official time. The record also reflects that since 1980 Respondent has made transfers of personnel and issued copies of memos directing such action to each individual, but it does not appear that notification was given to the Union in respect thereto. Based on the foregoing, including the fact that the reassignment involved only one employee - with no apparent impact on other unit employees - I conclude the change was de minimis. Accordingly, I find Respondent was under no obligation to notify the Union and afford it an opportunity to request bargaining, and its failure to do so did not violate 7116(a)(1) & (5) of the Statute.

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[13] See also U.S. Department of Housing and Urban Development, Washington, D.C. Area Office, 20 FLRA No. 38 where the Authority held the transfer of three employees to be de minimis, relying on the fact that it was for a temporary, albeit extended, period; that the duties remained the same, and the change involved only a few employees.

Having concluded that: (a) Respondent did not interfere with, restrain, or coerce Howard Wright in violation of 7116(a)(1) of the Statute by virtue of the statements made to the employees on May 2, 1984 by Fire Chief Smith; (b) Respondent did not permanently transfer or reassign Howard Wright from Fire Station 1 to Fire Station 2 on September 13, 1984 because of his exercise of protected activity in violation of 7116(a)(2) of the Statute; (c) the failure by Respondent to notify the Union of the said transfer or reassignment, and afford it an opportunity to bargain re the impact and implementation thereof, did not constitute a violation of 7116(a)(5) of the Statute - it is recommended that such allegations in the complaint (paragraph 9, 10, and 11) be dismissed.

Having concluded that Respondent violated Section 7116(a)(1) and (8) of the Statute by conducting a formal discussion with employee Howard Wright concerning his grievance without affording the Union an opportunity to be present as required by Section 7114(a)(2)(A) of the Statute, and thus violated Section 7116(a)(1) & (8) of the Statute, it is recommended that the Authority issue the following:

ORDER

Pursuant to Section 7118 of the Statute and Section 2423.29 of the Rules and Regulations, it is hereby ordered that the Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California, shall:

1. Cease and desist from:

    (a) Failing to give the employees' exclusive representative, American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO, prior notice of, and an opportunity to be represented at, formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Post at its facilities, 63rd Civil Engineers Squadron, Norton Air Force Base, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

(b) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

IT IS FURTHER ORDERED that the remaining allegations of the complaint in Case No. 8-CA-40473 be, and they hereby are, dismissed.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: November 13, 1985
Washington, DC

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to give the employees' exclusive representative, American Federation of Government Employees, Interdepartmental Local 3854, AFL-CIO, prior notice of, and an opportunity to be represented at, formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: __________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 8, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, CA 90071, and whose telephone number is: (213) 688-3805.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3231

Union

and

Case No. 0-NG-1023

SOCIAL SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The petition concerns the negotiability of three proposals submitted during the course of impact and implementation bargaining on the merger of the Bridgeport, Ohio Branch Office and the Wheeling, West Virginia District Office of the Social Security Administration.

II. Procedural Issues

The Union's petition for review originally contained six proposals. In its Response to the Agency's Statement of Position the Union withdrew its request for review as to three of these proposals and a portion of Proposal 1. Accordingly, the three proposals and the portion of Proposal 1 are no longer in dispute and will not be considered further. In addition, since the Agency withdrew its allegation of nonnegotiability as to a portion of Proposal 3, the Union's appeal as to that portion of the proposal is now moot. Finally, the Agency's contention that the Union's petition for review should be dismissed for failure to timely serve the head of the Agency cannot be sustained. While the Union initially mailed a copy of its petition for review to local management and the headquarters of the Social Security Administration, the Union subsequently served a copy of its petition and response on the Agency head's designee.

III. Union Proposal 1 (Portions remaining in dispute)

> Hours- Office hours are from 8:00 AM to 4:30 PM.
>
> Employees may use the first hour of the day, 8:00-9:00 AM, for training and manual maintenance.

A. Positions of the Parties

The Agency contends that because the first portion of this proposal prescribes specific office hours, it involves the technology, methods and means of performing work under section 7106(b)(1) of the Statute. The Agency contends that the second portion of the proposal, permitting employees to use the first hour of the day for training and manual maintenance, interferes with management's right to direct employees under section 7106(a)(2)(A) of the Statute. The Agency also contends that by prescribing certain assignments at specific times of day, the second portion of the proposal interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute.

The Union argues that the Agency has not made a showing that the first portion of Proposal 1 violates the Statute. The Union contends that the second portion of the proposal does not interfere with management's right to assign work.

B. Analysis

In Department of the Air Force, Lowry Air Force Base, Colorado, 16 FLRA 1104 (1984), the Authority held that an agency had no obligation to bargain over a change in hours that a Commissary store would be open. The Authority reasoned that since a part of the agency's mission was to provide commissary services for various personnel, the decision about the store's hours was mission-related and thus nonnegotiable pursuant to section 7106(a)(1) of the Statute. Since a part of the mission of the Agency in this case is to provide services to the public, a decision regarding the particular hours when a Social Security field office is to be open to the public is mission-related. Thus, based on Lowry Air Force Base the first portion of this proposal which would establish the specific hours the

Social Security Office will be open to the public is also outside the duty to bargain.

The Union claims that while the second portion of the proposal is intended to continue the historic practice in Social Security field offices of employees using the first hour of the work day for reading assigned materials, it does not contemplate employees being able to refuse other work assignments during this hour. This statement of intent is inconsistent with the express language of this portion of the proposal which permits employees, at their option, to spend the first hour of the work day performing training and manual maintenance to the exclusion of any other tasks. Thus, this portion of the proposal is to the same effect as Proposal 1 found outside the duty to bargain in American Federation of Government Employees, Local 2094, AFL-CIO and Veterans Administration Medical Center, New York, New York, 19 FLRA 1027 (1985). The Authority held that as Proposal 1 in that decision required management to refrain from assigning employees normal duties during specified time periods, it precluded the assignment of other work at those hours and thus violated management's right to assign work under section 7106(a)(2)(B) of the Statute. Based on the reasons and cases cited in Veterans Administration Medical Center, since the second portion of Proposal 1 in this case also requires management to refrain from assigning employees certain duties during a specified time period it is outside the duty to bargain.

As to the Agency's assertion that this portion interferes with its right to direct employees under section 7106(a)(2)(A) of the Statute, we note that the Agency has not provided any support for its claim. We need not reach this issue in view of our finding above that this portion of the proposal interferes with the Agency's right to assign work under section 7106(a)(2)(B) and is accordingly nonnegotiable for that reason.

C. Conclusion

The first portion of Proposal 1 violates management's right to determine its mission under section 7106(a)(1) of the Statute and the second portion of Proposal 1 violates management's right to assign work under section 7106(a)(2)(B) of the Statute.

IV. Union Proposal 2

> The attached pages are workflow procedures for the Wheeling District. Changes will be made

in writing and management will make any appropriate notifications.

A. Positions of the Parties

The Agency contends that because this proposal concerns workflow, or the means used to perform the work, it involves the technology, methods, and means of performing work under 7106(b)(1) of the Statute. In addition, the Agency contends that the proposal interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute.

The Union contends that the proposal requires management to give the union written notice of change in the manner work is accomplished within the office, and that the proposal does not concern the substance or content of office work procedures. As such, the Union argues that the proposal is a procedure negotiable under section 7106(b)(2) of the Statute.

B. Analysis

The term "workflow procedures" refers to a written document prepared by management which sets out workflow or work procedures within the office. The Agency has not in any manner indicated how requiring written notice of a change in work procedures interferes with the technology, methods and means used by the Agency for accomplishing or furthering its work under section 7106(b)(1). Nor has the Agency established how providing written notice to employees of changes in work procedures would prevent it from assigning employees or assigning work especially since nothing in the proposal can be construed to prevent the Agency from making changes and requiring compliance with them. Thus, this proposal constitutes a procedure by which the Agency exercises its management rights and is negotiable under section 7106(b)(2) of the Statute *See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA 152, 155 (1979), *enforced sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945, (1982).

C. Conclusion

This proposal is not inconsistent with the Agency's right to determine the technology, methods, and means of performing work, under section 7106(b)(1) or inconsistent with the Agency's right to assign employees under section 7106(a)(2)(A) or with the Agency's right to assign work under section 7106(a)(2)(B). Rather, the proposal constitutes a negotiable procedure under section 7106(b)(1).

V. Union Proposal 3 (Portion remaining in dispute)

Reassignment Procedures

> Adequate training needed for satisfactory performance in the new speciality will be provided on duty time.

A. Positions of the Parties

The Agency argues that by requiring management to provide specific training during duty time, Proposal 3 interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute. The Union argues that this proposal represents an "appropriate arrangement" under section 7106(b)(3) of the Statute for employees who are adversely affected by management's exercise of its authority.

B. Analysis

The employees subject to this proposal are claims representatives. There are two specializations within the claims representatives position, namely, Title II (T-2) involving the processing of claims concerning retirement, survivors and disability claims and Title XVI (T-16) involving the processing of claims for Supplemental Security Income. According to the Agency, employees are trained "intensively" in one of these specialties with only limited training in the other specialty. Employees are then assigned to perform duties in the area in which they received more intensive training. The proposal concerns employees who because of the office merger will be assigned duties in the specialty area in which they previously received only limited training.

This proposal is to the same effect as the portion of a proposal requiring management to assign formal training to employees to enable them to perform in a position "of equivalent significance and grade value" in American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Social Security Administration, 9 FLRA 899 (1982). The Authority found that portion of the proposal to be inconsistent with management's right under section 7106(a)(2)(B) of the Statute to assign work. Thus, based on the reasons and cases cited in Social Security Administration, this proposal, which also requires the Agency to provide certain specified training, conflicts with management's right to assign work. See also National Federation of Federal Employees, Local 108 and U.S. Department of Agriculture, Arkansas State Office of the Farmers Home Administration, 14 FLRA 19 (1984).

We turn now to the question of whether the proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. We assume that the proposal was intended to ameliorate an adverse effect perceived by claims representatives who, because of the office merger, are assigned duties outside the area in which they previously received intensive training.

Although the proposal would obligate the Agency to provide adequate training it does not specify the time or manner in which training will be provided. Management can determine the type of training to provide, that is, formal classes or on-the-job training, and further, when such training is to be provided. Nor does the proposal condition the Agency's right to assign duties or evaluate employees' performance of the duties on the Agency's first having trained the employees. Rather, the proposal merely provides that at some point the Agency should provide such training as is necessary for employees to satisfactorily perform their assigned duties. The Agency specifically acknowledges that "[i]n practice, employees do not cross over from [one specialty to the other] without training." Agency Statement of Position at second page.

The negative impact of this proposal on management's right to assign work is not so significant as to outweigh the disruption to an employee caused by being assigned duties outside the area in which he or she received intensive training and the benefit conferred by the proposal of an opportunity for employees to receive adequate training so that they may perform the new duties satisfactorily. See National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). Therefore, we find that this proposal does not excessively interfere with management's right, under section 7016(a)(2)(B) to assign work.

C. Conclusion

The Authority finds that Proposal 3 would not excessively interfere with management's rights under section 7106(a)(2)(B) and thus, that the proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of management's rights within the meaning of section 7106(b)(3) of the Statute.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review as to Proposal 1 be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 2 and 3.[*/]

Issued, Washington, D.C., July 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[*/] In finding Union Proposals 2 and 3 within the duty to bargain, the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2324

Union

and

Case No. 0-AR-1071

U.S. DEPARTMENT OF THE ARMY
FORT RILEY, KANSAS

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator A. Lee Belcher filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Activity has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., July 29, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ARMAMENT RESEARCH AND
DEVELOPMENT CENTER (ARDC)
DOVER, NEW JERSEY

Activity

and

Case No. 0-AR-1079

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES (NFFE), LOCAL 1437

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert S. Weaver filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Activity has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., July 29, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES MARINE CORPS
ALBANY, GEORGIA

Activity

and

Case No. 0-AR-1151

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2317

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator J. Earl Williams filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

COMMISSARY STORE, DEPARTMENT
OF NAVY, NAVAL AIR STATION

Activity

and

Case No. 0-AR-1161

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Alfred J. Moorhead filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July, 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case 383

Federal Labor Relations Authority

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NUMBER 383 REPORT OF CASE DECISIONS August 13, 1986

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 93 (July 30, 1986)

Headquarters, Defense Logistics Agency, Washington, D.C. and American Federation of Government Employees, Local 2449, AFL-CIO and Office of Personnel Management, Case No. 3-CA-664; Department of Defense, Washington D.C. and American Federation of Government Employees, Local 2449, AFL-CIO and Office of Personnel Management, Case No. 3-CA-1044; Department of the Army, Washington, D.C. and American Federation of Government Employees, Local 2449, AFL-CIO and Office of Personnel Management, Case No. 3-CA-1089; Post Commander, Cameron Station and American Federation of Government Employees, Local 2449, AFL-CIO and Office of Personnel Management, Case No. 3-CA-1090; Headquarters, U.S. Army Military District of Washington and American Federation of Government Employees, Local 2449, AFL-CIO and Office of Personnel Management, Case No. 3-CA-1091

22 FLRA No. 94 (July 30, 1986)

Equal Employment Opportunity Commission and National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Case Nos. 3-CA-40202 and 3-CA-40462

22 FLRA No. 95 (July 30, 1986)

United States Department of Justice, Bureau of the Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York and American Federation of Government, AFL-CIO, Local 3882, Case No. 1-CA-40368

Y3.F31/21-3:

ARBITRATION CASE

22 FLRA No. 96 (July 30, 1986)

Naval Undersea Warfare Engineering Station, Keyport, Washington and International Association of Machinists and Aerospace Workers, Local 282 (Conant, Arbitrator), Case No. 0-AR-1014

22 FLRA No. 93

Federal Labor Relations Authority

HQ, Defense Logistics Agency, Washington, D.C. and AFGE, Local 2449 and OPM, Case No. 3-CA-664; Dep't of Defense and AFGE, Local 2449 and OPM, Case No. 3-CA-1044; Dep't of the Army, Washington, D.C. and AFGE, Local 2449 and OPM, Case No. 3-CA-1089; Post Commander, Cameron Station and AFGE, Local 2449 and OPM, Case No. 3-CA-1090; HQ, U.S. Army Military District of Washington and AFGE Local 2449 and OPM, Case No. 3-CA-1091 (Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Agency Violations
    - Interference [§ 7116(a)(1)]
      - Bargaining Relationship
        - Interference by Component outside The Chain of Command
    - Refusal to Negotiate [§ 7116(a)(5)]
      - Agency Representatives are to be Fully Empowered to Negotiate
      - Bargaining Obligation
        - No Obligation if No Collective Bargaining Relationship
      - Conditions of Employment
        - Paid Parking Program
      - Paid Parking Program
        - OMB Circular A-118
- Parking
  - Paid Parking Program
    - OMB Circular A-118
- Remedy
  - No Bargaining Order
    - Paid Parking Program Regulation No Longer in Effect
  - No Reimbursement of Employees for Parking Fees
    - Paid Parking Program Regulation Left No Room for Implementation Negotiations
  - Reimburse Union for Parking Fees
    - Consistent with OMB Circular A-118

STATUTE

7103(a)(2) and (3)
7114(b)(2)
7116(a)(1) and (5)
7118

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

DIGEST NOTES

The Authority for the first time found that organizational entities of the same agency which are not in the same "chain of command" as the entity at the level of exclusive recognition may commit violations of § 7116(a)(1) by interfering with the exclusive bargaining relationship between the entity at the level of exclusive recognition and the union. The Authority concluded that "an agency should not be able to escape liability for conduct which has unlawfully interfered with, restrained or coerced employees in the exercise of their rights, simply because it is not the chain of command with the 'employer' at the level of exclusive recognition."

This case involved the: (1) union, which is the exclusive representative for a unit of Defense Logistics Agency (DLA) employees located at Cameron Station; (2) DLA, which is a primary national subdivision of the Department of Defense (DOD) and a tenant of Cameron Station; (3) DOD; (4) Department of the Army (DOA), which is a wholly distinct primary national subdivision of DOD; (5) U.S. Army Military District of Washington (MDW), which is a subordinate command within DOA; and (6) Cameron Station, which is an activity within, and subordinate to MDW.

The Authority found in agreement with the Judge that DLA violated § 7116(a)(1) and (5) by failing to bargain in good faith with the union concerning the impact and implementation of a paid parking program at Cameron Station pursuant to a Government-wide policy to charge for employee parking. The Authority has held that the impact and implementation of a paid parking program concerns conditions of employment and falls within the duty to bargain. Thus, DLA failed to meet its bargaining obligation under the Statute by refusing to negotiate, alleging lack of authority, and by further failing to obtain duly authorized representatives of DOD to negotiate on its behalf at the level of exclusive recognition concerning matters within the scope of bargaining.

The Authority found, in agreement with the Judge, that DOD did not violate the Statute by refusing to bargain with the exclusive representative of employees of a subordinate activity (DLA) before issuing internal directives to subordinate elements concerning its paid parking program. Further, there was no showing that DOD prevented DLA from fulfilling its duty to bargain with the union at the level of exclusive recognition. The Authority noted, however, that if DLA had requested DOD's assistance in meeting its bargaining obligation and the latter had refused, DOD's conduct would have violated the Statute.

The Authority found in agreement with the Judge that certain subordinate components of DOD (DOA, MDW, and Cameron Station) did not violate § 7116(a)(5) in implementing DOD's paid parking program. The components did not have a collective bargaining relationship with the union and therefore could not have violated a nonexistent duty to bargain.

The Authority agreed with the Judge's conclusion that neither DOA nor MDW engaged in conduct which was violative of § 7116(a)(1) when they impelmented DOD's paid parking program. The Authority also found, contrary to the Judge, that Cameron Station, as a host activity, did not violate § 7116(a)(1). Cameron Station's conduct in implementing the paid parking program was a proper exercise of its managerial prerogative. There was no showing, for example, that implementation of the program by Cameron Station prevented DLA from meeting its bargaining obligations, and no showing that Cameron Station in any way instructed DLA not to meet those obligations.

Subordinate components of DOD (DOA, MDW and Cameron Station) did not violate § 7116(a)(1)(5) by the assessment of parking fees for two parking spaces contractually reserved for the union. The Authority found in agreement with the Judge that these components owed no bargaining obligation to the union.

Subordinate elements of DOD (DOA and Cameron Station) violated § 7116(a)(1) of the Statute by requiring the payment of parking fees for two spaces which were reserved for the union, free of charge, by the parties' collective bargaining agreement. The Authority, however, found, contrary to the Judge, that MDW did not violate the Statute. Thus, Cameron Station together with DOA denied requests for reconsideration of Cameron Station's decision that fees would have to be imposed for the spaces in question and thereafter imposed such fees contrary to both the contractual commitment between DLA and the union and the terms of OMB Circular A-118 (providing for the continuation of valid negotiated agreements covering employee parking). MDW, on the other hand, by merely transmitting communications between Cameron Station and DOA was not involved in the deliberative process.

In view of the provisions of OMB Circular A-118 permitting the continuation of valid negotiated agreements until their expiration, and the provisions of the agreement between a subordinate element of an agency (DLA)and the union, allowing for two free parking spaces, the Authority ordered that the union be reimbursed for fees paid for reserved parking spaces pursuant to the implementation of a paid parking program at the agency level, to the extent that such monies had not already been refunded. The union was unlawfully assessed fees for the parking space, which were reserved for the union pursuant to the parties collective bargining agreement.

Federal Labor Relations Authority

22 FLRA No. 94

EEOC and National Council of EEOC Locals, No. 216, AFGE, Case Nos. 3-CA-40202 and 3-CA-40462 (Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Ground Rules
        - Travel and Per Diem
      - Provisions Not "Informational"
      - Refusal to Comply With Collective Bargaining Agreement
      - Site of Negotiations
        - Refusal to Pay Travel and Per Diem Does Not Create Obligation to Bargain
      - Travel and Per Diem
        - Parties Must Adhere to Provisions in Agreement
        - Provisions Do Not Violate Law or Regulation
  - Remedy
    - Adhere to Parties' Collective Bargaining Agreement
    - Pay Travel and Per Diem Claims Under the Terms of the CBA
  - Travel and Per Diem
    - Refusal to Comply With Collective Bargaining Agreement
- 5 U.S.C. § 5702 [Travel Expense Act]

STATUTE

7116(a)(1) and (5)
7118
7131(a)

DIGEST NOTES

The agency's refusal to comply with the parties' collective bargaining agreement and ground rules agreements providing for the payment of travel and per diem was violative of § 7116(a)(1) and (5). The provisions authorizing travel and per diem expenses had been incorporated into the terms of the parties collective bargaining agreement and the record does not support a conclusion that the parties intended the provisions to apply only under the condition which the agency asserts, i.e., in accordance with Interpretation and Guidance, 2 FLRA 265 (1979). The provisions do not violate law or government-wide regulation.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The Authority found that the agency did not violate the Statute when it refused to negotiate on changes in the sites of negotiations. The sites of the negotiations were established in the respective agreements of the parties. While those agreements presupposed that the agency would be paying travel and per diem expenses, the refusal to pay did not create an agency obligation to bargain on a change in the agreement.

Federal Labor Relations Authority

22 FLRA No. 95

Dep't of Justice, Bureau of Prisons, Wash., D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, N.Y. and AFGE Local 3882,
Case No. 1-CA-40368
(Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Enforcement of Award
    - § 7121(f) Matters in ULP Proceedings
  - Procedure
    - Clarification of Award
    - Finality of Award
    - Forums
      - Authority Has Jurisdiction
        - Enforcement of Final Awards re § 7121(f) Matters
- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply with Statute [§ 7116(a)(8)]
    - § 7122(b)
  - Procedure
    - Complaint
      - Motion to Amend Denied for Lack of Notice
    - Forums
      - ULP Proceeding Not Appropriate for Challenges to Arb Award
    - Notice by Authority
      - Citations of Case Law Filed Subsequent to Exceptions
  - Remedy
    - Comply with Arbitration Award
    - Make Whole
      - Pay and Monetary Losses
    - Offer Reinstatement to Former Position
  - Resignation
    - Caused by Failure to Comply with Arbitration Award
- FPM Letter 711-160 (July 13, 1981)
- 5 U.S.C. § 1205
- 5 U.S.C. § 7512
- 5 U.S.C. § 7703(b)(1) and (d)

STATUTE

7106(a)(2)(A)
7116(a)(1), (5), & (8)
7118
7118(a)(4)
7121(b)(3)(c)
7121(e) and (f)
7122(b)

DIGEST NOTES

The agency violated § 7116(a)(1) and (8) by refusing to comply with an arbitration award involving a § 7121(f) subject matter -- termination of the grievant. Although, the Authority does not have jurisdiction, under § 7122, to review the substance of the award, it may, once such an award has become final and binding, review matters of compliance with the award in an unfair labor practice proceeding. The Authority found that the clarified award of the arbitrator became final and binding when no timely action was taken by the Director of OPM under 5 U.S.C. § 7703(d).

An unfair labor practice charge was timely filed, within the six-month period required by § 7118(a)(4), and the agency's exceptions as to: (1) the lack of proper service of the union's request for clarification of the award and the resulting lack of an opportunity to be heard by the arbitrator; and (2) the award's alleged interference with management's rights under § 7106(a)(2)(A) to assign employees; were not litigable issues in an unfair labor practice proceeding seeking compliance with an arbitration award involving a § 7121(f) subject matter. Those matters go to the merits of the award and may only be timely raised within the appeals procedures established by the Congress.

The Authority found that the agency failed to comply with an arbitration award which obligated it to reinstate a grievant to his former position and the agency, instead, ordered him to a position at another facility. The arbitrator's clarification of his award clearly showed that the agency's reassignment of the grievant was inconsistent with the award. The record supported the Judge's finding that the agency's failure to comply with the award caused the grievant to resign from Federal service, the Authority found that but for the agency's refusal to comply with the award, the grievant would not have resigned. Accordingly, the Authority adopted the Judge's recommended remedy that the grievant be made whole and that the agency offer to reinstate the grievant to his former position without prejudice to his seniority or other rights or privileges.

The Judge denied the General Counsel's post-hearing motion to amend the complaint by adding the agency's failure to comply with § 7121(b)(3)(C) and § 7121(f) to the original § 7122(b) assertion as the statutory basis for the agency's violation of § 7116(a)(8). The denial was based on lack of notice to the agency. While affirming the Judge's ruling that the General Counsel's motion to amend the complaint be denied, the Authority agreed that the Judge's finding upon which he fashioned his recommended remedy is within the scope of the unamended complaint.

Federal Labor Relations Authority

22 FLRA No. 96

Naval Undersea Warfare Engineering Station, Keyport, Washington and IAM & AW Local 282 (Conant, Arbitrator), Case No. 0-AR-1014
(Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Contrary to the Statute
      - § 7106(a)(2)(A)
      - § 7106(a)(2)(B)
  - Collective Bargaining Agreement
    - Interpretation by Arbitrator May Not Infringe on Management Rights under § 7106(a)
    - Remedy Not within Scope of Agreement
  - Exceptions Asserted in Appeal
    - Award Contrary to the Statute
      - § 7106(a)(2)(A)
      - § 7106(a)(2)(B)
  - Positions
    - Assign Employees
      - Arbitration Award Infringing Management Rights under § 7106
  - Remedy
    - Reassign Grievant to Former Position and Work Area
  - Training
    - Assign Work
      - Arbitration Award Infringing Management Rights under § 7106
- Negotiability
  - Management Rights
    - Assign Employees [§ 7106(a)(2)(A)]
      - Arbitration Award is Infringement on Management Right
        - Position
        - Work Area
    - Assign Work [§ 7106(a)(2)(B)]
      - Arbitration Award is Infringement on Management Right
        - Training
  - Generally
    - Nothing Shall Affect Management Rights
    - Procedures and Appropriate Arrangements in Negotiated Agreement
  - Subjects of Bargaining
    - Appropriate Arrangements [§ 7106(b)(3)]
    - Procedures [§ 7106(b)(2)

STATUTE

7106(a)(2)(A) and (B)
7106(b)(2) and (3)
7122(a)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The arbitrator determined that the agency violated the terms of the parties' collective bargaining agreement by assigning the grievant, a union steward, to another department several miles away from his previous work area assignment without first consulting with the union. As a remedy, the arbitrator directed that the grievant be returned to his former position in his former work area under the direction of his former supervisor. It was further directed that if the former position is not available because of substantial job redesign, the grievant would be trained to undertake a suitable job in the original work area.

In its exception, the agency contended that the arbitrator's award violates management's rights to: (1) assign employees under § 7106(a)(2)(A) because the award directs assignment of the grievant to a particular position; and (2) assign work under § 7106(a)(2)(B) because the award directs training be provided to the grievant. The Authority concluded that the award interferes with management's right to assign employees and to assign work as it pertains to training. Because the award directly interferes with management's rights, the award does not constitute merely a proper enforcement of an applicable procedure or appropriate arrangement within the parties' collective bargaining agreement.

The Authority found that the arbitrator's particular remedy was not founded on any specific negotiated agreement of the parties and was solely the creation of the arbitrator. Accordingly, the award was modified by striking the remedy of returning the grievant to his original position or to a suitably equivalent position in his original work area.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, DEFENSE LOGISTICS AGENCY
WASHINGTON, D.C.

Respondent

and

Case No. 3-CA-664

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

DEPARTMENT OF DEFENSE
WASHINGTON, D.C.

Respondent

and

Case No. 3-CA-1044

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

DEPARTMENT OF THE ARMY
WASHINGTON, D.C.

Respondent

and

Case No. 3-CA-1089

[22 FLRA No. 93]

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

POST COMMANDER, CAMERON STATION

Respondent

and

Case No. 3-CA-1090

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

HEADQUARTERS, U.S. ARMY MILITARY
DISTRICT OF WASHINGTON

Respondent

and

Case No. 3-CA-1091

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel; the Charging Party (Union); Respondents Headquarters, U.S. Army Military District of Washington (MDW) and Cameron Station; and the Intervenor, Office of Personnel Management. The consolidated complaint, as amended, alleged that Respondent Defense Logistics Agency (DLA) violated section 7116(a)(1) and (5) of the Statute by failing to bargain in good faith with the Union concerning the impact and implementation of a paid parking program at Cameron Station pursuant to a Government-wide policy to charge for employee parking. It further alleged that the other named Respondents violated section 7116(a)(1) and (5) of the Statute by their interference with the bargaining relationship between the Union and DLA which resulted in the Union being denied the opportunity to negotiate concerning the impact and implementation of the paid parking program prior to implementation at Cameron Station; and that Cameron Station, MDW and Department of the Army (DOA) additionally interfered with the bargaining relationship between the Union and DLA by their acts and conduct in connection with the assessment of parking fees for two reserved parking spaces assigned to the Union pursuant to its contract with DLA.

II. Background

The facts are fully set forth in the Judge's Decision. The Authority notes here, however, that the Union is the exclusive representative for a unit of DLA employees located at Cameron Station. DLA is a primary national subdivision of the Department of Defense (DOD), and it is a tenant of Cameron Station. DOA is a wholly distinct primary national sub-division of DOD, MDW is a subordinate command within DOA, and Cameron Station is an activity within, and subordinate to, MDW. Thus, there is no command relationship between DOA, MDW, and Cameron Station on the one hand and DLA on the other. Cameron Station, the host Activity, provides office and warehouse space and support services to DLA, but has no collective bargaining relationship with the Union. Similarly, no bargaining relationship exists between the Union and DOD, DOA or MDW.

III. Judge's Decision

The Judge found that Respondent DLA violated section 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union concerning the impact and implementation of the paid parking program at Cameron Station. The Judge further found that Respondent DOD had not violated the Statute and recommended dismissal of this portion of the complaint. As to Respondents DOA, MDW and Cameron Station, who were charged with violating the Statute by denying the Union an opportunity to negotiate prior to implementation of the paid parking program and by assessing parking fees for two reserved spaces assigned to the Union pursuant to an existing contract with DLA, the Judge found that they had not violated section 7116(a)(5) of the Statute. However, the Judge concluded that Cameron Station had violated section 7116(a)(1) of the Statute by denying the Union an opportunity to negotiate, and that Cameron Station, MDW and DOA had all violated section 7116(a)(1) of the Statute for assessing fees.

IV. Positions of the Parties

The parties excepted to various legal conclusions made by the Judge. In their jointly filed exceptions, MDW and Cameron Station excepted to the Judge's findings that each had violated section 7116(a)(1) of the Statute. The Intervenor, Office of Personnel Management, excepted to the finding of a violation against DLA.

As to the above findings, the General Counsel excepted to the Judge's failure to find that Cameron Station had violated section 7116(a)(5) of the Statute by interfering with the bargaining relationship between DLA and the Union, and to the Judge's failure to conclude that DOD, DOA and MDW violated section 7116(a)(1) and (5) of the Statute based on their involvement in denying the Union an opportunity to bargain over the impact and implementation of the paid parking program.

The only exception filed by the Charging Party was to the Judge's remedy. The Charging Party urged the Authority to order that all employees who were charged fees for parking be reimbursed for such payments.

V. Analysis

The Authority will address the responsibility of each of the Respondents in turn. First, as to DLA, it is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them, except as provided otherwise by Federal law or Government-wide rule or regulation or agency regulation for which a compelling need exists. The Authority has concluded that the impact and implementation of a paid parking program concerns unit employees' "conditions of employment" and falls within the duty to bargain.[1] In this case, when the Union learned of the proposed parking requirements to be implemented at Cameron Station, it requested negotiations with DLA to resolve the alleged conflict with the parties' existing collective bargaining agreement and requested to bargain over matters left to agency discretion under the "Government-wide regulation" directing the implementation of paid parking programs. In its response to the Union, DLA refused to negotiate on the ground that it lacked any authority with respect to the implementation of the paid parking program at Cameron Station and noted that the MDW Post Commander located at Cameron Station had the responsibility for implementing the program. However, the Authority has held that "the Statute clearly requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."[2] Thus, DLA failed to meet its bargaining obligation under the Statute by refusing to negotiate or to obtain duly authorized representatives of the Agency to negotiate on its behalf with the Union at the level of exclusive recognition as to matters within the scope of bargaining.[3]

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[1] See, for example, Department of Housing and Urban Development, 9 FLRA 136 (1982); Veterans Administration Central Office, Veterans Administration Medical Center, Long Beach, 9 FLRA 325 (1982); General Services Administration, Region 8, Denver, Colorado, 10 FLRA 257 (1982).

[2] Boston District Recruiting Command, Boston, Massachusetts, 15 FLRA 720, 724 n.6 (1984). See also National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 13 FLRA 554 (1983); American Federation of Government Employees, AFL-CIO, Local 3656 and Federal Trade Commission, Boston Regional Office, Massachusetts, 4 FLRA 702, 703 (1980).

As for the allegations against Respondent DOD, the Union is not the exclusive representative of a unit of employees at the DOD level, but rather is the exclusive representative of units of employees at a subordinate level within the Agency. Thus, the Authority notes that DOD had no duty to bargain with the Union prior to issuing internal directives to subordinate elements concerning the paid parking program. See Boston District Recruiting Command, Boston, Massachusetts, 15 FLRA 720 (1984), and cases cited therein. Also, in the absence of any showing that DOD prevented DLA from fulfilling its duty to bargain with the Union at the level of exclusive recognition, the Authority finds that DOD has not violated the Statute as alleged. It should be noted, however, that if DLA had requested DOD's assistance in resolving the matter and the latter had refused, DOD's conduct would have violated the Statute. As indicated by the Judge, however, that is not the case here.

We turn next to the allegation that DOA, MDW and Cameron Station violated section 7116(a)(1) and (5) of the Statute by their actions in implementing the paid parking program. The Judge found that the only violation committed was by Cameron Station which interfered with the rights of DLA employees to exercise their statutory collective bargaining rights. This conduct was found to be violative of section 7116(a)(1) of the Statute. The Judge found that neither DOA nor MDW had violated section 7116(a)(1) in this regard and, further, that no violation of section 7116(a)(5) had been committed by either DOA, MDW or Cameron Station.

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[3] Section 7114(b)(2) of the Statute provides:

> § 7114. Representation rights and duties
>
> . . . . . .
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation--
>
> . . . .
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]

We agree with the Judge's conclusions that none of these Respondents violated section 7116(a)(5) of the Statute. We note that these Respondents do not have a collective bargaining relationship with the Union and therefore could not have violated a nonexistent duty to bargain. We also agree with the Judge's conclusion that neither DOA nor MDW engaged in conduct which was violative of section 7116(a)(1) of the Statute. However, we disagree with the Judge's finding that Cameron Station violated section 7116(a)(1). We view Cameron Station's conduct in implementing the paid parking program as a proper exercise of its managerial prerogative and find that it has not been established how the act of implementing the program interfered with any protected rights under the Statute. There is no showing, for example, that implementation of the program by Cameron Station prevented DLA from meeting its bargaining obligations and no showing that Cameron Station in any way instructed DLA not to meet those obligations.

Finally, we address the allegation that Respondents DOA, MDW and Cameron Station violated section 7116(a)(1) and (5) of the Statute by assessing parking fees for two spaces used by the Union. As the Judge noted in his decision, DLA and the Union had a contractual arrangement whereby the Union was provided two reserved spaces which it had used free of charge. Although the contract did not specify that the spaces were to be used without charge, at the time the agreement was negotiated there was no question that the spaces were free of charge. Also, OMB Circular A-118, one of the Government-wide parking regulations giving rise to the paid parking program, expressly provided that it was not to be interpreted as rendering null and void any valid negotiated agreements covering employee parking which were in effect on the effective date of the Circular, until such time as the agreements expired. At some point, Cameron Station indicated that parking fees would have to be assessed for the two parking spaces. The commander of DLA requested reconsideration of this decision, relying in part upon a proposed internal DOD directive on parking which provided that valid agreements were to remain in effect until their expiration, and further relying upon the agreement between

DLA and the Union that the two reserved Union spaces were to be provided free of charge.[4] Cameron Station responded that the Union could retain the use of the two reserved spaces but that essentially it would have to pay the fees. DLA repeated its request that Cameron Station reconsider its decision. Cameron Station then forwarded DLA's two requests to MDW which forwarded the requests to DOA. In its response, DOA stated as follows:

> Any valid, negotiated agreement between installation/activity commanders and unions in effect on 13 August 1979, that specifically state[s] free parking will be provided will remain in effect until the expiration of the agreement . . . . If free parking is not specifically provided for in the agreement, then it should not be provided. Commanders may provide reserved parking spaces or passes that facilitate parking for union representatives; however, fees should be collected for their use when the union representative is an official visitor parking over three hours.

In the meantime, the Union had purchased permits for its two reserved spaces.

The Judge found that neither DOA, MDW nor Cameron Station had violated section 7116(a)(5) of the Statute concerning the assessment of fees for the two spaces. We agree for the reasons set forth in his decision. We also agree with the Judge's conclusion that DOA and Cameron Station committed independent violations of section 7116(a)(1) of the Statute by interfering with the relationship between DLA and the Union but disagree with his finding as to Respondent MDW. DLA and the Union had a collective bargaining agreement providing the Union with two free parking spaces, which agreement was made known to DOA and Cameron Station by DLA. OMB Circular A-118 itself provided for the continuation of valid negotiated agreements covering employee parking. Although aware of these facts,

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[4] The Judge found it unnecessary to interpret the parties' agreement because DLA and the Union agreed that the two spaces were to be provided free of charge. In view of the parties' agreed interpretation, we also find it unnecessary to interpret the contract provision.

Cameron Station made the determination that fees would have to be imposed for the spaces in question. Together with DOA, it subsequently denied requests for reconsideration of that decision and thereafter imposed such fees contrary to both the contractual commitment between DLA and the Union and the terms of the OMB Circular. In our view, such conduct interfered with the Union's right to the use of two free parking spaces, as contractually agreed upon, thereby unlawfully interfering with the exclusive bargaining relationship between DLA and the Union in violation of section 7116(a)(1) of the Statute. MDW, on the other hand, merely transmitted communications between Cameron Station and DOA. There is no evidence that MDW itself was involved in the deliberative process. Therefore, it did not engage in conduct which interfered with the relationship between DLA and the Union, and this allegation of the complaint shall be dismissed as to Respondent MDW.

In concluding that DOA and Cameron Station violated section 7116(a)(1) of the Statute by interfering with protected rights of DLA employees, the Authority has the opportunity for the first time under the Statute to decide that organizational entities of the same agency not in the same "chain of command" as the entity at the level of exclusive recognition may commit violations of section 7116(a)(1) of the Statute if they are found to have unlawfully interfered with the protected rights of employees other than their own by taking action which conflicts with the bargaining relationship between the parties at the level of exclusive recognition. While this is a case of first impression under the Statute, such findings are supported by private sector precedent. Thus, the National Labor Relations Board has decided with court approval that an employer as defined in the National Labor Relations Act may be found to have violated certain unfair labor practice sections of the NLRA with respect to employees other than its own.[5] There is nothing in the Statute or its legislative history which would preclude a similar finding when a component of an agency has interfered with the protected rights of employees employed by an entity within a different primary national subdivision of the same agency.

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[5] See Hudgens v. NLRB, 424 U.S. 507, 510 (1976). See also Operating Engineers Local Union No. 3 v. NLRB, 266 F.2d 905, 909 (D.C. Cir. 1959) and Austin Co., 101 NLRB 1257, 1258-1259 (1952).

Section 7116(a)(1) of the Statute makes it an unfair labor practice "for an agency . . . to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[.]" (Emphasis added.) The term "agency" is defined in section 7103(a)(3) of the Statute as "an Executive agency" (with various inclusions and exclusions not here relevant) and, as relevant here, the term "employee" is defined in section 7103(a)(2) of the Statute as "an individual . . . employed in an agency[.]" A literal reading of these provisions supplies clear support for the conclusion that "an agency" which interferes with, restrains or coerces "any employee" in the exercise of that employee's protected rights commits a violation of section 7116(a)(1) of the Statute, even if the agency's actions are not directed at an employee for which it is the employer at the level of exclusive recognition, as in this case.

Underlying our holding here is the policy consideration that in our judgment an agency should not be able to escape liability for conduct which has unlawfully interfered with, restrained or coerced employees in the exercise of their rights simply because it is not in the chain of command with the "employer" at the level of exclusive recognition. Particularly in this instance, where Cameron Station was responsible for providing and maintaining a variety of services to DLA and its employees, including parking facilities, Cameron Station's actions in assessing parking fees for the two spaces directly interfered with the contractually agreed upon provision between DLA and the Union, thereby unlawfully interfering with the rights of DLA employees. The conduct of DOA similarly interfered with the rights of DLA employees because DOA was directly involved in the process of causing the fees to be assessed even though it knew that the collective bargaining agreement between DLA and the Union provided two free parking spaces to the Union.

We wish to caution, however, that our decision should not be construed as implying that agencies--even those with Government-wide responsibilities--automatically run the risk of violating the Statute when regulations relating to conditions of employment of unit employees are simply promulgated. Rather, our finding here is that when a component of an agency engages in conduct which unlawfully interferes with the protected rights of employees of another component, a violation of section 7116(a)(1) of the Statute will be found to have occurred.

It should also be noted that the reasons leading to the finding of a violation of section 7116(a)(1) by Cameron Station and DOA would not apply to a section 7116(a)(5) allegation. Thus, while a party outside of the chain of command could--and in this case did--interfere with employees' rights by disrupting an agreement between the employees' exclusive representative and the agency component at the level of exclusive recognition, that outside party cannot be found to have failed or refused to negotiate in good faith because, in the absence of a collective bargaining relationship, no duty to bargain exists and thus there can be no violation of section 7116(a)(5) of the Statute. This is consistent with our findings above concerning all the named Respondents not party to the collective bargaining relationship with the Union.

VI. Remedy

With regard to an appropriate remedy, the Authority concludes that, inasmuch as there is no regulation in effect at this time requiring the collection of parking fees,6/ it is unnecessary to order DLA to negotiate regarding this matter at the present time. Moreover, the Union's request that employees be reimbursed for all parking fees collected pursuant to the regulation cannot be granted. The mechanism for determining the amount of fees to be collected and the conditions for exemptions from such fees were specifically addressed in the regulation. The regulation did not, therefore, leave the amount of the fees open to "implementation"

6/ During the pendency of the instant case before the Authority, the United States District Court for the District of Columbia ruled that the paid parking plan, as embodied in OMB Circular A-118, was invalid, and ordered that the GSA regulation be set aside and its enforcement permanently enjoined. American Federation of Government Employees, AFL-CIO, et al. v. Freeman, 510 F.Supp. 596 (D.D.C. 1981). Thereafter, GSA revised the regulation to suspend the collection of parking fees in accordance with the injunction (46 F.R. 40191 (1981)). The District Court's decision was subsequently reversed. American Federation of Government Employees, AFL-CIO, et al. v. Carmen, 669 F.2d 815 (D.C. Cir. 1981). However, President Reagan has stated that the collection of parking fees will not be reinstated. Statement by the President on Parking Fees for Federal Employees, Public Papers of the Presidents (Ronald Reagan) 1981, 1161.

negotiations and the fees would have been collected regardless of the results of negotiations over implementation of the program. However, as to the fees paid by the Union for the two reserved spaces, OMB Circular A-118 essentially permitted the continuation of valid negotiated agreements, until their expiration, and, as noted, the agreement between DLA and the Union allowed for two free spaces. Therefore we find that it will effectuate the purposes and policies of the Statute to order that the Union be reimbursed for such fees paid, to the extent that such monies have not already been refunded.

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings, conclusions and recommended Order, as modified.

We find in agreement with the Judge's conclusion, that Respondent DLA violated section 7116(a)(1) and (5) of the Statute.[7] We also agree with the Judge's conclusion that Respondent DOD did not violate the Statute. As to the Judge's findings regarding DOA, MDW and Cameron Station, and their actions in implementing the paid parking program, we agree that none of these Respondents violated section 7116(a)(5) of the Statute and that neither DOA nor MDW violated section 7116(a)(1). However, we find, contrary to the Judge, that Cameron Station did not commit a violation of section 7116(a)(1) in this regard.

As to the assessment of parking fees for two contractually reserved spaces, we agree that no violation of section 7116(a)(5) was committed by DOA, MDW or Cameron Station. We further adopt the Judge's findings that DOA and Cameron Station violated section 7116(a)(1) of the Statute by requiring the payment of parking fees for those two spaces, but disagree with his finding that MDW also violated the Statute in this regard.

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[7] See Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984).

Accordingly, we shall issue the following order for the conduct found to have violated the Statute and shall dismiss the complaint as to the matters found not to have violated the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, IT IS HEREBY ORDERED that:

A. Headquarters, Defense Logistics Agency, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain, upon request, with the American Federation of Government Employees, Local 2449, AFL-CIO, the exclusive bargaining representative of its employees located at Cameron Station, Alexandria, Virginia, concerning the impact and implementation of any aspect of a paid parking program which may be established by Government-wide rule or regulation.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Post at Cameron Station copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an authorized representative of Defense Logistics Agency, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

B. Department of the Army, Washington, D.C. and Cameron Station shall:

1. Cease and desist from:

(a) Assessing parking fees for two reserved spaces provided in the collective bargaining agreement between Headquarters, Defense Logistics Agency and the American Federation of Government Employees, Local 2449, AFL-CIO, thereby unlawfully interfering with the bargaining relationship between the parties.

(b) In any like or related manner interfering with, restraining, or coercing employees represented by the American Federation of Government Employees, Local 2449, AFL-CIO and employed by Headquarters, Defense Logistics Agency, in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Reimburse the American Federation of Government Employees, Local 2449, AFL-CIO, for the fees it paid for the two reserved parking spaces provided in the collective bargaining agreement with Headquarters, Defense Logistics Agency, to the extent that such monies have not already been refunded.

(b) Post at Cameron Station copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an authorized representative of both the Department of the Army, Washington, D.C. and Cameron Station, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

IT IS FURTHER ORDERED that the remaining unfair labor practice allegations in the complaints against Respondents Department of Defense, Department of the Army, Headquarters, U.S. Army Military District of Washington, and Cameron Station be, and they hereby are, dismissed.

Issued, Washington, D.C., July 30, 1986.

Calhoun

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 93]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give notice to and bargain, upon request, with the American Federation of Government Employees, Local 2449, AFL-CIO, the exclusive representative of our employees located at Cameron Station, concerning the impact and implementation of any aspect of a paid parking program which may be established by Government-wide rule or regulation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
Headquarters,
Defense Logistics Agency

Dated:____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT assess parking fees for two reserved spaces provided in the collective bargaining agreement between Headquarters, Defense Logistics Agency and the American Federation of Government Employees, Local 2449, AFL-CIO, thereby unlawfully interfering with the bargaining relationship between the parties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees represented by the American Federation of Government Employees, Local 2449, AFL-CIO and employed by Headquarters, Defense Logistics Agency, in the exercise of their rights assured by the Statute.

WE WILL reimburse the American Federation of Government Employees, Local 2449, AFL-CIO, for the fees it paid for the two parking spaces provided in the collective bargaining agreement with Headquarters, Defense Logistics Agency, to the extent that such monies have not already been refunded.

____
Department of the Army,
Washington, D.C.

Dated: ____________ By: ______________________________
(Signature) (Title)

____
Cameron Station

Dated: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

[22 FLRA No. 93]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET NW.
WASHINGTON, D.C. 20036

. . . .

HEADQUARTERS, DEFENSE LOGISTICS AGENCY
and
DEPARTMENT OF THE ARMY
and
DEPARTMENT OF DEFENSE
and
CAMERON STATION
and
HEADQUARTERS, U.S. ARMY MILITARY
DISTRICT OF WASHINGTON

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2449, AFL-CIO

Charging Party

and

OFFICE OF PERSONNEL MANAGEMENT

Intervenor

. . . .

Case Nos. 3-CA-664
3-CA-1044
3-CA-1089
3-CA-1090
3-CA-1091

Erick J. Genser, Esq. and
Peter B. Robb, Esq.
For the General Counsel

Doris O. Hildreth
For the Charging Party

Sam Horn, Esq.
For the Department of Defense
and Department of Army

Capt. Helen Sharetts, Esq.
For Cameron Station and Headquarters
U.S. Army Military District of Washington

Thomas P. Rhodes, Esq.
For Headquarters, Defense
Logistics Agency

Stuart M. Foss, Esq.
For the Intervenor,
Office of Personnel Management

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Labor Relations Statute (the Statute), 92 Stat. 1191, 5 U.S.C. §7101 et seq. It was instituted by the filing of a Complaint and Notice of Hearing, and Order Consolidating Case Nos. 3-CA-664, 3-CA-1044, and 3-CA-1089 on April 30, 1980. A Complaint and Notice of Hearing, and Order Consolidating Cases 3-CA-1090 and 1091 was issued on June 18, 1980. As more specifically detailed in the Index and Description of Formal Documents to General Counsel Exhibits 7(a) to 7(bb), the Complaints were based on separate charges filed against each Respondent. An Order Consolidating all the above mentioned cases and Rescheduling the Hearing was issued on June 19, 1980.

The General Counsel alleges that the Respondents, during the course of their implementation of President Carter's paid parking program, violated Section 7116(a)(1) and (5) as follows:

1. Respondent Defense Logistics Agency refused to negotiate with Local 2449 over the impact and implementation of paid parking at Cameron Station.

2. Respondent Cameron Station implemented a paid parking program without giving due consideration to Local 2449's right to negotiate over its impact and implementation.

3. Respondents Department of Defense, Department of the Army, and Military District of Washington curtailed Local 2449's statutory right to negotiate fully over the impact and implementation of the paid parking program at Cameron Station.

4. Respondents Department of the Army, Military District of Washington, and Cameron Station unilaterally assessed parking fees to Local 2449 for two parking spaces assigned to it.

Respondents deny committing any unfair labor practices; their specific defenses will be discussed later in this decision.

It would also point that this is the sixth and last in a series of "parking" cases litigated by the General Counsel. Decisions in the other cases have already been issued by the two Administrative Law Judges and are pending review by the Authority. Those decisions rendered by Judge Salvatore Arrigo are as follows: Defense Contract Administration Services Region, Boston, Massachusetts; Commander, Fort Devens, Fort Devens, Massachusetts; Defense Logistics Agency, Washington, D.C.; Department of Defense, Washington, D.C. and National Association of Government Employees, Local R1-210, Case Nos. 1-CA-212, 1-CA-298, 1-CA-299, and 1-CA-300 (December 22, 1980) (hereinafter referred to as "DCASR"); Boston District Recruiting Command, Boston, Massachusetts; 96th U.S. Army Reserve Command, Hanscom Air Force Base, Massachusetts; Department of the Army, Washington, D.C.; Department of Defense, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 1900, Case Nos. 1-CA-206, 1-CA-207, 1-CA-208, 1-CA-209, 1-CA-303, 1-CA-304 (December 22, 1980) (hereinafter referred to as "Boston District"); and Department of the Army and American Federation of Government Employees, AFL-CIO, Case No. 3-CA-766 (December 22, 1980) (hereinafter referred to as "Department of the Army"). Those decisions issued by Judge William Devaney are as follows: Office of the Assistant Secretary of Defense for Public Affairs and Washington Headquarters Services and American Federation of Government Employees, AFL-CIO, Local 2, Case Nos. 3-CA-718 and 1026 (May 18, 1981) (hereinafter referred to as "PA"); and Harry Diamond Laboratories, Department of the Army, and Department of Defense, and American Federation of Government Employees, AFL-CIO, Local 2, Case Nos. 3-CA-719, 819, and 970 (May 18, 1981) (hereinafter referred to as "HDL").

At the hearing in Washington, D.C. all parties were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, Respondents, the Intervenor,1/ and the General Counsel filed briefs which have been duly considered.

1/ The Charging Party objected to intervention by the Office of Personnel Management (OPM) on the ground that OPM was not a party to the rule making involved herein. The motion was denied at the hearing.

Upon consideration of the entire record[2] in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence presented at the hearing, I make the following findings of fact,[3] conclusions or law, and recommended order.

Findings of Fact

1. Respondent Department of Defense ("DOD") is an agency within the meaning of Section 7103(a)(3) of the Statute. Respondents Department of the Army ("DA or DOA") and Headquarters, Defense Logistics Agency ("DLA") each are separate primary national subdivisions of the Department of Defense within the meaning of Section 2421.5 of the Rules and Regulations of the Authority. Respondents Headquarters, U.S. Army Military District of Washington ("MDW") and Cameron Station are subordinate activites of the Department of the Army within the meaning of Section 2421.4 of the Rules and Regulations of the Authority.

2. Respondent Cameron Station is under the jurisdiction of MDW; that is, the Commanding Officer of Cameron Station reports directly to the Commander of MDW. There is an organizational "chain of command" that exists from DOD at the top of the chain, to DA, then to MDW, and finally to Cameron Station. Each "link" reports directly to the organizational entity immediately above it in the chain.

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[2] Counsel for the General Counsel and Counsel for the Department of Defense and Department of the Army filed Motions to Correct the Transcript. The requested corrections being proper, the motions are hereby granted and the transcript is corrected as follows:

PAGE	LINE	FROM	TO
15	7	November 3, 1979	November 30, 1979
15	23	19780	1980
25	22	allocations	allegations
26	4	representatives	represented
26	23	DLA	Cameron Station
27	19	agency	relationship
28	23	employees	employment
34	20	Defense	Army
35	9	agency of	agency or
71	16	MY	By
83	6	has notice	had no notice

[3] There being no serious factual disputes, I have adopted, to the maximum extent possible, the findings of fact proposed by Counsel for the General Counsel, with appropriate deletions and additions of my own.

3. Respondent DLA's Director reports directly to DOD. Respondents DLA and DA appear on the same level in an organizational chart. DLA is located on the premises of Cameron Station in Alexandria, Virginia and can be described as a "tenant" of Cameron Station. As the "landlord" of DLA, Cameron Station provides office and warehouse space to DLA and customary support services that are normally provided by a landlord to a tenant.

4. The Charging Party/Union is the American Federation of Government Employees, Local 2449, AFL-CIO (hereinafter "Local 2449"), a labor organization within the meaning of Section 7103(a)(4). At all times material herein, the American Federation of Government Employees, AFL-CIO has been certified as the exclusive representative of two separate consolidated units of professional and non-professional employees of DLA nationwide. Local 2449 at all times material herein has been designated by the American Federation of Government Employees, AFL-CIO to act as the exclusive representative for those DLA bargaining unit employees located at Cameron Station. Official notification of the delegation of authority authorizing local bargaining unit officials to act as the exclusive representative for employees in matters of local concern was transmitted to the Director of DLA on or about May 30, 1979.

5. The organizational relationship of the parties to this proceeding, as described above, may be summarized and perhaps better understood by the following chart:

Department of Defense
(an "agency")

Defense Logistics Agency* — Department of Army
("primary national subdivisions")

Military District of Washington
(an "activity")

Cameron Station
(an "activity" and
herein the "landlord")

*A "tenant" facility at Cameron Station, Alexandria, VA. whose employees are represented by Local 2449.

6. The allegations in this case arise from the implementation of a

paid parking program at Cameron Station in the Fall of 1979. The implementation of the program was the result of government-wide regulations issued by the Office of Management and Budget (OMB) and the General Services Administration (GSA) on August 17, 1979 and September 13, 1979, respectively, directing Federal agencies to implement paid parking at non-exempt facilities (where free parking existed before), as a means of promoting certain policy goals, e.g., energy conservation and cleaner air.

7. As a result of orders received on or about October 29, 1979 from MDW, the Command Officer of Cameron Station proceeded to devise and implement a paid parking program at that facility. All employees who worked on the premises of Cameron Station (regardless of the employer) and who were not exempted were required to pay a $10.00 parking fee for the month of November to park on the facility. Those non-exempt employees who had not purchased parking permits by November 10, 1979 were subject to penalties.

8. By letter dated October 9, 1979, DLA forwarded a copy of the GSA government-wide parking regulation to Local 2449. Subsequent to the receipt of this letter, the President of Local 2449, Mr. Gus Apostalakis, sent a letter dated October 16, 1979 to Captain W. I. Starrett, Jr., Commander of the DLA Administrative Support Unit, requesting negotiations concerning the paid parking program to be implemented at Cameron Station. After receiving the letter from Local 2449 dated October 16, 1979, Captain Starrett spoke with Mr. Apostalakis over the telephone and informed him of his position that he (DLA) did not have authority to enter into negotiations over the matter. Captain Starrett then put this position in writing to Mr. Apostalakis in a letter dated October 18, 1979.

9. After Mr. Apostalakis received this letter, Mr. Apostalakis and Captain Starrett had another discussion, and it was agreed that the parties would meet to discuss the matter. Officials of Local 2449 thereafter met with Captain Starrett and another DLA official on October 19, 1979. At this meeting, Local 2449 officials again requested to negotiate, but Captain Starrett refused, reiterating his position that he had no authority to negotiate the matter. Captain Starrett explained that he wasn't in a position to negotiate because DLA was a tenant on a MDW post. Throughout this meeting, Captain Starrett took the position that the purpose of the meeting was a consultation session rather than a negotiating session.

10. After this meeting, Captain Starrett sent a memo to the Post Commander of Cameron Station dated October 19, 1979 requesting a meeting and information regarding the paid parking program. In his memo, Captain Starrett made reference to the contract between DLA and Local 2449 and to "our obligations to our work force and the Union." Captain Starrett was uncertain as to whether he ever specifically communicated Local 2449's desire to negotiate to Cameron Station, but he was sure he had at least

expressed the Union's concern during informal discussions. Accordingly, I find that Cameron Station was never presented with a specific request to bargain.

11. On November 11, 1979, Local 2449 filed an unfair labor practice charge against DLA alleging a refusal to bargain, copies of which were served on General Post, Captain Starrett and Mr. Frank Scutch.

12. On November 1, 1979, a meeting was held between Cameron Station and DLA officials at which time Cameron Station requested that DLA assist in the collection of parking fees from DLA employees. DLA officials agreed to assist in collecting the fees for the month of November. A memo was then issued by Captain Starrett to all DLA personnel at Cameron Station on or about November 2, 1979, detailing the DLA parking fee collection system for the month of November. Actually, DLA had devised this plan prior to the meeting with Cameron Station officials on November 1, 1979. Captain Starrett correctly had anticipated Cameron Station's request for assistance, and therefore asked the DLA Resource Management Officer to develop a fee collection system a few days prior to November 1, 1979. DLA did not meet with Local 2449, however, prior to developing the fee collection procedures for November. The fee collection method was determined without allowing Local 2449 to provide any input.

12. Captain Starrett did call Peter Morgus, (who was acting president of Local 2449 at the time) shortly after November 1 to inform Mr. Morgus that DLA would collect parking fees from employees for the month of November.[4/] Mr. Morgus voiced his objection to Captain Starrett, noting that Local 2449 had attempted to negotiate the impact and implementation of paid parking at Cameron Station. Captain Starrett responded by stating only that DLA had to do it; he did not inform Mr. Morgus of the collection procedures that were to be used or provide an opportunity for Mr. Morgus to submit comments. Mr. Morgus subsequently received the memo concerning the parking fee collection system on or about November 5, 1979 through the normal employee distribution system.

14. On or about November 8, 1979, Mr. Morgus, who was still acting as President of Local 2449, sent a letter to Captain Starrett regarding two parking spaces assigned to Local 2449 in accordance with Article XXXIX of the contract between DLA and Local 2449. The letter expressed the opinion that the two spaces should not be subject to a parking fee and warned that imposition of a fee would be regarded as abrogation of the contract. Captain Starrett agreed with Mr. Morgus that the two

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[4/] DLA asserts, and I agree, that Mr. Morgus did not thereafter make additional requests to bargain. In my opinion, such requests were not necessary since DLA had already refused to negotiate and Local 2449 had already filed an unfair labor practice charge.

spaces assigned to Local 2449 pursuant to the contract were not to be charged a fee, and informed Mr. Morgus of his concurrence with this position by letter dated November 26, 1979. In his deposition, Captain Starrett stated that he was only expressing his personal opinion.

15. Captain Starrett then wrote to Colonel Briggs, the Post Commander of Cameron Station, on or about November 26, 1979, requesting that Colonel Briggs reconsider his decision to assess parking fees to Local 2449 for these two spaces.[5] Captain Starrett's letter indicated that the bargaining history and intent of both Local 2449 and DLA was that these spaces were to be free spaces, and that OMB Circular A-118 stated that any contract provision covering employee parking in effect as of August 13, 1979 shall remain in effect until the expiration of the agreement (G.C. Exh. No. 5). The Deputy Post Commander responded to Captain Starrett's letter, informing Captain Starrett that the two spaces assigned to Local 2449 were subject to the parking fees (G.C. Exh. No. 17). Colonel Briggs made the determination of his own at this time that the spaces were not to be free spaces (Tr. 80). Subsequently, on December 11, 1979 and again on December 12, 1979, Cameron Station Security Police issued a parking citation to an official of Local 2449 who had parked in one of the two assigned spaces without a valid permit (G.C. Exh. No. 12). Local 2449 officials thereafter purchased permits for the two assigned spaces.

16. Captain Starrett subsequently wrote another letter to Colonel Briggs on or about January 25, 1980, attempting once again to have Colonel Briggs reconsider his decision to assess fees for the two spaces assigned to Local 2449. Sometime after receipt of this letter, Colonel Briggs transmitted both letters from Captin Starrett concerning the two spaces to MDW for a legal interpretation. The request for a legal interpretation was then forwarded to the Department of the Army, who, in turn, responded on March 28 that the two spaces assigned to Local 2449 pursuant to the collective-bargaining agreement were not to be exempt from the parking fees (TR. 81, 82; Resp. Cameron Station Exh. No. 1). Local 2449 has continued to purchase permits for the two spaces since receiving the parking tickets in December 1979.

(Involvement of DOD, DA, and MDW)[6]

17. Respondents DOD and Department of the Army's involvement with

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[5] It is not clear from the record precisely when that decision was made and communicated to DLA and Local 2449.

[6] For the most part, the following facts in paragraphs 17-27 are based upon Jt. Exh. No. 1, testimony from the Harry Diamond case which was stipulated as part of the present record. Precise page references are contained in the General Counsel's brief pp. 6-9.

the implementation of the paid parking program dates back several months prior to October 29, 1979, when Cameron Station was directed to begin collecting parking fees. Mr. Francis B. Roche of the Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics chaired a DOD working group charged with the responsibility of working out the details of the program within DOD. The Department of the Army had various individuals on this committee as representatives.

18. As early as April 1979, Mr. Roche sent a draft OMB circular to DOD components for comment. Mr. Roche then consolidated the comments received from DOD components and forwarded them to OMB in June 1979. By mid-July 1979, it was known to DOD (and to the Department of the Army through its representatives on the DOD working group) what direction the final parameters of the OMB circular would take.

19. Based on this knowledge, and its previous involvement, DOD approached OMB and reached an agreement with OMB whereby DOD real estate units would appraise the parking facilities at DOD component activities to arrive at a figure for parking charges at each facility. Having reached this agreement to conduct its own appraisals, DOD then met with officials from OMB and GSA in late July 1979, at which time DOD was given four general guidelines to use in conducting the appraisals. Neither OMB nor GSA, however, gave DOD instructions on specific appraisal techniques to be used.

20. After receiving permission to conduct its own appraisals, DOD directed its real estate appraisers on or about August 3, 1979 to take immediate steps to determine the rates to be charged for Government-furnished employee parking at military installations (G.C. Exh. No. 28). An appraiser from the Army Corps of Engineers then conducted an appraisal survey and, using his subjective judgment, based on nothing more definitive than "commonly accepted appraisal techniques", determined a value for parking at Cameron Station (G.C. Exh. No. 29). The completed survey form indicates that the appraiser went outside the area surrounding Cameron Station as there are no known commerical parking facilities nearby. At no time did DOD notify the Unions that it was carrying out the appraisal.

21. DOD (through the efforts of Mr. Roche) then developed draft parking regulations of its own which were sent to component activities for comment, including the Department of the Army, on or about September 18, 1979 (G.C. Exh. No. 26). Subsequently, on or about October 11, a DOD parking directive was issued to component activities (including the Department of the Army) which contained DOD procedures for implementing the Government-wide parking regulations (G.C. Exh. No. 27). No substantive changes were made in the October 11, 1979 document from the September 18, 1979 draft.

22. The October 11, 1979, DOD parking directive did, however, go

beyond the Government-wide regulations in certain significant respects. Beyond the paramount consideration of the fee, which was not contained in the OMB or GSA regulations, DOD made an administrative determination to limit free visitor parking to 3 hours which was then binding on subordinate activities. Further, in a series of questions and answers which were attached to the DOD directive, a policy limiting rebates was outlined (G.C. Exh. No. 27).

23. The DOD parking directive was a regulation that directed, among others, the Department of the Army to implement the paid parking program at its installations. In implementing the program, the Department of the Army, through Lt. Colonel Paul T. Gerard, Jr., devised its own set of implementing instructions to guide its subordinate activities. These implementing instructions took the form of a revision to already existing Army Carpooling and Parking Regulations (G.C. Exh. Nos. 23, 24, 25).

24. Colonel Gerard began working on the Department of the Army's revised parking regulations in September 1979. Prior to this, however, Colonel Gerard was a Department of the Army representative on the DOD working group concerned with the paid parking program. His involvement with the program included a review of the draft DOD directive sometime in August or the first part of September 1979 and a subsequent submission of comments upon the completion of this review.

25. Upon receipt of the DOD directive on October 12, 1979, a message was drafted and sent to affected Army installations on October 15, 1979. This message directed affected installations (including Cameron Station) to implement a paid parking program by November 1, 1979 and included the fee to be charged (G.C. Exh. No. 13).

26. Colonel Gerard then finalized the draft of the revised Department of the Army parking regulations he had been working on and sent a copy of the draft to MDW and Cameron Station on October 17, 1979 (G.C. Exh. No. 21). Two days later an advance copy of the revised parking regulation was forwarded to MDW and Cameron Station (G.C. Exh. 22). The Department of the Army's parking regulation contained provisions of the DOD directive which went beyond the contents of the Government-wide regulations, including the limitations on visitor parking and parking fee rebates. There is no evidence, however, that the Department of the Army ever sent its parking regulation to Local 2449 for review and/or discussion.

27. MDW thereafter drafted a Letter of Instruction (LOI) to guide installations within its jurisdiction in implementing the paid parking program (G.C. Exh. No. 19). These instructions were developed pursuant to the DOD directive and the Department of the Army regulations and were then sent to Colonel Briggs at Cameron Station. The MDW Letter of Instruction, like the DOD and Department of the Army regulations, was never submitted to Local 2449, nor did MDW conduct negotiations with

Local 2449 concerning MDW's implementing instructions. It should be noted, however, that MDW did provide copies of the LOI to Union representatives with which MDW holds exclusive recognition at a meeting on October 26, 1979.

Discussion and Conclusions of Law

A. The Effect of Government-wide and Agency Regulations

In my judgment, no useful purpose would be served in exploring *ab initio* this particular subject which has already been treated fully by Judge Arrigo in *DCASR Boston*, *supra*., and adopted by Judge Devaney in *HDL*, *supra*. Judge Arrigo's conclusions and reasoning, which I adopt, are as follows:

> "There is no contention that the OMB and GSA regulations on paid parking are negotiable matters. Indeed, it is clear that these regulations are Government-wide regulations within the meaning of Section 7117(a)(1) of the Statute, and, as such, no duty to bargain is required regarding the subject matter contained therein. However, the OMB parking regulation, while setting forth various specific instructions on paid parking, required GSA and all agencies to issue instructions relative to the implementation of the OMB regulation. DOD was, therefore, obligated to adopt the specific requirements of OMB and GSA but, nevertheless, was left discretion as to various practices and procedures relating to the implementation of the OMB and GSA regulations.
>
> "Sections 7117(a)(2) and (3) of the Statute govern an agency's duty to bargain with a union with regard to matters encompassed by agency wide regulations. Thus, under the Statute, an agency or a primary national subdivision of an agency is obligated to bargain with a union regarding matters encompassed by their regulations only where the union represents the majority of employees in the agency or primary national subdivision, or when the Authority has determined under 7117(b) of the Statute that no compelling need exists for the regulation ...
>
> "In the case herein DOD's parking regulation of October 11, 1979 and DOA's regulation of October 19, 1979 were applicable to all their subordinate bodies and I conclude the DOD regulation was an 'agency' regulation and the DOA regulation was a regulation issued by a 'primary national subdivision of such agency' within the meaning of Section 7117(a)(3) of the Statute. Further, the Union herein does not represent a majority of the employees in DOD or DOA nor has the Authority determined that no compelling need exists

> for the DOD or DOA regulations in effect, the issue having never been presented to the Authority for such a determination. Accordingly, I conclude tht prior to their issuance, neither DOD nor DA was obligated to bargain ... regarding the matters which were the subject of the parking regulations referred to herein.
>
> "However, the DOD and DOA regulations were not self implementing. Rather, in order to be effectuated, components subordinate to DOD and DOA were required to implement them as they would affect employees within their jurisdiction. The regulations did not provide for all possible contingencies and, therefore, various area of discretion were left to the judgement of management at the level of actual employee location and union representation.
>
> "The Authority has held in National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA No. 119, that 'to the extent that an agency has discretion with respect to a matter affecting conditions of employment of its employees, that matter is within the duty to bargain of the agency.' Clearly, the paid parking program at the Facility is a condition of employment. Accordingly, I conclude that management was obligated under the Statute to negotiate ... to whatever extent management had discretion under applicable Government-wide and agency regulations in the implementation of the paid parking at the Facility." (DCASR, supra, pp. 12-14) (footnotes omitted) To like effect, see, also, Boston District, supra; Department of the Army, supra.)

The effect of the foregoing, as applied to the instant case, is that the regulations issued by DOD and DA were agency regulations, and that MDW and Cameron Station had discretion in their implementation.

B. Whether the Compelling Need for an Agency Regulation May be Litigated in a Section 7116 Proceeding.

The General Counsel asserts that Local 2449 may challenge the validity of agency regulations as a bar to negotiations in an unfair labor practice proceeding and it is not limited to raising such challenge in a negotiability proceeding. I disagree. This contention previously was rejected by Judge Arrigo in Boston District, supra, and by Judge Devaney in HDL, supra. I also rejected this contention recently in Defense Logistics Agency et al, 1-CA-213, OALJ-81-131 (July 7, 1981). In reaching this conclusion I adopted Judge Arrigo's views and supplemented them with additional reasoning of my own. Since these views are applicable herein, and are dispositive of General Counsel's contentions, I shall quote them as follows:

Section 7117 of the Statute has the effect of removing from the ambit of collective bargaining those matters which are the subject of a government-wide or agency-wide rule or regulation under certain circumstances. Thus, Section 7117 states as follows:

> "§7117. Duty to bargain in good faith; compelling need; duty to consult
>
> "(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> "(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.
>
> "(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

The regulations prescribed by the Authority are set forth in Part 2424 of the Rules and Regulations. There is no dispute that the Unions herein failed to utilize the procedures established by the Board to resolve issues concerning "compelling need."

Respondent contends that Section 7117 of the Statute is a bar to negotiations because DLAR 5500.1 is an agency-wide regulation and the Authority has not made a determination that "no compelling need" exists for the regulation. I find merit to this defense. Indeed, I specifically find and conclude that Part 2424 of the Rules and Regulations is the exclusive procedure wherein the Authority may determine whether compelling need exists for an agency-wide regulation.

To begin with, a literal reading of the statutory language makes clear that it is "only if the Authority has determined" (past tense) that no compelling need exists for an agency-wide regulation that the duty to bargain even arises. Thus, an initial determination by the Authority pursuant to its prescribed procedures is a condition precedent which must be satisfied before a determination can be made that a duty to bargain in fact exists. The Authority's function under Section 7117 is to determine whether the agency-wide regulation is a bar to negotiations. Stated differently, the Authority's role is to resolve a "negotiability" issue; its role is not to resolve the underlying "obligation to bargain" in the same proceeding.

The General Counsel contends, however, that the issue of "compelling need" may be resolved in an unfair labor practice proceeding. I reject this contention for the same reasons stated by Judge Arrigo in Boston District Recruiting Command, Boston, Massachusetts, Case No. 1-CA-206 et. al, OALJ-81-023, at pp. 13-15, (December 22, 1980). In that case, Judge Arrigo concluded as follows:

> Counsel for the General Counsel also suggests ... that if the agency regulation stands as a bar to negotiations, then the proceeding herein served to put the issue of compelling need before the Authority for determination. In my view neither the Statute nor the Authority's regulations appear to envision this approach. Indeed, section 7117(b)(3) of the Statute provides that where a hearing is held to make a determination of compelling need, it, '... shall not include the General Counsel as a party.' Accordingly, to combine a compelling need determination with an unfair labor practice proceeding, where the General Counsel has the responsibility of presenting the evidence in support of the complaint and carries the burden of proving the allegations of the complaint, would run contrary to Statutory prohibition. Therefore, Counsel for General Counsel's contention is rejected." (footnote omitted).

Therefore, based upon the foregoing reasoning, I conclude that the Authority does not even have the option of litigating the compelling need issue in a Section 7116 proceeding where the General Counsel is a party.

When the Union first learned of the issuance of this agency-wide regulation, it could have sought a determination by the Authority on the compelling need issue. Regardless of which way the Authority decided the case, it is my opinion that its decision would have removed an impediment to meaningful negotiations and may have assisted in paving the way to voluntary settlement of the unfair labor practice issues. Even if a Section 7116 proceeding could not be avoided altogether, the issues to be litigated might well be narrowed and simplified. In short, the Statutory scheme of providing an expedited forum before the Authority, without the presence of the General Counsel, makes sense.

In an excellent brief filed by Counsel for the General Counsel, the contention is made that the compelling need aspects of Section 7116(a)(2) are only applicable in cases where an agency invokes an existing rule or regulation as a bar to negotiations. It is argued that the present case should be viewed as a unilateral change (or revision) of an existing regulation. Accordingly, it is argued that this issue may be litigated in a Section 7116 proceeding and that "the compelling need provisions of the Statute are in reality not applicable to the facts of this case." I disagree. The problem with this theory is that its practical effect is to prevent an agency "from acting at all", that is, issuing a regulation containing a change in conditions of employment. Moreover, under this theory, even if an agency informed a Union and proposed putting into effect an agency-wide regulation, and the Union failed to seek a compelling need determination from the Authority, the agency still would be required to act at its peril and risk the allegation that it violated the Act, if it decided to make the regulation effective nothwithstanding the Union's inaction. While it is true that the legislative history does not envision that an agency may unilaterally remove issues from the bargaining table merely by issuing regulations, it does not follow that an agency is prohibited from acting at all. Section 7117(b)(1) and (2) clearly contemplate that agencies may issue regulations prior to their being put to a compelling need challenge. Thus, Section 7117(b)(1) refers to an exclusive representative challenging a regulation "which is then in effect" and Section 7117(b)(2)(A) refers in the past tense to an agency "which issued" the rule or regulation. It follows, therefore, that the Authority is not deprived of jurisdiction in a Part 2424 proceeding simply because the agency regulation involves a "unilateral" change.

Furthermore, if a union were permitted to litigate compelling need issues in an unfair labor practice proceeding with the aid of the General Counsel, it would mean the union had a choice of forums and could choose to by-pass the expedited forum designated by the Authority in Part 2424 of the Rules and Regulations. I concede that Sections 2423.5 and 2426.5 of the Rules and Regulations may raise some doubt as to my interpretation. However, I believe that the last sentence in those sections is intended to reserve to the Authority exclusive jurisdiction of (1) all compelling need issues and (2) those negotiability issues which, because no action has been taken, may not form the basis for a possible unfair labor practice and therefore may not be litigated in a Section 7116 proceeding. I further note that even in cases where a party elects to file a negotiability petition and is referred by the Authority to a Section 7116 proceeding it is because (1) the Respondent denies any changes occurred or (2) resolution of the dispute is dependent upon the resolution of factual issues related to the parties' conduct, both of which are more related to the underlying obligation to bargain. National Treasury Employees Union and NTEU Chapter 66, 6 FLRA No. 16. Since neither of these situations obtains here, I believe the Authority could have made a "compelling need" determination had the Union only invoked the expedited procedures of Part 2424.

Finally, I would observe that, in the absence of a clear delegation from the Authority, I am reluctant to assume that I have the authority to make compelling need determinations in an unfair labor practice proceeding. And, unless I have that authority, an agency will be foreclosed from ever obtaining such a determination since, as noted above, it cannot initiate a petition for review under Section 2424.2 of the Rules and Regulations. The net result of this discussion is that the agency regulation is a bar to negotiations.

C. Respondent DLA's Obligation to Negotiate the Impact and Implementation of Paid Parking

1. As noted above, the DOD and DA regulations were not self implementing. In order to be effectuated, components subordinate to DOD and DA were required to implement these as they would affect employees within their jurisdiction. DLA had a duty to notify Local 2449 and bargain upon request concerning the impact and implementation of the paid parking program because DLA is the Activity with which Local 2449 had a contract and for whose employees Local 2449 was the exclusive representative.

2. Local 2449, through its President, made a timely request to bargain which was refused by DLA through its agent, Captain Starrett. By such conduct, DLA violated Section 7116(a)(1) and (5) of the Statute.

3. Respondent DLA's principal defense is that it was only a tenant at Cameron Station and therefore lacked the authority to bargain about this particular subject matter. There is a significant difference, however, between an agent lacking authority and an agent not having an obligation to bargain. In a recent negotiability decision,[7] the Authority rejected an Agency argument that it had no duty to bargain because it was inappropriate for negotiations to proceed at the local level since it intended to retain authority over such matters at the

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7/ American Federation of Government Employees, AFL-CIO, Local 3656, 4 FLRA No. 92.

Agency level. The Authority held that the Agency's allegation "does not relate to the bases for finding that a proposal is not within the duty to bargain under Section 7117" and, further, that Section 7114(b)(2) includes the obligation for an agency to be represented at negotiations "by representatives who ae empowered to negotiate and enter into agreements on all matters within the scope of negotiations" in the bargaining unit. In other words, the Authority correctly pointed out to the Agency that the obligation to bargain encompassed the obligation to appoint representatives who are empowered to negotiate. Respondent's defense is accordingly rejected. It was incumbent upon DLA to obtain the requisite authority for itself or arrange for bargaining between Local 2449 and an agent empowered to negotiate. While it is not my responsibility to suggest how this could be accomplished I feel compelled to observe that a chain of command is a two-way street. It can be utilized from top to bottom for issuance of circulars, regulations, directives, and LOI; it can be used in reverse order for transmitting input to higher echelon and for obtaining advisory opinions, as was done in this case by Colonel Briggs who sought advice as to whether Local 2449's revised parking spaces were "free." In like manner, why couldn't DLA request its immediately higher level organization DOD to ensure that DOD instructs its agent DA, to instruct its agent MDW, to instruct its agent Cameron Station, to make appropriate arrangements whereby another DOD agent (DLA) is not left holding the bag with no authority to negotiate on the subject of paid parking? If the facts were different and it were shown that DOD refused a request from DLA to intervene for the purpose of resolving this conflict, I would agree that DOD should share liability for DLA's violation either as a joint tortfeasor or on a principal-agent theory. However, that does not appear to be the case.

D. Respondent Cameron Station's Implementation of the Paid Parking Program was a Violation of Section 7116(a)(1) but not Section 7116(a)(5).

Respondent Cameron Station implemented the paid parking program at its facility through the issuance of formal memoranda to employees located at Cameron Station (G.C. Exh. Nos. 14, 15). It is undisputed that these memoranda were issued without prior notice to the Union, but a legal issue which must be resolved is whether or not Cameron Station had any legal obligation to provide Local 2449 with such notice. While the desire on the part of Local 2449 to bargain was not specifically made known to Cameron Station, the Post Commander was nevertheless aware of the fact that a labor orgnization represented a group of DLA employees located on his post that would be affected by paid parking. A letter was sent to Colonel Briggs, the Post Commander, dated October 19, 1979, which noted that paid parking would have implications for the contract between DLA and Local 2449 (G.C. Exh. No. 4). Notwithstanding such knowledge, Cameron Station implemented the paid parking program which immediately affected DLA and its employees.

The General Counsel contends that Cameron Station inhibited the collective bargaining process by acting without giving due consideration to Local 2449's right to negotiate over the impact and implementation of the paid parking program. On the factual situation presented herein, I am constrained to find that Cameron Station violated Section 7116(a)(1) because its conduct did in fact, interfere with the rights of DLA employees to exercise their collective bargaining rights set forth in the Statute. However, I am not persuaded that this same conduct constitutes a violation of Section 7116(a)(5) which makes it an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter." The principal reason for my reaching this conclusion is that Cameron Station does not owe any duty to bargain to Local 2449 since it does not have an exclusive representative relationship with Local 2449. It is only when an agency has an obligation to bargain that it also has the concomitant obligation to provide a Union with adequate advance notice of a change in conditions of employment so that the Union has a reasonable opportunity to request negotiations.

I agree with the position taken by Intervenor in its excellent brief in the HDL case that Naval Air Rework, as Executive Order case, is of doubtful validity by virtue of the enactment of the Statute. In any event, it is not applicable herein because Cameron Station is not in the same chain of command and therefore is not a higher level part of "agency management" vis-a-vis DLA. Nor can Naval Air Rework be relied upon as a defense to my finding of a Section 7116(a)(1) violation for even though it is a subordinate activity of DOD and therefore an agent of DOD, its conduct was not "ministerial" when it implemented the paid parking program. Thus, close analysis discloses that Cameron Station simply does not occupy a position similar to either the agency or activity in Naval Air Rework. In fact, Cameron Station is a third party vis-a-vis its relationship to DLA and Local 2449 who have a contractual relationship. Essentially what I am deciding is that a third party cannot stand in the shoes of a contractual party and be said to have violated Section 7116(a)(5) but this does not mean that its conduct cannot independently constitute interference with a contractual relationship in violation of Section 7116(a)(1).

E. Whether DOD, DA and/or MDW Share in Cameron Station's Liability for Violating Section 7116(a)(1).

In my opinion, DOD and DA clearly are free of any liability. Their agency regulations were a bar to negotiations. The responsibility for implementing these regulations was with subordinate activities like MDW and Cameron Station and it is their conduct which was at issue. I agree with the General Counsel that MDW's regulation does not fall within the purview of an agency regulation within the meaning of Section 7117. But I fail to see why MDW should be saddled with an unfair labor practice by virtue of Cameron Station's conduct simply because it is a higher level activity in that chain of command, unless the Authority decides to use the single employer theory. I am not persuaded by the evidence that MDW required Cameron Station to act as it did in precipitously implementing the paid parking program. In my view, Cameron Station had considerable discretion in implementing the program; it was a free agent and is solely responsible for its conduct. Indeed, the arguments in General Counsel's brief (at p. 15) explaining why Cameron Station's actions were not "ministerial" is precisely the reason why it alone is responsible and why MDW cannot be held to share liability.

In concluding that DOD, DA, and MDW are free from liability, I would be remiss if I did not point out that a different conclusion was reached by Judge Arrigo in DCASR Boston, supra, a similar situation involving a landlord (Ft. Devens) and a tenant (DCASR), each in a different chain of command, but with each having DOD at the top of the chain. Judge Arrigo concluded that "DOD, as the parent organization of all these subordinate activities and a moving party through the issuance of its parking regulations, was inextricably involved in the situation" and further, that only DOD "has the authority to resolve the predicament in which it was enmeshed" with its subordinate components which Judge Arrigo characterized as a "joint enterprise".

While I do not disagree with Judge Arrigo's approach in DCASR, I reach a different conclusion because I feel compelled to do so by the Authority's continued adherence to the doctrine enumciated by the Federal Labor Relations Council's in Naval Air Rework which (1) did not consider utilizing a single employer concept and (2) did not treat the lower level activity as an agent/accomplice to the unfair labor practice committed by the parent agency at a higher organizational level. Instead, Naval Air Rework viewed the conduct of each activity in isolation from the other when the Council stated that the "acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of Section 19(a) of the Order by 'agency management,' but may not, standing alone, provide the basis for finding a separate violation by 'agency management' at a lower organizational level of the agency where a unit of exclusive recognition exist." (Emphasis in original). In reaching my conclusions in the instant case concerning the respective liability of the named Respondents I have, in effect, followed the Council's "standing alone" test.

These paid parking cases of Judges Arrigo, Devaney, and myself present novel legal issues and are significant in that they aptly illustrate what has been described as "the problem of identifying the proper respondent."[8]

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[8] Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980).

F. Respondent Cameron Station Violated Section 7116(a)(1) By Unilaterally Assessing Parking Fees To Local 2449 For The Two Spaces Assigned To It

Local 2449 had been assigned two parking spaces at Cameron Station pursuant to Article XXXIX of the contract between Local 2449 and DLA. Upon implementation of the paid parking program, and prior to November 26, Colonel Briggs of Cameron Station assessed parking fees for these two spaces and officials of Local 2249 received parking tickets for parking in the spaces without having purchased a parking permit. Officials of Local 2449 have purchased monthly permits since receiving these tickets. The General Counsel contends that assessment of these fees ignored the valid contractual agreement in effect between Local 2449 and DLA and therefore violates the Statute.

OMB Circular No. A-118 expressly states that the policy to institute parking fees was not to be interpreted to render null and void any valid negotiated agreement covering any provision of employee parking in effect on the effective date of the Circular (G.C. Exh. No. 8). Article XXXIX of the contract thus remained in full force and effect upon the implementation of the paid parking program and Cameron Station could not change it anymore than DLA could. Moreover, the contracting parties themselves - DLA and Local 2449 - both regarded Article XXXIX as providing two free spaces, (I need not decide whether their interpretation was correct). This mutual interpretation of the agreement was communicated to Colonel Briggs by Captain Starrett in two different letters. Notwithstanding the position of the two parties to the contract, Colonel Briggs unilaterally determined that Local 2449 should pay for these spaces. This action by Colonel Briggs is a blatant abrogation by an outside third party of a term and condition of employment agreed to between the two parties to a valid collective bargaining agreement.

In my opinion, it would effectuate the purposes of the Federal Service Labor-Management Relations Statute to protect this collective bargaining relationship from interference by a third-party government agency. Accordingly, I concluded that Cameron Station violated Section 7116(a)(1) by interfering with the collective bargaining relationship of DLA and Local 2449. However, I do not find this conduct also violated Section 7116(a)(5) for the same reasons discussed earlier.

The foregoing unfair labor practice took place prior to the November 26 letter from Captain Starrett requesting reconsideration by Colonel Briggs of his decision. Thereafter, in January, Captain Starrett again wrote a letter requesting reconsideration. At the hearing, the General

Counsel learned for the first time[9] that Colonel Briggs - after receiving Captain Starrett's second letter - sent both of Captain Starrett's letters to MDW for a legal interpretation. This request was in turn forwarded to DA which responded in March that the Union's reserved parking spaces were not free. Thus, we have a situation where an unfair labor practice in November 1979 continued in effect through March 1980 at which time it could very well have ceased at the direction of higher authority had DA concluded that Cameron Station had acted improperly in the first instance. Such a conclusion by DA surely would have permitted it to escape liability (1) by not joining in the unfair labor practice and (2) by ordering Cameron Station to cease requiring the Union to pay for the parking spaces. Instead, DA (the principal) chose to place its stamp of approval on the conduct of Cameron Station (its agent) and by allowing the unlawful interference to continue, DA thereby condoned Cameron Station's unlawful conduct. It follows from this that DA also violated Section 7116(a)(1) by interfering with the contractual relationship of DLA and Local 2449, by requiring Local 2449 to continue paying for the reserved parking spaces. Finally, turning now to MDW, I think it would ill behoove MDW to defend its role in this incident by asserting that it was merely a middleman or conduit between Cameron Station and DA. It played a part in this process - as principal or agent or both - and should not be permitted to escape liability. I find that MDW also violated Section 7116(a)(1).

G. Summary

Having found that Department of Defense did not violate the Statute I recommend that the Complaint be dismissed as to it. Having found no violations of Section 7116(a)(5) against any Respondent, except DLA, I recommend dismissal of the allegations against all other Respondents.

Having found that Headquarters, Defense Logistics Agency violated Section 7116(a)(1) and (5) by refusing to bargain with Local 2449 of AFGE, about implementation of the paid parking program I recommend the Authority issue a separate Order applicable to this Respondent, as set forth below.

Having found that Department of the Army, Headquarters, U.S. Army Military District of Washington, and Cameron Station each violated

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[9] At this juncture in the hearing, the General Counsel moved to amend the Complaint to add DA and MDW as Respondents for this additional alleged violation relating to the two parking spaces. Since this evidence was not made available to the General Counsel during the investigation, and since it is related to the basic allegations in the charges, and since there appears to be no basis for claiming surprise, unfairness, or prejudice, the motion is hereby granted.

Section 7116(a)(1) by interfering with the contractual relationship between Headquarters Defense Logistics Agency and AFGE Local 2449, and in the interest of not unduly complicated this decision with individually tailored orders and notices, I recommend that these Respondents only be required to sign one Notice to Employees, as set forth below.

Order

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that Headquarters, Defense Logistics Agency shall:

1. Cease and desist from:

(a) Refusing to negotiate in good faith with the American Federation of Government Employees, Local 2449, AFL-CIO, the exclusive representative of a bargaining unit of employees at Cameron Station, Alexandria, Virginia concerning the implementation of a paid parking program at Cameron Station to the extent consonant with government-wide and agency regulations.

(b) Instituting changes in conditions of employment, including changes concerning a paid parking program, without negotiating in good faith with American Federation of Government Employees, Local 2449, AFL-CIO.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Upon request, meet and negotiate with the American Federation of Government Employees, Local 2449, AFL-CIO concerning the implementation of a paid parking program at Cameron Station, Alexandria, Virginia to the extent consonant with government-wide and agency regulations.

(b) Post, at its Cameron Station, Alexandria, Virginia facility, copies of the attached Notice marked Appendix A on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official and be posted and maintained by him or her for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to insure that such

Notice is not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Order

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby orderd that Department of the Army, Headquarters, U.S. Army Military District Washington, and Cameron Station shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by implementing a paid parking program at Cameron Station in such a manner as to preclude American Federation of Government Employees, Local 2449, AFL-CIO from exercising its statutory right to negotiate the impact and implementation of such program with Headquarters, Defense Logistics Agency, prior to such implementation.

(b) Interfering with, restraining, and coercing employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by assessing parking fees for two parking spaces assigned to American Federation of Government Employees, Local 2449, AFL-CIO at Cameron Station in accordance with the collective bargaining agreement between said Union and Headquarters, Defense Logistics Agency.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Reimburse American Federation of Government Employees, Local 2449, AFL-CIO for all money paid since November 1, 1979 to purchase parking permits for two parking spaces assigned to it at Cameron Station in accordance with the collective bargaining agreement between American Federation of Government Employees, Local 2449, AFL-CIO and Headquarters, Defense Logistics Agency.

(b) Post, at its Cameron Station, Alexandria, Virginia facility, copies of the attached Notice marked Appendix B on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official and be posted and maintained by him or her for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where such notices are customarily posted. Reasonable steps shall be taken to insure that such Notice is not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Francis E Dowd

FRANCIS E. DOWD
Administrative Law Judge

Dated: July 10, 1981
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL, upon request, negotiate in good faith with the American Federation of Government Employees, Local 2449, AFL-CIO, the exclusive representative of our bargaining unit employees at Cameron Station, Alexandria, Virginia concerning the implementation of a paid parking program at Cameron Station to the extent consonant with government-wide and agency regulations.

WE WILL NOT institute changes in conditions of employment, including changes concerning a paid parking program, without negotiating in good faith with American Federation of Government Employees, Local 2449, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Federal Service Labor-Management Relations Statute.

Headquarters, Defense Logistics Agency
(Agency or Activity)

Dated: ________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III for the Federal Labor Relations Authority whose address is: 1133 15th St., NW., Suite 300, Washington, DC 20005; Telephone No. (202) 653-8452.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by implementing a paid parking program at Cameron Station in such a manner as to preclude American Federation of Government Employees, Local 2449, AFL-CIO from exercising its statutory right to negotiate the impact and implementation of such program with Headquarters, Defense Logistics Agency, prior to such implementation.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute by assessing parking fees for the two parking spaces assigned to the American Federation of Government Employees, Local 2449, AFL-CIO at Cameron Station in accordance with the collective-bargaining agreement between the American Federation of Government Employees, Local 2449, AFL-CIO and Headquarters, Defense Logistics Agency.

WE WILL reimburse the American Federation of Government Employees, Local 2449, AFL-CIO for all money paid since November 1, 1979 to purchase parking permits for the two parking spaces assigned to it at Cameron Station in accordance with the collective-bargaining agreement between the American Federation of Government Employees, Local 2449, AFL-CIO and Headquarters, Defense Logistics Agency.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Federal Service Labor-Management Relations Statute.

Department of the Army
(Agency or Activity)

Dated: ____________ By: ____________
(Signature)

Headquarters, U.S. Army
Military District of Washington
(Agency or Activity)

Dated: ____________ By: ____________
(Signature)

Cameron Station
(Agency or Activity)

Dated: ____________ By: ____________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III for the Federal Labor Relations Authority whose address is: 1133 15th St., NW., Suite 300, Washington, DC 20005; Telephone No. (202) 653-8452.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondent

and

Case Nos. 3-CA-40202
and 3-CA-40462

NATIONAL COUNCIL OF EEOC LOCALS, NO. 216,
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties. The issue is whether the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it (1) refused to authorize payments for travel and per diem for negotiators of the Charging Party (the Union) as required by the terms of the parties' negotiated agreements and (2) when it refused to negotiate over a change in the site of negotiations being held pursuant to certain of those agreements.

II. Background Facts

The Respondent and the Charging Party were parties to a collective bargaining agreement effective from August 29, 1981, to August 29, 1984, the mandatory provisions of which have continued in full force and effect, and to ground rules agreements pertaining to the implementation of a field reorganization, mid-term negotiations regarding certain specified matters and implementation of EEOC Order 131, each of which provided for the payment of travel and per diem expenses for Union representatives at negotiations held pursuant to the provisions of those agreements. Since December 1983, the Respondent has refused to authorize payments for travel and per diem expenses as provided for by those agreements. Since January 1984, the Respondent refused to bargain with the Charging Party over a change in the site of negotiations held pursuant to the ground rules agreements applied to the negotiations at issue.

III. Positions of the Parties

The Respondent contends that the provisions in the parties' agreements authorizing the payment of travel and per diem were "for informational purposes only" pursuant to the Authority's Interpretation and Guidance, 2 FLRA 265 (1979), rather than a result of negotiations. Respondent further argues that its subsequent refusal to authorize payments was a result of the United States Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. FLRA, 464 U.S. 89 (1983), wherein the Court found that section 7131(a) of the Statute does not entitle employees on official time to the payment of travel and per diem expenses. Moreover, Respondent contends that the payment of travel and per diem is not a negotiable condition of employment and was not appropriate under applicable law and regulation (Travel Expense Act, 5 U.S.C. § 5702 and implementing regulations of the Office of Personnel Management).

As to its refusal to negotiate on changes in the sites of negotiations, Respondent contends that the sites were mutually agreed to by the parties and that there was no obligation to negotiate changes in those agreements.

The General Counsel contends that travel and per diem is a mandatory subject of bargaining which when in an agreement may not be lawfully rejected or unilaterally altered, and that Respondent made the determination required by applicable law and regulation when it included the provisions in the agreement.

As to the refusal to negotiate a change in the site of negotiations, the General Counsel argues that changed circumstances, i.e., the Supreme Court's decision in BATF, obligates the Respondent to negotiate, notwithstanding the existence of an agreement, on where the negotiations would occur. The General Counsel seeks as a remedy, reimbursement to Union representatives for their travel and per diem expenses.

IV. Analysis

As to the Respondent's reliance on the United States Supreme Court's decision in BATF, following that decision the Authority decided in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), slip op. at pp. 6-7, petition for review filed sub nom., Department of the Treasury, U.S. Customs Service v. FLRA, No. 85-1198, (D. C. Cir., March 27, 1986), that a union's proposal which would require an agency to pay travel and per diem expenses incurred by employees using official time, while not an entitlement under the Statute, is within the duty to bargain as it is not inconsistent with law or Government-wide regulation. To refuse to give effect to such provisions in a collective bargaining agreement is violative of section 7116(a)(5) of the Statute. See Department of Defense Dependents School System, 21 FLRA No. 125 (1986). The Respondent's contention that the provisions were in the agreement "for informational purposes" is not a basis for a different conclusion. The provisions authorizing travel and per diem expenses had been incorporated into the terms of the parties' collective bargaining agreement and the record in this case does not support a conclusion that the parties intended the provisions to encompass the payment of the expenses only as long as the Respondent was required to pay them under the Authority's Interpretation and Guidance. Since the provisions negotiated by the parties do not violate law or government-wide regulation, the parties were therefore obligated to adhere to those provisions during the term of their agreement which the parties stipulated continued in full force and effect. Accordingly, the Respondent's unilateral refusal to comply with agreed-upon provisions for the payment of travel and per diem was inconsistent with the good faith bargaining obligation and constitutes a violation of the Statute.

We do not however, believe that the Respondent's refusal to negotiate on changes in the sites of the negotiations was violative of the Statute. As the parties describe in their briefs, the sites of the negotiations were established in the respective agreements of the parties. While those agreements presupposed that the Respondent would be paying travel and per diem expenses, the refusal to pay such expenses does not create a circumstance where the Respondent was obligated to bargain on a change in the agreement.

V. Conclusion

The Authority finds that the Respondent's refusal to comply with the parties' collective bargaining agreement and ground rules agreements providing for the payment of travel and per diem is violative of section 7116(a)(1) and (5) of the Statute. To remedy this unfair labor practice, we shall order the Respondent to abide by the terms of the agreements at issue and to pay travel and per diem to all bargaining unit employees who previously submitted or who submit appropriate claims for such payments under the terms of the agreement. Such payments must be consistent, not only with the terms of the parties' agreements, but also with law and regulation, including the Federal Travel Regulations.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Equal Employment Opportunity Commission shall:

1. Cease and desist from:

(a) Refusing to comply with the terms of collective bargaining agreements negotiated with the National Council of EEOC, Locals No. 216, American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, which provide for the payment of travel and per diem expenses, thereby failing and refusing to bargain in good faith.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with collective bargaining agreements negotiated with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, which provide for the payment of travel and per diem expenses to its representatives.

(b) Pay travel and per diem expenses to all bargaining unit employees who previously submitted or who submit appropriate claims for such payments under the terms of collective bargaining agreements, to the extent that such payments are consistent with the terms of the collective bargaining agreement and law and regulation, including the Federal Travel Regulations.

(c) Post at its facilities where bargaining unit employees represented by the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, are located, copies of the attached

Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C. July 30, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to comply with the terms of collective bargaining agreements negotiated with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, which provide for the payment of travel and per diem expenses.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with collective bargaining agreements negotiated with the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, which provide for the payment of travel and per diem expenses to its representatives.

WE WILL pay travel and per diem expenses to all bargaining unit employees who previously submitted or who submit appropriate claims for such payments under the terms of collective bargaining agreements, to the extent that such payments are consistent with the terms of the collective bargaining agreements and law and regulation, including the Federal Travel Regulations.

____
(Activity)

Dated: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting , and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, 1111 18th Street, N.W., Room 700 (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

22 FLRA No. 95

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS, WASHINGTON, D.C.
AND BUREAU OF PRISONS, FEDERAL CORRECTIONAL
INSTITUTION, RAY BROOK, NEW YORK

Respondent

and

Case No. 1-CA-40368

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3882

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent and the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent filed an opposition to the General Counsel's exceptions and cross-exceptions and the General Counsel filed an opposition to the Respondent's exceptions. The complaint alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) when it failed to comply with the provisions of section 7122(b) of the Statute by refusing to implement an arbitration award clarifying an earlier award dealing with an employee's termination from employment.

II. Facts

A grievance over the termination of Richard Frontera, an employee at the Respondent's Ray Brook, New York facility (FCI, Ray Brook), was filed pursuant to the parties' negotiated grievance procedure and the matter was submitted to arbitration. On December 16, 1983, Arbitrator Dale S. Beach found that there was not just and sufficient cause for the adverse action taken. He issued an award that reduced the penalty to a 60 calendar day suspension and ordered that "[w]ithin 10 calendar days of receipt of this Award Mr. Frontera shall be reinstated to his regular job without the loss of any employee benefits." The award also provided for backpay to June 10, 1982, the date of discharge, less pay for the 60-day suspension, and less any possible unemployment compensation or wages received from other employment during the period of discharge. Upon receipt of the December 16th award, the Respondent determined that an appeal should not be filed. It also decided that Frontera would be returned to work in a location other than FCI, Ray Brook. The Respondent did not request the Office of Personnel Management (OPM) to take the necessary steps to perfect an appeal to the United States Court of Appeals for the Federal Circuit in accordance with the provisions of section 7121(f) of the Statute and 5 U.S.C. § 7703(d).

The Respondent decided not to return Frontera to FCI, Ray Brook. Rather, the Respondent reassigned him to the United States Penitentiary, Lewisburg, Pennsylvania (USP, Lewisburg). This was done despite vigorous objection by the Charging Party (the Union) that this would not satisfy the arbitrator's award. The Union contacted Arbitrator Beach on February 7, 1984, and sought an interpretation of his order that the Respondent "reinstate Frontera to his regular job without the loss of any employee benefits." The Respondent did not receive proper notice of the request for clarification.

On March 1, 1984, without providing the Respondent an opportunity to be heard, Arbitrator Beach issued a Clarification of Award, holding that Frontera should be reinstated to his regular job as Cook-Foreman at FCI, Ray Brook, without the loss of any employee benefits. In his clarification, Arbitrator Beach explained that "[t]he use of the term 'regular job' in my award means regular job at the Federal Correctional Institution at Ray Brook, New York. Normally when arbitrators say 'regular job' they mean the same job at the same location held by the grievant before his discharge."

The Respondent did not request OPM to take the necessary steps to perfect an appeal of the clarified award to the Federal Circuit. Instead, the Respondent refused compliance and filed exceptions to the clarified award with the Authority. The Respondent admits that the award as clarified has not been implemented.

[22 FLRA No. 95]

On June 29, 1984, the Authority in American Federation of Government Employees, Local 3882 and Federal Prison System, Ray Brook, New York, 15 FLRA 204 (1984), dismissed the Respondent's exceptions, noting that it had no jurisdiction to review the case, as the arbitration award involved a section 7121(f) matter, and referred the Respondent to its right to seek judicial review pursuant to 5 U.S.C. § 7703. The Respondent's motion for reconsideration was denied by the Authority on December 11, 1984, on the same grounds.

The assignment of Frontera to USP, Lewisburg, represented an economic and personal burden for him. He did begin working at Lewisburg in early 1984, but resigned on March 2, 1985, due to such hardship.

III. Judge's Decision

The Judge, contrary to the Respondent's contentions, concluded that the Authority had jurisdiction to order compliance with section 7121(f) arbitration awards. The Judge found that the sentence in section 7122 mandating that agencies "shall take the actions required by an arbitrator's final award" refers to arbitration awards reviewed by the Authority, and to adverse action arbitration awards reviewable by the United States Court of Appeals for the Federal Circuit.

The Judge further found that the charge in this case was timely filed, finding that the record, at a minimum, establishes that OPM received notice of the clarified award through the Respondent, and that OPM thereafter took no action to intervene in the arbitration proceeding for the purpose of requesting reconsideration as a step toward appeal to the Federal Circuit. Since more than 30 days passed after OPM's receipt of notice, OPM's right to proceed further was extinguished. Therefore, the clarified award became final and binding. He concluded that the charge in this case was filed well within six months of the date on which the clarified award became final and binding, and within the six-month period prescribed by section 7118(a)(4) of the Statute.

The Judge concluded that because the record clearly showed that the Respondent did not comply with the March 1, 1984 clarified award after it became final and binding, the Respondent violated section 7116(a)(1) and (8) of the Statute. The Judge found it unnecessary to pass upon whether such conduct was also violative of section 7116(a)(5) of the Statute. The Judge ordered that the Respondent comply with the clarified award and make Frontera whole, consistent with applicable law and regulation, for any loss of pay he may have suffered by reason of his separation (resignation) from Federal service brought about by the Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation to the effective date of the offer of reinstatement, less any amount earned through other employment during this period of time. The Judge also ordered the Respondent to make Frontera whole, consistent with law and regulation, for any monetary losses incurred as a result of the Respondent's assignment of Frontera to USP, Lewisburg, for which he has not otherwise been reimbursed.

IV. Positions of the Parties

The Respondent asserts in its exceptions that: (1) the Authority does not have jurisdiction under section 7122(b) of the Statute to enforce the award of an arbitrator issued pursuant to section 7121(e) and (f) of the Statute; (2) the charge in this case was filed more than six months after the alleged unfair labor practice occurred; (3) the March 1, 1984 clarified award did not constitute in itself an enforceable award because proper service of the request for clarification by the Union was never received by the Respondent and because it had no opportunity to be heard prior to its issuance; (4) the award violated management's reserved right to assign employees under section 7106(a)(2)(A) of the Statute. The Respondent also excepted to the Judge's remedy, questioning whether the complaint should have been found to include the matter of Frontera's resignation, and whether the remedy exceeds the Authority's powers. The Respondent also objected to several of the Judge's evidentiary rulings and findings of fact.

The General Counsel excepted to the Judge's finding that it was unnecessary to pass upon whether the conduct found to be violative of section 7116(a)(1) and (8) of the the Statute also violated section 7116(a)(5) of the Statute. The General Counsel also excepted to the Judge's ruling denying its motion to amend the complaint to include the allegation that the Respondent's action was also contrary to section 7121 of the Statute. Finally, the

General Counsel renewed its arguments in support of the Judge's rationale as to the timeliness of the unfair labor practice charge.

V. Analysis

In agreement with the Judge, the Authority finds that it does have jurisdiction to order compliance with section 7121(f) arbitration awards. In a recent case, issued subsequent to the Judge's Decision, United States Army Adjutant General Publications Center, St. Louis, Missouri, 22 FLRA No. 20 (1986), the Authority resolved this very issue. It held that, while the Authority does not have jurisdiction to review exceptions to the merits of an arbitrator's award falling within section 7121(f) of the Statute, once such an award has become final and binding, the Authority has jurisdiction over matters of compliance with the award in an unfair labor practice proceeding.

We agree with the Judge that the clarified award in this case became final and binding at the expiration of 30 days after OPM's receipt of notice of the award, and that the unfair labor practice charge in this case was filed within the six-month period required by section 7118(a)(4) of the Statute.

The Respondent's exceptions also raise issues as to: (1) the lack of proper service of the request for clarification and the resulting lack of an opportunity to be heard by the Arbitrator, and (2) the alleged interference with management's reserved rights under section 7106 of the Statute. We find, as did the Judge, that these issues are not litigable in this unfair labor practice proceeding, but are matters that go to the merits of the award that may only be raised within the appeals procedures established by Congress. See United States Army Adjutant General Publications Center, cited above.

There is no dispute that the Respondent has not complied with the March 1, 1984 clarified award of Arbitrator Beach, which as we have found became final and binding when no timely action was taken by the Director of OPM under section 7703(d) of Title 5, United States Code. Recognizing that the Authority has jurisdiction to order compliance with the Arbitrator's award in this unfair labor practice proceeding, the Authority finds that the Respondent's noncompliance is in violation of section 7116(a)(1) and (8) of the Statute.[1]

VI. Remedy

The Authority finds that the Judge's recommended remedy is appropriate in the circumstances of this case. In this regard, while we affirm the Judge's ruling that the General Counsel's motion to amend the complaint be denied, we agree that the Judge's finding upon which he fashioned his recommended remedy fell within the scope of the complaint.

The Arbitrator's award obligated the Respondent to reinstate employee Frontera to his former position at FCI, Ray Brook, New York. The Respondent ordered him to report to USP, Lewisburg, Pennsylvania. The record shows that Frontera and the Charging Party on his behalf went to great lengths in an attempt to persuade the Respondent that the reassignment would be a hardship. While the Respondent gave the reason that in cases such as Frontera's it was Bureau policy to reassign the employee, it also insisted that in its opinion the reassignment was not precluded by the Arbitrator's award. The Arbitrator's clarification clearly showed that the reassignment was inconsistent with the award.

The Judge's finding that the Respondent's failure to comply with the award caused Frontera's resignation is supported by the record. Accordingly, we find that, but for the Respondent's refusal to comply with the Arbitrator's award, Frontera would not have resigned from Federal service. We shall adopt the Judge's recommended Order. See Department of the Treasury, United States Customs Service, New York Region, New York, New York, 21 FLRA No. 119 (1986).

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[1] In view of this conclusion, the Authority finds it unnecessary to pass upon whether the Respondent also violated section 7116(a)(5) of the Statute and denies the General Counsel's exception to the Judge's Decision in this regard.

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions and cross-exceptions to that Decision, the positions of the parties, and the entire record,[2] and adopts the Judge's findings, conclusions, and recommended Order. We conclude that the Respondent's refusal to reinstate Frontera to his regular job at FCI, Ray Brook, New York, without the loss of any employee benefits, as required by Arbitrator Beach's award, which had become final and binding, constituted a failure to comply with the Arbitrator's award and a violation of section 7116(a)(1) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the United States Department of Justice, Bureau of Prisons, Washington, D.C., and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, shall:

1. Cease and desist from:

(a) Failing and refusing to implement the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082 by Arbitrator Dale S. Beach, by failing and refusing to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York.

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[2] The Respondent, subsequent to the filing of its exceptions, filed several requests that the Authority take notice of various decisions of the Merit Systems Protection Board and the Federal Courts. These requests have in each instance been vigorously opposed by the General Counsel. While the Authority does not wish to discourage parties from bringing to our attention relevant case law, citations to authority which are cumulative or which seek only to supplement arguments already made do not enhance the record. To the extent that the Respondent's requests raise anything new, they have been considered.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and polices of the Statute:

(a) Comply with the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082 by Arbitrator Dale S. Beach, by offering to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York, without prejudice to his seniority or other rights or privileges.

(b) Make Richard Frontera whole, consistent with applicable laws and regulations, for any loss of pay he may have suffered by reason of his separation from Federal service brought about by Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation (resignation) on March 2, 1985, to the effective date of the offer of reinstatement, less any amount earned through other employment during this period of time.

(c) Consistent with law and regulation, make Richard Frontera whole for any monetary losses incurred as a result of Respondent's assignment of Richard Frontera to the United States Penitentiary, Lewisburg, Pennsylvania, and for which he has not otherwise been reimbursed.

(d) Post at its Washington, D.C. and Ray Brook, New York facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, Bureau of Prisons, Washington, D.C., or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C., July 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to implement the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082 by Arbitrator Dale S. Beach, by failing and refusing to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082 by Arbitrator Dale S. Beach, by offering to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York, without prejudice to his seniority or other rights or privileges.

WE WILL make Richard Frontera whole, consistent with applicable laws and regulations, for any loss of pay he may have suffered by reason of his separation (resignation) on March 2, 1985, from Federal service brought about by Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation to the effective date of the offer of reinstatement, less any amount earned through other employment during this period of time.

WE WILL, consistent with law and regulation, make Richard Frontera whole for any monetary losses incurred as a result of Respondent's assignment of Richard Frontera to the United States Penitentiary, Lewisburg, Pennsylvania, and for which he has not otherwise been reimbursed.

(Agency or Activity)

Dated:________________ By: ________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, WASHINGTON, D.C.,
AND BUREAU OF PRISONS, FEDERAL
CORRECTIONAL INSTITUTION, RAY
BROOK, NEW YORK

Respondent

and

Case No. 1-CA-40368

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3882

Charging Party

. . . .

William C. Owen, Esquire
For the Respondent

Richard Zaiger, Esquire
Peter F. Dow, Esquire
For the General Counsel

Gay Snyder, Esquire
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint alleged that since on or about March 1, 1984, and continuing to March 12, 1985, the date on which the complaint was issued, the United States Department of Justice, Bureau of Prisons, Washington, D.C.; and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York (Respondent), failed to comply with the provisions of 5 U.S.C. § 7122(b) of the Statute, by refusing to implement a clarified arbitration award issued by Arbitrator Dale S. Beach on March 1, 1984 for the purpose of clarifying an earlier arbitration award issued by Arbitrator Beach on December 16, 1983, in Case No. 82K/24082. The complaint further alleged that the conduct outlined violated Section 7116(a)(1), (5) and (8) of the Statute.[1]

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[1] Counsel representing the General Counsel based the Section 7116(a)(8) violation upon alleged failure to comply with the provisions of Section 7122(b) of the Statute. However, in a post-hearing motion counsel representing the General Counsel moved to amend paragraph 17 of the complaint so as to include alleged failure to comply with the provisions of "5 U.S.C. 7121(f) and/or 5 U.S.C. 7121(b)(3)(C)," as a basis for the Section 7116(a)(8) violation. The motion also requested minor inconsequential amendments relating to Section 17(a) of the complaint. In this regard, it was requested that the phrase, "Since on or about March 1, 1984, and continuing to date, Respondent by its agent and representatives have failed and continue to fail to reinstate Richard Frontera . . . ." be modified to allege, "Since on or about March 1, 1984, and continuing to date Respondent by its agents and representatives has failed and continues to fail to reinstate Richard Frontera . . . ."

Section 2423.12(d) of the Regulations, 5 C.F.R. 2423.12(d), provides in part: "A complaint may be amended upon such terms as may be deemed just . . . at the hearing and until the case has been transmitted to the Authority pursuant to § 2423.26, upon motion by the Administrative Law Judge designated to conduct the hearing . . . ."

Counsel representing the Respondent interposed objection to the motion to amend the complaint. Since the record does not indicate that Respondent was given specific notice in the complaint or at the hearing, that the General Counsel was relying upon Section 7121(f) or Section 7121(b)(3)(C) as basis for a Section 7116(a)(8) violation, and since the parties did not otherwise litigate issues relating to this prosecutive theory, it is determined that the motion to include these statutory provisions in Paragraph 17 of the Complaint must be denied. Federal Mediation and Conciliation Service, 9 FLRA No. 31 (1982), 9 FLRA 199; Social Security Administration, 16 FLRA No. 148 (1984), 16 FLRA 1135. However, the minor changes in terminology proposed in the quoted portion of Section 17(a) of the complaint do not alter the substantive meaning of the complaint. The motion is granted insofar as it relates to these changes.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record, including a stipulation of facts, exhibits, relevant evidence adduced at the hearing,[2] and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Richard Frontera, a Cook-Foreman at Respondent's Federal Correctional Institution, Ray Brook, New York (FCI, Ray Brook), was terminated on June 10, 1982, for intimidating and physically abusing a prisoner, and for failing to report a possible breach of prison security. The American Federation of Government Employees, AFL-CIO, Local 3882 (Union), grieved Frontera's termination to arbitration, and on December 16, 1983, Arbitrator Dale S. Beach issued an award wherein he held that there was not just and sufficient cause for the adverse action taken. He reduced the penalty to a 60 calendar day suspension and ordered that "[w]ithin 10 calendar days of the receipt of this Award Mr. Frontera shall be reinstated to his regular job without the loss of any employee benefits." The award also provided for backpay to June 10, 1982, the date of discharge, less pay for the 60-day suspension, and less any possible unemployment compensation or wages received from other employment during the period of discharge.

Upon receipt of the December 16th award, the Respondent determined that an appeal should not be filed. It was also decided that Mr. Frontera would be returned to work in a location other than FCI, Ray Brook. Respondent took no action to persuade the Office of Personnel Management (OPM) to perfect an appeal in accordance with the provisions of 5 U.S.C. §§ 7121(f) and 7703(d) (G.C. Exh. No. 1(H), at page 3; Tr. 212, 213, 216).[3] If OPM became aware of the existence of the December 16th award for appeal purposes, the specific nature and date of such awareness was not made a part of the record. There was no showing that OPM received a copy of the December 16th award, or that OPM was ever otherwise put on notice of its existence.

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[2] Counsel representing the General Counsel moved to correct errors in the hearing transcript. Under Authority reflected in 5 C.F.R. § 2423.19(r), the proposed corrections are approved.

[3] Section 7121(f) provides: "In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board . . . ."

(continued)

Respondent surveyed available openings in Mr. Frontera's work classification and grade and determined initially that he should be assigned to work at the Federal Prison Camp (FPC), Big Spring, Texas.[4] The Respondent's position was based upon the fact that a literal interpretation of the December 16th award did not preclude an immediate reassignment to another institution if the new position matched his prior job classification and pay level (Tr. 117-118).[5]

Mr. Frontera communicated with a representative of the Union who advised him to fight the transfer through the Union, and to communicate with his Congressman concerning the matter (Tr. 157-158). A letter dated January 10, 1984 addressed to Mr. Frontera by Congressman David O'B. Martin disclosed the results of an unsuccessful effort to resolve the issue (G.C. Exh. No. 5).

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[3] (continued)

Since October 1, 1982, the United States Court of Appeals for the Federal Circuit has had, under the provisions of the Federal Courts Improvement Act of 1982, 96 Stat. 25, exclusive jurisdiction to hear appeals from final orders or final decisions of the Merit Systems Protection Board. Section 7703 was amended by the Act to reflect this jurisdictional change.

Section 7703(d) provides: "The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied . . . The granting of the petition for judicial review shall be at the discretion of the Court of Appeals." Section 7703 makes no provision for direct agency appeal to the Federal Circuit.

[4] On January 9, 1984, 24 days after the award, Mr. Frontera learned of Respondent's intent to relocate him and determined that he would oppose a transfer (Tr. 156-158). The fact that the parties faced elements of uncertainty in the meaning to be accorded the December 16, 1982 award was acknowledged by counsel representing the General Counsel (Tr. 36-37, 143-144).

[5] The record reflects no issue concerning the job classification or grade level assigned in connection with his reinstatement to federal employment (Tr. 190-192).

At a meeting with Respondent's representative on January 16, 1984, Mr. Frontera was advised that he was being reassigned to the FPC, Big Spring, Texas as of February 5, 1984, and that he should report there no later than 12:00 noon, on February 14, 1984 (Jt. Exh. Nos. 3 and 4).

On January 27, 1984, Congressman David O'B. Martin again questioned the Respondent's refusal to put Mr. Frontera back to work at FCI, Ray Brook (Jt. Exh. No. 6). In a letter dated February 1, 1984, the Respondent, through Norman Carlson, Director, Bureau of Prisons advised that in cases involving serious misconduct and mistreatment of inmates, it was Bureau policy "to reassign the employee to another facility in order to give him an opportunity for a fresh start among new co-workers and to lessen the possibility for reprisal against him by the inmate population." It was further noted that the reassignment of Mr. Frontera was not a disciplinary action, but merely an attempt to insure that Mr. Frontera would not be returned to a situation which would endanger him or the security of an institution (Jt. Exh. No. 7).

On February 1, 1984, the Respondent informed Frontera that a decision had been made to cancel his transfer to FPC, Big Spring, Texas, and that instead he would be reassigned to the United States Penitentiary (USP), Lewisburg, Pennsylvania, effective February 5, 1984 (Jt. Exh. Nos. 8 and 9). He was ordered to report on February 7, 1984.[6]

In response to a Union request for an opportunity to discuss Respondent's refusal to return Frontera to his job at FCI, Ray Brook, a meeting was held on February 6, 1984. Respondent took the position that it had a right to reassign Frontera under the circumstances, and further that there was nothing in the December 16th award which mandated his return to FCI, Ray Brook (Tr. 146-148). At the meeting Ronald N. Cloutier, President of the Union was handed a copy of a letter dated February 6, 1984, signed by J.T. Hadden, Warden, FCI, Ray Brook. The letter repeated the Respondent's position that reassignment was necessary to give Frontera a fresh start and "to lessen the possibility of any reprisal against him by the inmate population." He noted that the Respondent was "trying to insure that Mr. Frontera is not returned to a situation which would endanger him or jeopardize the orderly running and security of the institution." (G.C. Exh. No. 4).

At this point in the case history Mr. Cloutier contacted Mr. George Girlando in the AFGE's Second District Office, New Brunswick, New Jersey to ascertain if the Union might petition for a clarification of Arbitrator Beach's December 16, 1982 award (Tr. 15). As a result of this contact Mr. Girlando addressed a mailgram dated February 7, 1984 to Arbitrator Beach, and sought an interpretation of paragraph (3) of the award which ordered the Respondent to reinstate Mr. Frontera to his regular job without the loss of any employee benefits. (Jt. Exh. Nos. 11, 12 and R. Exh. No. 1).

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[6] Frontera did report for duty at Lewisburg as ordered (Tr. 160, Jt. Exh. No. 10).

The Respondent's representative in the arbitration proceeding was clearly identified as Ronald Brown; however, the mailgram was misdirected to one Raymond Brown at FCI, Ray Brook (Tr. 55). Ronald Brown's testimony, and other testimony in the record reflects that the Respondent did not receive notice of the request for clarification (Tr. 81-84, 109-111, 172-173).7/

On February 15, 1984, the Respondent processed a number of documents or personnel actions concerning Mr. Frontera's reinstatement and return to duty (Jt. Exh. No. 17). His separation of June 10, 1982 was cancelled. He was suspended for a 60-day period in accordance with the December 16th

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7/ On July 26, 1985, after the close of the hearing, and prior to the filing of post-hearing briefs, counsel representing the Respondent requested that official notice be taken of portions of the "U.S. Postal Service Handbook M-79, Mailgram Operating Procedures." The request was designed to provide additional support for a factual finding that the Union's request for clarification was not in fact received by Respondent's representatives.

During the hearing the Respondent had ample opportunity to develop the record relating to this factual issue, but did not introduce evidence relating to provisions of the Handbook. The record reflects no explanation concerning the specific origin or date of this publication, nor any showing that the provisions of the Handbook were applicable to the mailgram sent to the arbitrator by the Union. Furthermore, the record reflects no reason to justify the Respondent's failure to introduce this material at the hearing. Admission at this late date would necessarily operate to deprive the General Counsel and the Charging Party of an opportunity to object or to interpose rebuttal. For the reasons outlined the request is denied.

Counsel representing the Respondent also requested that official notice be taken of the Regional Director's dismissal letter, and the General Counsel's affirmance of dismissal in Case No. 3-CA-40249. Also included was a request that an arbitrator's clarification issued in Case No. 3-CA-40249, be officially noted in conjunction with the dismissal letters issued in Case No. 3-CA-40249. These requests are granted inasmuch as the documents may be received for appropriate consideration in resolving questions of law, as distinguished from questions of fact. However, it is noted that principles expressed in these documents have no precedential value with respect to legal issues posed in this case.

award. He was characterized on a personnel action as having been "returned to duty" at FCI, Ray Brook as of August 10, 1982, although he was never actually allowed to return to work at the Ray Brook facility. As of February 26, 1984, he was reassigned from FCI, Ray Brook to the United States Penitentiary, Lewisburg, Pennsylvania for payroll purposes (Jt. Exh. No. 17). Between February 5, 1984 and February 26, 1984 he was carried as an employee of FCI, Ray Brook, although actually reassigned to his new post in Lewisburg during this period (Tr. 176-177).

On March 1, 1984, in response to the request for clarification, and without providing Respondent an opportunity to be heard, Arbitrator Beach issued a Clarification of Award, holding that Richard Frontera should be reinstated to his regular job as Cook-Foreman at FCI, Ray Brook without the loss of any employee benefits (Jt. Exh. No. 13).

The Respondent did not request OPM to take the necessary steps to perfect an appeal to the United States Court of Appeals for the Federal Circuit in accordance with the provisions of 5 U.S.C. § 7703(d) (G.C. Exh. No. 1(H) at page 3). Instead, Respondent's representatives decided to refuse compliance, and to file exceptions to the award with the Authority (Tr. 118-119, 76-77).[8]

The clarified award was the subject of discussion between Mr. Owen, Respondent's Counsel, and an OPM staff representative. Mr. Owen apprised OPM that he had two theories on which to attack the clarified award (Tr. 213), and inquired whether it would be wise to appeal to the Authority (Tr. 215). He related that he received an affirmative reply from OPM (Tr. 215). This telephone call would necessarily have had to occur between March 1, 1984, the date of issuance of the clarified award, and March 27, 1984, the date on which the Respondent filed exceptions wich the Authority (Jt. Exh. No. 18).

FPM Letter 711-160 dated July 13, 1981 requires federal agencies to supply OPM with two copies of all Section 7121(f) arbitration awards within five days of an agency's receipt of the award so as to enable OPM to exercise its statutory right to appeal in such cases. It further requires agencies to notify OPM by telephone "as early as possible if [an] agency believes that OPM should seek court review . . . ." FPM Bulletin 711-91(3) dated November 13, 1984, advises agencies to "promptly serve OPM a copy of arbitral awards in these cases to allow maximum time to assess their impact and to determine whether reconsideration and judicial review are warranted." This Bulletin notes that OPM "must rely on agencies for prompt service of troublesome decisions subject to judicial review within prescribed time limits."

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[8] The Respondent admits that the award as clarified has not been implemented by the Respondent (Jt. Exh. No. 26; Tr. 75-76, 80-81).

The telephone call to OPM acknowledged by Respondent's counsel was consistent with Respondent's obligation to phone OPM in cases wherein an agency has an interest in appealing a Section 7121(f) arbitration award. (FPM Letter 711-160 dated July 13, 1981). Presumably, neither Respondent nor OPM was interested in taking the necessary steps to perfect an appeal to the Federal Circuit, as both the Respondent and OPM elected to take their chances with an appeal to the Authority, the wrong forum in this instance. The reason for the OPM decision on this issue does not appear in the record; however, the record does reflect that the Respondent's representatives labored or appeared to labor, under the erroneous assumption that the filing of exceptions was governed by Section 7122 of the Statute (Jt. Exh. Nos. 18 and 20).

On June 29, 1984, the Authority dismissed the exceptions,[9/] clearly noted that it had no jurisdiction to review the case, and referred the Respondent to review procedures set out in 5 U.S.C. § 7703. In so doing the Authority stated:

> The matters described in Section 7121(f) of the Statute include those covered under 5 U.S.C. § 7512 which applies to specified adverse actions, including removals and suspensions for more than 14 days. Pursuant to Section 7121(f), review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, i.e., in the same manner and under the same conditions as judicial review of a final decision of the Merit Systems Protection Board.[10/]

On July 11, 1984, the Respondent moved for reconsideration, and requested a stay of the Authority's June 29, 1984 order dismissing the Respondent's exceptions (Jt. Exh. No. 20).[11/] On August 27, 1984, while the motion for reconsideration was pending before the Authority, the charge initiating this case was filed. On December 11, 1984, the Respondent's motion for reconsideration was denied, thus upholding the Authority's earlier ruling that it had no jurisdiction in the matter (Jt. Exh. No. 23).

[9/] The Respondent argued that the March 1, 1984 clarified award interfered with management's right to assign employees, that it interfered with management's right to establish and carry out internal security practices, and that the arbitrator exceeded his authority in issuing the clarified award.

[10/] 15 FLRA No. 38 (1984), 15 FLRA 204.

[11/] The motion for reconsideration was amended on July 16, 1984 (Jt. Exh. No. 21).

Following the denial of the Respondent's motion for reconsideration, the Union again made a request that Mr. Frontera be reassigned to FCI, Ray Brook. However, the Respondent declined on the ground that the Federal Bureau of Prisons had appropriately exercised its discretion to assign him to the USP, Lewisburg (Jt. Exh. No. 24, and G.C. Exh. No. 6).

The assignment of Mr. Frontera to the USP in Lewisburg, Pennsylvania represented an economic burden for Mr. Frontera. The record revealed that he and his adopted family had lived in Tupper Lake, New York, in the Ray Brook area since 1976, and that Lewisburg was nearly 400 miles away from his established home. After commencing work in Lewisburg early in 1984, he had to return home approximately once a month to attend to family business. Circumstances precluded his adopted family from relocating. As a result he had to contribute to the support of his home in Tupper Lake, New York, while at the same time renting a room in Lewisburg. These adverse circumstances ultimately led to economic and personal hardship, and to Mr. Frontera's resignation on March 2, 1985, due to such hardship (Jt. Exh. No. 25).

Discussion and Conclusions

Prior to the hearing counsel representing the Respondent moved to dismiss the complaint on the ground that conduct alleged in the complaint as a basis for violation of Sections 7116(a)(1), (5) and (8) of the Statute, occurred more than six months before the filing of the charge. It was argued that any unfair labor practices which might have occurred are time-barred by the provisions of Section 7118(a)(4) of the Statute (G.C. Exh. No. 1(N). This motion was referred to the Office of Administrative Law Judges for disposition in accordance with the provisions of 5 C.F.R. § 2423.22(b). At the opening of the hearing record, counsel representing the Respondent also moved to dismiss the complaint on the ground that the arbitration award herein falls within the purview of Section 7121(f) of the Statute. It was argued that the Authority has no jurisdiction to order compliance with such awards (R. Exh. No. 1). Decisions on these motions were reserved.12/

12/ A third motion to dismiss made by Respondent's counsel at the opening of the hearing rested on the theory that the complaint failed to allege an unfair labor practice within the meaning of the Statute. The rationale underlying this motion rests on the premise that Mr. Frontera could not, in the Respondent's judgment, be entitled to reinstatement to the position he formerly held at FCI, Ray Brook in the absence of a new unfair labor practice charge alleging that his resignation from USP, Lewisburg was coerced (Tr. 9-10). Inasmuch as this motion is vague and unclear at best, it is denied. Moreover, the issue of whether or not a particular remedy would be appropriate in this case would have no bearing on the question of whether the complaint reflects compliance with the provisions of 5 C.F.R. § 2423.12(b).

The motion to dismiss based upon the absence of Authority jurisdiction rests on the theory that Section 7122(b) relates entirely to arbitration awards which could have been, but were not, appealed to the Authority in accordance with the provisions of Section 7122(a) of the Statute.[13] Accordingly, it is argued that as a matter of law Section 7122(b) is inapplicable and that there can be no violation of 7122(b) for refusing to take action required by an adverse action arbitration award appealable to the United States Court of Appeals for the Federal Circuit under the provisions of Section 7121(f).[14]

The argument rests on the premise that the Authority may enforce only those arbitration awards which it has been given express jurisdiction to review, and further that failure to comply with arbitration awards falling within the purview of Sections 7121(f) of the Statute may not be the subject of an unfair labor practice proceeding. It is also contended that enforcement of adverse action arbitration awards may occur only through utilization of a compliance proceeding initiated under the provisions of 5 U.S.C. § 1205 pertaining to the enforcement of Merit Systems Protection Board orders.

Respondent's argument on this issue is not persuasive. Section 7121(f) of the Statute merely outlines the appeal route that must be pursued with respect to an arbitration award relating to matters covered under 5 U.S.C. §§ 4303 and 7512. Section 7121(f) provisions placing the arbitrator in the place of the Merit Systems Protection Board are specifically limited to 5 U.S.C. § 7703 (judicial review of decisions of the Merit Systems Protection Board). Section 7121(f) does not include enforcement procedures under 5 U.S.C. § 1205. Moreover, there is no indication that the latter section extends to arbitral awards.

Although Section 7122(b) provides finality for arbitration decisions appealable to the Authority if timely exceptions are not filed with the Authority, it also specifically provides that "An agency shall take the actions required by an arbitrator's final award." There would be no logical reason for limiting the mandate reflected in this sentence to arbitration awards falling within Authority appellate jurisdiction, in light of the fact that Section 7121(f) provides a procedure for finalizing Section 7121(f) arbitration awards.

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[13] Section 7122(b) requires that "[a]n agency shall take the actions required by an arbitrator's final award . . . ."

[14] The post-hearing brief filed on behalf of the General Counsel notes that this issue is currently before the Authority in *U.S. Army, Adjutant General Publications Center, St. Louis, Missouri*, Case No. 7-CA-40064, a case stipulated directly to the Authority (G.C. Brief at page 6). See "*Judicial Review of Adverse Action Arbitration Awards*," Federal Labor Relations Reporter (Highlights), December, 1983, 83 FLRR No. 22; and [illegible]*verse Action Arbitration in the Federal Sector: A Streamlining of the Appellate Procedures?*", Federal Labor Relations Reporter (Highlights), January 1984, 83 FLRR No. 24, for discussion of procedural problems posed by Section 7121(f) arbitration awards.

Section 7122 provides a procedure for judicial review of arbitration awards falling within the purview of Authority jurisdiction and, by reason of the provisions of Section 7121(f), it also incorporates by reference a procedure (5 U.S.C. § 7703) for review of adverse action arbitration awards by the United States Court of appeals for the Federal Circuit. The quoted sentence mandating that agencies "shall take the actions required by an arbitrator's final award" refers to arbitration awards reviewed by the Authority, and to adverse action arbitration awards reviewable by the United States Court of Appeals for the Federal Circuit. This interpretation operates to provide a consistent procedural approach designed to compel compliance with arbitration awards. In either case, a failure to comply with the provisions of Section 7122(b), constitutes an unfair labor practice within the meaning of Section 7116(a)(8) of the Statute, and thus brings to bear upon such non-compliance, the full power of the Statute's enforcement mechanisms relating to unfair labor practices.[15]

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[15] Respondent argues that should the Authority seek enforcement of an order to comply with an arbitral award, it would have to petition a Court of Appeals other than the Federal Circuit. However, there is no statutory or other inconsistency merely because the Federal Circuit has appellate jurisdiction under Section 7703, while enforcement under Section 7123 of the Statute would involve another Court. The Federal Circuit would have jurisdiction to review the arbitrator's findings. Neither the Authority nor Courts of Appeal reviewing Authority unfair labor practice decisions would be reviewing or relitigating underlying arbitration awards involved in unfair labor practice proceedings designed to enforce such awards. *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA No. 27 (1984), 15 FLRA 151, *aff'd sub nom. Dept. of the Air Force, et al.* v. *FLRA*, No. 84-3695 (6th Cir., Oct. 25, 1985); *Department of Defense, Department of the Navy, United States Marine Corps, United States Marine Corps Air Station, Cherry Point, North Carolina*, 15 FLRA No. 137 (1984), 15 FLRA 686; *Veterans Administration Medical Center, Phoenix, Arizona*, 15 FLRA No. 138 (1984), 15 FLRA 706; *Department of Health and Human Services, Region II*, 15 FLRA No. 139 (1984), 15 FLRA 710; *Department of Justice, U.S. Immigration and Naturalization Service, Washington, D.C.*, 16 FLRA No. 118 (1984), 16 FLRA 840; *Department of the Navy, Naval Submarine Base, New London, Connecticut*, 19 FLRA No. 31 (1985), 19 FLRA 250.

Given the different functions of the Federal Circuit under Section 7703 and other Circuits under Section 7123 of the Statute, Respondent's concern with conformity of court decisions is misplaced.

(continued)

The interpretation of the Statute set out is reflected in summary form in a memorandum dated October 18, 1984, addressed to the General Counsels of Executive Departments, Agencies, and Independent Establishments by Joseph Morris, General Counsel, Office of Personnel Management (G.C. Exh. No. 2). Mr. Morris notes that in cases involving adverse action arbitration awards which are not reviewable by the Authority, the arbitrator cannot enforce the award, and "[r]efusal to comply provides grounds for an unfair labor practice charge."[16] For the reasons outlined the motion to dismiss for want of jurisdiction is denied.

The Respondent's motion to dismiss based upon an untimely filing of the charge depends upon an initial determination of the finality of the March 1, 1984 clarified award as the Authority has held that where there has been no compliance the timeliness of a charge based upon a failure to implement an arbitration award is determined from the date that the award becomes final and binding. United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra, at note 15.[17] The Authority has also made it clear that the language of Section 7122(b) requires an agency to take actions required by an arbitrator's award only after the award has become final and binding. In the absence of a clear showing of finality there is no statutory obligation (under Section 7122(b)) to comply with the award. U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26 (1984), 15 FLRA 139; United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, supra.

Because the removal action brought against Mr. Frontera arose as a disciplinary action under 5 U.S.C. § 7512, Mr. Frontera had a choice, under Section 7121(e) of the Statute, to resolve his claims through utilization of the negotiated grievance procedure or the statutorily established Merit Systems Protection Board procedure set out in 5 U.S.C. § 7701. He elected to utilize the grievance procedure and pursued the matter through the arbitration phase. As noted Section 7121(f) and Section 7703 do not provide for direct agency appeal of an arbitrator's decision in such cases. Only the Director of OPM may initiate an appeal.

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[15] (continued)

The fact that Mr. Frontera theoretically might conceivably have other possible enforcement procedures available to him would not necessarily operate to divest the Authority of unfair labor practice jurisdiction. The possible existence of an alternative procedure, without more, does not mean that the unfair labor practice procedure is unavailable to compel compliance with final and binding Section 7121(f) arbitration awards.

[16] The memorandum was designed for use by agencies "for informational and instructional purposes."

[17] There is no reason for drawing the conclusion that a refusal to comply with an arbitration award constitutes a continuing unfair labor practice so as to extend the six month period of limitation for an indefinite period in the event of continuing non-compliance.

Section 7703(b)(1) of the Statute provides:

> (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final decision of the Board shall be filed in the the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner receives notice of the final order or decision of the Board.

The 30-day period referred to in Section 7703(b)(1) has been considered by the Federal Circuit, and it has been held that Section 7703(d) first conditions OPM's appeal right upon OPM's prior intervention in the arbitration proceeding. If OPM was not made a party to the arbitration, OPM must first intervene and request reconsideration of the arbitration award. Devine v Nutt, 718 F.2d 1048 (1983), rev'd sub nom. on other grounds Cornelius v. Nutt, 105 S. Ct. 2882 (1985); Divine v. Sutermeister, 724 F.2d 1558 (1983). Devine v. Pastore, 732 F.2d 213 (1984); Devine v. Levin, 739 F.2d 1567 (1984).

Section 7703 does not provide a specific time for OPM to intervene and request reconsideration of an arbitration award covered by Section 7121(f) and Section 7703. However, the Federal Circuit has held that the time for filing a request for reconsideration "runs from the date OPM receives notice of the decision of the MSPB or arbitrator, as the case may be." Devine v. Sutermeister, supra, at 1562, note 4. This case makes it clear that the failure of OPM to take appropriate action within 30 days of OPM's receipt of notice operates to extinguish OPM's right to request intervention and reconsideration in the arbitration proceeding and the right to appeal to the Federal Circuit as well.

At a minimum, the record establishes that OPM received notice of the March 1, 1984 clarification award through Respondent's counsel, and that OPM thereafter took no action to intervene in the arbitration proceeding for the purpose of requesting reconsideration as a step toward appeal to the Federal Circuit. A period of more than 30 days passed after OPM's receipt of notice thus resulting in the extinguishment of OPM's right to proceed further.18/

18/ As noted the exact date of Mr. Owen's telephone conversation with OPM about the clarified award cannot be determined from the record. However, it would have had to occur between March 1, 1984, the date of the clarified award, and March 27, 1984, the date on which the Respondent filed exceptions to the award.

It is noted that a copy of the complaint filed in this case was mailed to OPM on March 12, 1985 (G.C. Exh. No. 1(G)). Thus, even assuming the

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Since the charge in this case was filed on August 27, 1984, it was well within six-months of the date on which the clarified award became final and binding, and within the six-month period of limitation prescribed in Section 7118(a)(4) of the Statute. Accordingly, Respondent's motion to dismiss based upon Section 7118(a)(4) is denied.

If the Respondent (through OPM) did in fact have a basis for an appeal to the Federal Circuit, it was lost by the passage of time consumed in the unfortunate choice of appellate procedures. It is entirely possible that Respondent's contentions, if brought to the attention of the Federal Circuit, would have produced a different result. However, such issues are not litigable in this proceeding.[19] The Authority has repeatedly held in a series of analogous cases, that any contention that an arbitrator's award is deficient because it is contrary to any law, rule or regulation must be made by invoking the procedures established by Congress.[20]

It is clear from the record that the Respondent did not comply with the March 1, 1984 clarified award after it became final and binding. The Respondent did not return Mr. Frontera to his regular duties at FCI, Ray Brook. This was admitted by the Respondent. The mere processing of documents to make it appear that Mr. Frontera had been fully reinstated

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[18] (continued)

absence of prior notice to OPM, the March 1, 1984 clarified award would have become final and binding prior to the date of the hearing.

It is somewhat unusual that the record does not reflect that the Respondent ever mailed a copy of either award to OPM in light of the Respondent's obligation to do so under the provisions of FPM Letter 711-160 dated July 13, 1981. Instead, Respondent made a special effort to establish that the Respondent did not seek OPM intervention. It was only under close questioning that Respondent acknowledged a telephone conversation with an OPM representative concerning the March 1, 1984 award. As a whole, the record tends to suggest an effort on the part of Respondent to obfuscate this factual issue, and to avoid a final and binding effect by creating a record tending to indicate the absence of communication between the Respondent and OPM, and the absence of notice on the part of OPM. This tendency was noted in counsel's responses to questions on the subject, and especially by statements made on page 54 of Respondent's post-hearing brief.

[19] A number of issues may be mentioned in this context. For the most part these are the same matters which were mistakenly brought to the attention of the Authority, and then again belatedly and mistakenly raised in this unfair labor practice proceeding.

[20] See relevant Authority precedent cited in note 15, supra.

was certainly not compliance with the March 1, 1984, arbitration award. Respondent's repudiation of the obligation to reinstate Mr. Frontera was total in nature, and was the direct cause of Mr. Frontera's resignation. It constitutes a clear violation of Section 7122(b) of the Statute. Accordingly, this conduct also constitutes an unfair labor practice within the meaning of Sections 7116(a)(1) and (8) of the Statute.21/

Having found that the Respondent violated Sections 7116(a)(1) and (8) of the Statute, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the United States Department of Justice, Bureau of Prisons, Washington, D.C., and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, shall:

1. Cease and desist from:

   (a) Failing and refusing to implement the March 1, 1981 Clarification of Award issued in FMCS Case No. 82K/24082, by failing and refusing to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York.

   (b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute.

   (a) Comply with the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082, by offering to reinstate Richard Frontera to his regular job as

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21/ In view of this conclusion it is unnecessary to pass upon whether such conduct was also violative of Section 7116(a)(5) of the Statute. General Services Administration, Washington, D.C., 18 FLRA No. 52 (1985), 18 FLRA 395; Veterans Administration Medical Center, Phoenix, Arizona (1984), *supra* at note 15; Department of Health and Human Services, Region II (1984), *supra* at note 15.

a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York, without prejudice to his seniority or other rights or privileges.

(b) Make Richard Frontera whole, consistent with applicable laws and regulations, for any loss of pay he may have suffered by reason of his separation from Federal service brought about by Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation to the effective date of the offer of reinstatement, less any amount earned through other employment during this period of time.

(c) Consistent with law and regulation, make Richard Frontera whole for any monetary losses incurred as a result of Respondent's assignment of Richard Frontera to the United States Penitentiary, Lewisburg, Pennsylvania, and for which he has not otherwise been reimbursed.

(d) Post at its Washington, D.C. and Ray Brook, New York facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Bureau of Prisons, Washington, D.C., or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

LOUIS SCALZO
Administrative Law Judge

Dated: November 15, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to implement the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082, by failing and refusing to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the March 1, 1984 Clarification of Award issued in FMCS Case No. 82K/24082, by offering to reinstate Richard Frontera to his regular job as a Cook-Foreman at the Federal Correctional Institution, Ray Brook, New York, without prejudice to his seniority or other rights or privileges.

WE WILL make Richard Frontera whole, consistent with applicable laws and regulations, for any loss of pay he may have suffered by reason of his separation brought about by Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation to the effective date of the offer of reinstatement less any amount earned through other employment during this period of time.

WE WILL, consistent with law and regulation, make Richard Frontera whole for any monetary losses incurred as a result of Respondent's assignment of Richard Frontera to the United States Penitentiary, Lewisburg, Pennsylvania, and for which he has not otherwise been reimbursed.

____
(Agency or Activity)

Dated: _________________________ By: ____________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone number is: (617) 223-0920.

22 FLRA No. 96

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL UNDERSEA WARFARE ENGINEERING
STATION, KEYPORT, WASHINGTON

Activity

and

Case No. 0-AR-1014

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL 282

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on an exception to the award of Arbitrator Eaton H. Conant filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

According to the Arbitrator, the grievance in this case arose when the grievant, a union steward, was transferred from the industrial engineering department in building 82 of the Activity to the research and engineering department of the Activity at a location several miles away. A grievance was filed protesting that this reassignment violated Article 7, section 10 of the parties' collective bargaining agreement because management failed to consult with the Union concerning the transfer between work areas as required by the agreement. After the grievance was filed, the grievant was again reassigned: first, to the building adjacent to building 82 and subsequently, back to building 82, his original work area as a steward.

Before the Arbitrator the Activity argued that these subsequent reassignments ultimately returning the grievant to his original building of assignment operated to ameliorate the inadvertent failure to communicate with the Union over the disputed reassignment. The Arbitrator noted that it was not disputed that management violated the collective bargaining agreement when it assigned the grievant to the research and engineering department several miles away from his previous work area assignment. The Arbitrator also noted that the Union contended that management's actions subsequent to the filing of the grievance did not ameliorate the violation and that only an award which returned the grievant to his original position was tenable. Although the Arbitrator stated that this remedy was complicated by the apparent abolishment of the grievant's original position in the industrial engineering department, the Arbitrator agreed with the Union. Accordingly, as his award, the Arbitrator directed that the grievant be returned to his former position in the industrial engineering department under the direction of his former supervisor. The Arbitrator further directed that if the former position is not available because of substantial job redesign, the grievant will be trained to undertake a suitable job in the original work area.

III. EXCEPTION

A. Contentions of the Agency

As its exception the Agency contends that the award is contrary to section 7106(a)(2)(A) and (B) of the Statute. Specifically, the Agency argues that to the extent the Arbitrator's award directs assignment of the grievant to a particular position, it interferes with management's right to assign employees and that to the extent the award orders training provided the grievant, it interferes with management's right to assign work.

B. Opposition of the Union

In its opposition the Union concedes that the Arbitrator was not authorized to require that the Agency provide training to the grievant. However, the Union maintains that the Arbitrator's direction to return the grievant to his original position, or a suitable alternative, is not contrary to section 7106(a) because it merely constitutes a proper enforcement of an applicable procedure or appropriate arrangement of the parties' collective bargaining agreement.

IV. ANALYSIS AND CONCLUSIONS

The Authority has consistently recognized that the plain language of section 7106(a) provides that "nothing in the Statute shall affect the authority" of an agency to exercise the rights enumerated in that section. *The 438 Air Base Group, McGuire Air Force Base, New Jersey and American Federation of Government Employees, Local 1778*, 22 FLRA No. 3 (1986). Therefore, the Authority has held that an arbitration award under a negotiated grievance procedure may not interpret or enforce a provision of a collective bargaining agreement so as to improperly deny an agency the authority to exercise its rights under section 7106(a) of the Statute. *Id.* Under the language of section 7106(a)(2)(A) of the Statute and previous decisions of the Authority, it is clear that management has the right to assign employees in the agency. It is equally clear that the award in this case interferes with the Activity's exercise of its right to assign employees by rescinding management's current assignment of the grievant and directing that he be reassigned to his original position or a suitable equivalent. *See Department of Health and Human Services, Social Security Administration, Charlotte, North Carolina District and American Federation of Government Employees, Local 3509, AFL-CIO, 17 FLRA 103, 104 (1985).* However, in these same decisions the Authority has indicated that because management's section 7106(a) rights are subject to section 7106(b)(2) and (3),[1] an award that is claimed to interfere with rights under section 7106(a) that enforces an applicable procedure or appropriate arrangement which has been negotiated by the parties may not necessarily be contrary to section 7106(a). *Id.*

In this case because the award directly interferes with management's right to assign employees, we find contrary to the argument of the Union that the award does not merely constitute a proper enforcement of an applicable procedure of the parties' collective bargaining agreement. *See National Treasury Employees Union, Chapter 26 and Internal Revenue Service, Atlanta District*, 22 FLRA No. 30 (1986) (Proposals 1, 2, and 4). In directing that the grievant be returned to his original position under the direction of his original supervisor, the Arbitrator has not enforced the terms of an applicable negotiated appropriate arrangement of the parties' agreement. Although the Arbitrator ruled that management had violated the parties' agreement by not consulting with the Union concerning the transfer of the grievant, the cited provision only pertains to transfers between work areas and work shifts. The provision does not in any respect pertain to assignments of union stewards to positions in the agency when the work area remains the same. Consequently, once the grievant was reassigned to a building adjacent to, and subsequently back to, his original building of assignment, the Arbitrator's remedy of directing that the grievant be returned to his original position under the direction of his original supervisor or to a suitably equivalent position was not founded on any specific negotiated agreement of the parties and was solely the creation of the Arbitrator. See SSA, Charlotte, North Carolina District, 17 FLRA at 105. As the Authority acknowledged in SSA, Charlotte, North Carolina District, an arbitrator may legitimately bring his or her judgment to bear in reaching a fair resolution of a dispute, but an arbitrator may not "dispense his [or her] own brand of industrial justice." Id. (citing Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). The award in this case, which interferes with management's right to assign employees and to assign work, as it pertains to training, does not constitute the enforcement of an applicable negotiated procecure or appropriate arrangement. The award is therefore deficient as contrary to section 7106(a) of the Statute.

---

[1] Section 7106(b)(2) and (3) provide:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
>
> . . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

V. DECISION

Accordingly, for the above reasons, the Arbitrator's award is modified to strike the remedy of returning the grievant to his original position or to a suitably equivalent position in his original work area.

Issued, Washington, D.C., July 30, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/case n. 384

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 384 REPORT OF CASE DECISIONS August 14, 1986

UNFAIR LABOR PRACTICE CASE

22 FLRA No. 98 (July 31, 1986)

American Federation of Government Employees, Local 495, AFL-CIO (Veterans Administration Medical Center, Tucson, Arizona) and Linda S. Moore, An Individual, Case No. 8-CO- 20006-2

NEGOTIABILITY CASES

22 FLRA No. 99 (July 31, 1986)

National Treasury Employees Union and Department of Health and Human Services, Region X, Seattle, Washington, Case No. 0-NG-1275

22 FLRA No. 100 (July 31, 1986)

Columbia Power Trades Council and United States Department of Energy, Bonneville Power Administration, Case No. 0-NG-1031

ARBITRATION CASE

22 FLRA No. 97 (July 30, 1986)

U.S. Department of Education and National Council of Department of Education Locals, Council 252, AFGE, Local 3893 (Phelan, Arbitrator), Case No. 0-AR-1091

Y3.F 31/21-3:

22 FLRA No. 97

Federal Labor Relations Authority

Dep't of Education and National Council of Dep't of Education Locals, Council 252, AFGE, Local 3893 (Phelan, Arbitrator), Case No. 0-AR-1091
(Decided July 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B) 7122(a)

Arbitration
  Award Modified
    Reevaluation of Performance to Replace Voided Rating
  Exceptions Asserted in Appeal
    Arbitrator
      Exceeded His Authority
        Decided an Issue Not Before Him
        Disregarded Limitations in Collective Bargaining Agreement
    Award
      Contrary to FSLMR Statute
        § 7106(a)(2)(B)
  No Basis for Review
    Disagreement with Arbitrator's Interpretation of CBA
    Disagreement with Arbitrator's Reasoning and Conclusions
  Remedy
    Void Defective Performance Rating and Reevaluate Performance
Negotiability
  Management Rights
    Assign Work [§ 7106(a)(2)(B)
      Workload Adjustment per Arbitrator's Award

DIGEST NOTES

The arbitrator determined that the performance rating of the grievant (the local union president) was defective because the grievant's supervisor failed to properly deal with the issue of a work adjustment (giving due consideration to the time required of the grievant to fulfill labor-management representational functions) during the appraisal period because "the required neutrality with respect to representational functions was compromised." The arbitrator ordered the grievant's rating voided.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its first exception, the agency asserted that the arbitrator exceeded his authority by determining an issue not included in the subject matter submitted to the arbitrator. The Authority concluded that the agency's focus on the arbitrator's findings as to a certain article of the parties' agreement constituted nothing more than disagreement with the arbitrator's reasoning and conclusions underlying the award which resolved the submitted issue of whether the performance evaluation of the grievant was a product of union animus.

The agency, in its second exception, asserted that the arbitrator exceeded his authority by disregarding a plain and specific limitation on his authority contained in the parties' collective bargaining agreement. The Authority concluded that the second exception constituted nothing more than disagreement with the arbitrator's interpretation and application of the parties' agreement and rejected the agency's argument that the arbitrator modified the agreement by his finding that the grievant's supervisor should have made a workload adjustment in connection with the application of the performance elements and standards to the grievant -- when there is no such requirement or connection in the actual language of the agreement.

In its third exception, the agency argued that the arbitrator interpreted and applied the parties' agreement contrary to management's right to assign work under § 7106(a)(2)(B), by finding that the grievant's supervisor should have made a workload adjustment. The Authority found no basis for finding that the award interfered with the agency's right under § 7106(a)(2)(B) to assign work. Thus, the arbitrator's ruling that the grievant's supervisor failed to properly deal with the work adjustment issue does not direct what specific work adjustments must be or should have been made.

The Authority modified the arbitrator's award by directing the agency to reevaluate the grievant's performance for the period in question. Although the arbitrator properly sustained the grievance and refused to permit the disputed rating to stand, a reevaluation was necessary in order for the grievant to have an existing performance appraisal for the period in dispute. The arbitrator's award, in addition to voiding the rating, should have directed that the grievant's work be reevaluated by management.

Federal Labor Relations Authority

22 FLRA No. 98

AFGE Local 495 (VA Medical Center, Tucson, Ariz.) and Linda S. Moore, an Individual,
Case No. 8-CO-20006-2
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

Attorney Fees
  Equal Access to Justice Act
    Eligibility for Award
    FLRA Procedures Under the Act
    Standards for Award
Unfair Labor Practice
  Attorney Fees
    Recovery by Labor Organization
    when Respondent in ULP Proceeding
      Standards under 5 CFR Part 2430
  Procedure
    Attorney Fee Proceeding under 5 CFR Part 2430
      GC's Decision Not to File Exceptions in Underlying Case
        No Adverse Inference Regarding GC's Position is Permitted
    Forums
      Authority has Exclusive Jurisdiction
      over Alleged § 7116 Violations
    Prima Facie Case
      Attorney Fee Proceeding under 5 CFR Part 2430
  Union Violations
    Discrimination
      § 7116(b)(4)
      Based on Marital Status
        Identity of Spouse
Administrative Procedures Act, 5 U.S.C. § 554
Equal Access to Justice Act of 1980, 5 U.S.C. § 504 (Supp. V 1981)
Equal Access to Justice Act of 1985, Pub.L. No. 99-80, 99 Stat 183

STATUTE

7105
7116(b)(4)
7120

DIGEST NOTES

The Authority adopted the Judge's conclusion that the union should be awarded attorney fees and expenses under Part 2430 of the Authority's Rules and Regulations (5 CFR Part 2430), which implement the Equal Access to Justice Act of 1980. The union's application for fees under Part 2430 arose out of the General Counsel's prosecution of a complaint against the union alleging that in imposing discipline against an individual, the union had

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

discriminated against her based on her marital status in violation of § 7116(b)(4). In that proceeding, the Judge recommended that the complaint be dismissed because the General Counsel had failed to present evidence to establish a violation of the Statute. No exceptions were filed to the Judge's Decision and the Authority adopted it as the resolution of the case dismissing the complaint. In agreement with the Judge's conclusion, but for different reasons, the Authority found that the General Counsel failed to show that initiating the underlying case was "reasonable" in fact, or that "special circumstances" existed that would make an award of attorney fees and expenses unjust.

The Authority's Rules and Regulations state that when no exceptions are filed to a Judge's decision, the Authority will issue an order which adopts that decision as the result of that case, with the understanding that the adoption does not mean that the reasoning or conclusions of the Judge shall have precedential significance for any other case. The Authority, therefore, disagreed with the Judge's suggestion that the reasonableness of the General Counsel's position, in a case involving a request for attorney fees under the Equal Access to Justice Act, can be discerned by noting that no exceptions were filed in the underlying case. It cannot be concluded that a failure to file exceptions means that the party having the opportunity but failing to do so knew that its position was wrong.

Because the underlying case was based on an alleged violation of § 7116(b)(4), the issue was properly before the Authority and not the Assistant Secretary of Labor. The case presented novel issues relative to discrimination based on marital status. The Authority agreed with the Judge that the General Counsel was not reasonable in prosecuting the underlying case against the union since it failed to show that the facts alleged would reasonably support the legal theory advanced; that is, the General Counsel failed to prove a _prima facie_ case.

The Authority agreed with the Judge's ultimate conclusion, but for different reasons, that the General Counsel failed to show that "special circumstances" existed which justified denial of the union's application. While strongly agreeing with the General Counsel that advancing novel or untested cases and legal theories -- such as the allegation of unlawful discrimination based on marital status under § 7116(b)(4) -- must not be deterred, the Authority noted that the General Counsel had failed to present a _prima facie_ case of discrimination under the General Counsel's own theory of what would constitute prohibited discrimination.

Allowable fees and expenses established by the Authority represented the amount recommended by the Judge regarding the union's defense in the underlying case, less the amount claimed for a dinner conference, plus the amount associated with processing the union's application before the Authority.

22 FLRA No. 99

Federal Labor Relations Authority

NTEU and Dep't of Health and Human Services, Region X, Seattle, Wash., Case No. 0-NG-1275 (Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Procedure	7114(c)
Withdrawal of Allegation	7117

DIGEST NOTES

Where the agency had withdrawn its allegation concerning the union's proposal, there was no longer an issue as to whether the proposal is within the parties' duty to bargain. Therefore the Authority dismissed the petition for review.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 100

Federal Labor Relations Authority

Columbia Power Trades Council and U.S. Dep't of Energy, Bonneville Power Administration, Case No. 0-NG-1031 (Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Civil Service Reform Act (CSRA)
  Section 704 Applies to Conditions of Employment
  Which Are Not Related to Pay and Pay Practices
  Legislative History - § 704
Negotiability
  Conditions of Employment
    Prevailing Rate Employees
      Modifications to Provisions - Previously Negotiated Subject
      § 704 of CSRA Applies to Wages
      and Conditions of Employment
    Work Rules
      Prevailing Rate Employees

Civil Service Reform Act, § 704, 92 Stat. 1111, 1218, codified at 5 U.S.C. § 5343 (Amendments, note) (1982 ed.).
Comptroller General Decision B-191520 (June 6, 1978)
Pub. L. No. 92-392, § 9(b), codified at 5 U.S.C. § 5343 (Amendments, note) (1982 ed.)
57 Comp. Gen. 259 (1978)

DIGEST NOTES

Both the language and structure of § 704 of the Civil Service Reform Act support the conclusion that under that provision, agencies must continue to negotiate on terms and conditions of employment, other than pay and pay practices, of prevailing rate employees where those terms and conditions of employment were subject to negotiation prior to August 19, 1972. Section 704(a) and section 704(b) respectively provide for the negotiation of terms and conditions of employment and other employment benefits and pay and pay practices. Therefore, proposals relating to the work rules of employees covered under § 704 of the CSRA are negotiable subjects of bargaining, notwithstanding their possible conflict with the management rights provisions of § 7106, where those matters were subject to negotiations between the parties prior to August 19, 1972.

Section 704 of the CSRA and § 9(b) of Pub. L. No. 92-392 require an agency to continue to negotiate on subject matters, relating to certain prevailing rate employees, which were included in agreements to which it was a party prior to August 19, 1972. Parties covered by those sections are not confined merely to the continuation of the terms of previously existing agreements but could, in a new agreement, change those terms and conditions or alter the rights of respective parties concerning the matters involved. Section 9(b) suggests, further, that "new terms" --presumably items not in previous agreements-- may be included in any renegotiated agreement.

22 FLRA No. 97

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF EDUCATION

Agency

and

Case No. 0-AR-1091

NATIONAL COUNCIL OF DEPARTMENT
OF EDUCATION LOCALS, COUNCIL 252,
AFGE, LOCAL 3893

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Thomas M. Phelan filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant, the local union president, received for the appraisal year in dispute an overall rating of unsatisfactory. A grievance was filed protesting the rating and was submitted to arbitration on the following stipulated issue:

> Has the Employer violated Article 7, Section 7.01 and/or 7.05 by discriminating against the grievant in his performance appraisal because of his position with the Union, or has the Employer violated Article 22 by knowingly and incorrectly evaluating the grievant's performance and/or by refusing to develop a performance plan with due consideration to the time required to fulfill labor-management representational functions? If so, what shall the remedy be?

At arbitration the Union argued, among other things, that the appraisal was defective because a work adjustment should have been made for the grievant to accommodate his representational duties and that his supervisor did not make the adjustment because of union animus. In response the Arbitrator stated that if the evidence showed that a workload adjustment was both necessary and practical and that management failed to make the adjustment due to union animus, this would conflict with Article 13, pertaining to official time, and would constitute a violation of Article 7 because of the obvious restraint on union representatives. On the basis of the evidence presented, the Arbitrator specifically ruled that the grievant's performance rating was defective because the grievant's supervisor failed to properly deal with the issue of a work adjustment during the appraisal period because "the required neutrality with respect to representational functions was compromised." As his award the Arbitrator ordered the rating voided.

III. FIRST EXCEPTION

A. Contentions

The Agency contends that the award is deficient because the Arbitrator exceeded his authority by determining an issue not included in the subject matter submitted to arbitration. Specifically, the Agency maintains that the award is based on a determination that the grievant's supervisor violated the provisions of Article 13 of the collective bargaining agreement. Thus, the Agency argues that the Arbitrator determined an issue not submitted because the stipulated issue dealt only with whether the appraisal was the product of union animus in violation of Article 7 or whether management violated Article 22 in evaluating the grievant or developing his performance plan.

B. Analysis and Conclusions

The Authority concludes that the Agency fails to establish that the Arbitrator decided an issue not submitted. Contrary to the contention of the Agency, we find that the Arbitrator's award resolved precisely the issue submitted. As noted, the Arbitrator specifically stated that if management had failed to make appropriate work adjustments to accommodate the grievant's representational duties due to union animus, this failure would constitute a violation of Article 7. Consequently, we find the Arbitrator's subsequent ruling to be directly responsive to the stipulated issue of whether the grievant's appraisal was the product of union animus. See Department of the Air Force, Kirtland Air Force Base and American Federation of Government Employees, Local 2263, AFL-CIO, 19 FLRA No. 36 (1985). In other words, we find that the

Arbitrator affirmatively addressed that issue when he expressly concluded that the grievant's rating was defective because his supervisor failed to properly deal with the issue of a work adjustment due to what the Arbitrator termed a compromising of the required neutrality with respect to representational functions. Thus, the Agency's focus on the Arbitrator's findings as to Article 13 of the collective bargaining agreement constitutes nothing more than disagreement with the Arbitrator's reasoning and conclusions in reaching the award resolving the issue submitted of whether the appraisal was a product of union animus. Accordingly, no basis is provided for finding the award deficient as alleged by the Agency.

IV. SECOND EXCEPTION

A. Contentions

The Agency contends that the award is deficient because the Arbitrator exceeded his authority by rendering his award in disregard of a plain and specific limitation on his authority. Specifically, the Agency argues that the Arbitrator's finding, that the grievant's supervisor should have made a workload adjustment in connection with the application of the performance elements and standards to the grievant, modified the agreement because there is no such requirement or connection in the actual language of the agreement.

B. Analysis and Conclusions

The Authority concludes that this exception fails to establish that the award is deficient. We find that this exception constitutes nothing more than disagreement with the Arbitrator's interpretation and application of the parties' collective bargaining agreement and, as the Authority has consistently and repeatedly held, such disagreement provides no basis for finding the award deficient. U.S. Army Corps of Engineers, Kansas City District and National Federation of Federal Employees, Local 29, 22 FLRA No. 15 (1986).

V. THIRD EXCEPTION

A. Contentions

The Agency contends that the award is contrary to management's right in accordance with section 7106(a)(2)(B) of the Statute to assign work. Specifically, the Agency argues that the Arbitrator's interpretation and application of the parties' agreement to find that the grievant's supervisor should have made a workload adjustment deprives management of its right to make that determination and interferes with the right to assign work.

B. Analysis and Conclusions

The Authority has specifically recognized that conflicts, such as in this case, between employees' entitlements to official time for representational functions under section 7131 of the Statute and the entitlements of management under section 7106 can be expected and that when such conflicts arise, the parties must acknowledge the need for and seek a reasonable accommodation of the conflict. Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 89 (1985), petition for review filed sub nom. National Association of Government Employees, Local R7-23 v. FLRA, No. 86-1011 (D.C. Cir. Jan. 7, 1986). In this regard the parties in this case had negotiated in their collective bargaining agreement a workload adjustment provision for union representatives which the Arbitrator enforced in finding that the grievant's supervisor failed to properly deal with the issue of the adjustment of the grievant's work. Of course, the Authority has advised that an exclusive representative cannot negotiate and an arbitrator cannot enforce a contract provision relating to the allocation of official time for representational functions without regard to management needs and requirements regarding the assignment of work. Id.; see U.S. Army Corps of Engineers, Kansas City District and Local 29, National Federation of Federal Employees, 22 FLRA No. 9 (1986). However, in this case the Agency has not shown that the Arbitrator's enforcement of this provision disregards management needs and requirements regarding its assignment of work. In particular, the Arbitrator's ruling that the grievant's supervisor failed to properly deal with the work adjustment issue does not direct what specific work adjustments must be, or should have been, made. See American Federation of Government Employees, AFL-CIO, New York-New Jersey Council of District Office Locals, Social Security Administration and Department of Health and Human Services, Social Security Administration District Office Operations, 7 FLRA 413, 417 (1981). Consequently, we conclude that no basis is provided for finding that the award interferes with the Agency's right in accordance with section 7106(a)(2)(B) of the Statute to assign work.

VI. DECISION

Accordingly, for these reasons the Agency's exceptions are denied. With respect to the Arbitrator's remedy, the Authority notes that under *Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO*, 20 FLRA No. 39 (1985), cited by the Arbitrator in his decision, the Arbitrator properly sustained the grievance and refused to permit the disputed rating to stand. However, in order for the grievant to have an existing performance appraisal for the period in dispute, the Arbitrator should have in addition to voiding the rating directed that the grievant's work be reevaluated by management. Accordingly, the award is modified to read as follows:

> The overall rating for the grievant on his GPAS plan for the period ending September 30, 1984 is hereby voided. The Agency is directed to reevaluate the grievant's performance for that period taking into consideration what workload adjustments would have been made under the terms of the collective bargaining agreement if the required neutrality with respect to representational functions had not been compromised by the grievant's supervisor.

Issued, Washington, D.C., July 30, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 98

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 495, AFL-CIO
(VETERANS ADMINISTRATION MEDICAL
CENTER, TUCSON, ARIZONA)

Respondent

and

Case No. 8-CO-20006-2

LINDA S. MOORE, AN INDIVIDUAL

Charging Party

DECISION AND ORDER ON APPLICATION FOR ATTORNEY FEES

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent Union has filed an opposition. The dispute concerns whether the Union should be awarded attorney fees and expenses under part 2430 of the Authority's Rules and Regulations (5 CFR part 2430), which were issued to implement the Equal Access to Justice Act (EAJA) of 1980, Pub. L. No. 96-481, 94 Stat. 2325, codified at 5 U.S.C. § 504 (Supp. V 1981). The attorney fees requested were incurred by the Union in defending against an unfair labor practice complaint initiated by the General Counsel which alleged that the Union had violated section 7116(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute). This case requires the Authority to articulate the standards to be applied in determining whether to grant or deny attorney fees under part 2430 and in determining the amount of fees to be granted where fees are found to be warranted.

II. Background: The Judge's Decisions Dismissing the Complaint and Awarding Attorney Fees

The Union's application for fees under 5 CFR part 2430 arose out of the General Counsel's prosecution of a complaint against the Union. The complaint alleged that in imposing discipline against the Charging Party, Linda S. Moore, the Union had discriminated against her based on her marital status in violation of section 7116(b)(4) of the Statute. The Judge issued his Decision in that case on July 22, 1983, recommending that the complaint be dismissed.

The Judge found that the Union's action involved discipline under its constitution and bylaws and that, as such, the dispute was within the initial or exclusive jurisdiction of the Assistant Secretary of Labor for Labor-Management Relations under section 7120 of the Statute. In the alternative, assuming that the Authority had jurisdiction over the matter, he concluded that the complaint should be dismissed because the General Counsel had failed to present evidence to establish a violation of the Statute.

No exceptions were filed to the Judge's Decision, and on August 31, 1983, the Authority issued an Order as provided under section 2423.29 of its Rules and Regulations, 5 CFR 2423.29, adopting such Decision as the resolution of the case and dismissing the complaint. FLRA Administrative Law Judge Decisions Report No. 30 (Sept. 2, 1983).

The Union then filed its application for attorney fees and expenses under 5 CFR part 2430, and after submissions by the General Counsel and the Union, on May 4, 1984, the Judge issued the attached Decision in which he recommended that the application be granted.

The Judge found that the Union was eligible to apply for an award of attorney fees and expenses under part 2430 and that its application fulfilled the procedural requirements of such regulations. He stated that under section 2430.3 the General Counsel bears the burden of showing that the application should not be granted, and after considering the record in the underlying case and the General Counsel's arguments on the merits of the attorney fees application, he concluded that the General Counsel had not met this burden. Accordingly, he recommended that the application be granted and that $5,658.02 be awarded for attorney fees.

III. Positions of the General Counsel and the Union

The General Counsel's exceptions are limited to the merits of the application, and essentially argue that the Judge erred in concluding that the General Counsel failed to meet the burden of showing that his action in the underlying proceeding was reasonable in law and fact. The General Counsel further argues that special circumstances existed in the underlying case which would make an award unjust. The Union argues generally in support of the Judge's Decision on both of the above matters.

IV. Discussion and Analysis

Because this is the first instance in which the Authority must decide the merits of an application under 5 CFR part 2430, we first discuss the requirements of the EAJA and part 2430 and then apply these provisions to the instant case.

A. The Equal Access to Justice Act

Congress' purpose in enacting the 1980 EAJA was to reduce the extent to which individuals and organizations were discouraged from seeking review of, or defending against, unreasonable government action because of the expense of vindicating their rights. Thus, the EAJA provided for compensating for certain of these costs in certain court and administrative proceedings. Pub. L. No. 96-481, sec. 202, 94 Stat. 2325.

For administrative proceedings, section 203 of the EAJA, codified at 5 U.S.C. § 504, provided that Federal agencies or departments conducting "adversary adjudications" within the meaning of 5 U.S.C. § 554 (the Administrative Procedures Act) became liable for litigation expenses of a party to the case, other than the United States (for example, another Federal agency or department), if:

(1) that party was a "prevailing party" in the case;

(2) the party met certain eligibility requirements; and

(3) it was determined that the government had not shown that:

  (a) its action, represented by the position of the agency in the case, was "substantially justified," or

  (b) "special circumstances made an award unjust," or

> (c) the party applying for an award of costs had engaged in conduct which unduly or unreasonably protracted the final resolution of the case.

Pub. L. No. 96-481, sec. 203, 94 Stat. 2325; 5 U.S.C. § 504 (Supp. V 1981).

(1) Prevailing Party

Although "prevailing party" was not defined in the EAJA, its legislative history makes clear that it included (a) parties who obtain favorable settlements, in situations where the agency or department that initiated the matter seeks dismissal of the case, (b) parties who obtain partial victories, and (c) parties who totally prevail on the merits of their case after a hearing. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4990.

(2) Eligibility Requirements

Prevailing parties eligible to receive awards of costs in such proceedings were specified as including individuals and organizations, other than a Federal agency or department, such as partnerships, corporations, associations, and labor unions, but not: (a) individuals having a net worth exceeding $1 million; and (b) organizations having a net worth exceeding $5 million, unless the organization is exempt from taxation under certain provisions of the Internal Revenue Code and has less than 500 employees. 94 Stat. 2326; 5 U.S.C. § 504(b)(3)(B).

(3) Definition of Terms

When an application is filed by an eligible prevailing party, the EAJA provided that the application shall be granted unless the agency which initiated the proceeding shows that its position was "substantially justified," that the applying party unduly protracted the proceeding concerning which it is applying for an award, or that "special circumstances" exist. Although the phrases "substantially justified," and "special circumstances" were not specifically defined in the EAJA, the Senate and House Committees recommending the legislation provided guidance in identical explanations.

Thus, Congress did not intend that the government would have to show that it won the case, or that its decision to initiate the case was based on a substantial likelihood that it would win, in order to avoid paying the applicant's attorney fees. The intent was to establish a test of reasonableness, of whether the government could show that its position in the matter had a "reasonable basis in law and fact," a test somewhere between the one applied to plaintiffs in Civil Rights Act cases and the one applied for defendants under the "American rule." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4990. Under the Civil Rights Act, plaintiffs ordinarily recover their attorney fees unless special circumstances would render an award unjust. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). Under the "American rule," defendants may recover their costs only where it is found that the plaintiff's action was frivolous, unreasonable, groundless or without foundation. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420-21 (1978). See also Enerhaul v. NLRB, 710 F.2d 748 (11th Cir. 1983) and Spencer v. NLRB, 712 F.2d 539, 558 n.67 and accompanying text (D.C. Cir. 1983) ("substantially justified" was intended to be a test which is slightly more stringent than one of reasonableness).

As explained by the United States Courts of Appeals for the Third, Eighth, and Tenth Circuits, under this test of reasonableness the government must show that there is a reasonable basis in truth for the facts alleged, that there exists a reasonable basis in law for the theory of the case, and that the facts alleged will reasonably support the legal theory advanced. Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1308 (8th Cir. 1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984); Dougherty v. Lehman, 711 F.2d 555, 564 (3d Cir. 1983).

In applying the test in unfair labor practice cases within its jurisdiction, the National Labor Relations Board (NLRB) has stated that the question of whether its General Counsel was substantially justified should not be decided simply on the basis of whether the General Counsel had been able to prove a prima facie case. Iowa Parcel Service, Inc., 266 NLRB 392 (1983), affirmed Iowa Express Distribution v. NLRB, 739 F.2d 1305 (8th Cir. 1984); DeBolt Transfer, Inc., 271 NLRB 299 (1984) (where the NLRB adopted the Judge's decision that its General Counsel was not substantially justified even though a prima facie case had been established). To the same effect, see Board Avenue Laundry and Tailoring v. United States, 693 F.2d 1387, 1391 (since the question of reasonableness depends on all the pertinent facts of the case, fixed rules cannot be established for determining the issue).

The NLRB has also stated, however, that it will conclude that its General Counsel was not substantially justified if there is a failure to present evidence which, if credited by a factfinder, would constitute a prima facie case. Derickson Company, Inc., 270 NLRB 516, 518 (1984); SME Cement, Inc., 267 NLRB 763, n.1 (1983).

We find that this rule is appropriate as a threshold test in unfair labor practice proceedings under the Statute. A "prima facie" case is one in which the evidence presented would suffice to show that there is a basis for the theory of the case if such evidence is presumed to be true and the evidence presented by the opposing party is disregarded. Black's Law Dictionary 1353 (rev. 4th ed. 1986); Webster's Third New International Dictionary, Unabridged 1800 (1976). A case which did not reach the NLRB's standard would be groundless or "meritless" and the equivalent of or very close to a case under which a defendant would qualify for an award of fees under the "American rule." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

"Special circumstances" was intended to be a "safety valve" to ensure that awards would not be made in conflict with equitable considerations and to ensure that the government was not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.

In addition to setting out who may apply for such awards under agency proceedings and the tests to be applied in determining whether an award of costs should be made, the EAJA set forth procedural requirements for applications; limitations on the types and amounts of the costs to be reimbursed; and a mandate, applicable to the Authority, that agencies issue regulations for its implementation. Finally, the EAJA contained a "sunset" clause which provided by its terms that it would expire as of October 1, 1984, with the proviso that it would continue to apply until the final resolution of any pending case which had been initiated prior to October 1, 1984. On August 5, 1985, the EAJA was renewed and made permanent. Pub. L. No. 99-80, 99 Stat. 183 (1985). See Part C, infra.

B. Authority Proceedings under the EAJA; 5 CFR part 2430

The Authority issued regulations in 1981, codified at 5 CFR part 2430, which provide for the submission of EAJA applications for fees and expenses from parties to its proceedings and for the consideration of such applications.

These regulations reiterate the purpose of providing for awards of costs to eligible individuals and entities that prevail in agency adversary adjudications unless the agency's position in the case was substantially justified or special circumstances exist to make an award unjust. 5 CFR 2430.1. The regulations provide for awards in conjunction with unfair labor practice proceedings under the Statute pending on complaints against labor organizations between October 1, 1981, and September 30, 1984, including proceedings pending on September 30, 1984. 5 CFR 2430.2(a).1/

A labor organization/respondent in an unfair labor practice proceeding may qualify for an award if it prevails in the case, or in a significant and discrete portion of the case, on the merits. It also must meet the EAJA eligibility requirements of net worth and number of employees. 5 CFR 2430.2(b). If these requirements are met, the labor organization may receive an award unless the General Counsel can show that his position in initiating the case was "reasonable in law and fact." 5 CFR 2430.3(a). Further, an award will be reduced or denied if the General Counsel shows that the applicant has unduly or unreasonably protracted the proceeding, or that special circumstances make an award unjust. 5 CFR 2430.3(b).

The EAJA application is referred where possible to the same Administrative Law Judge who presided over the proceeding for which the award is sought. 5 CFR 2430.7. The Judge is required to make specific findings and conclusions on all the requirements in 5 CFR part 2430. 5 CFR 2430.12. The Judge's decision and the entire record on which it is based is then transmitted to the Authority and the parties may file exceptions to the Judge's decision in the manner set forth in sections 2423.26(c), 2423.27 and 2423.28 of the Authority's Rules and Regulations. 5 CFR 2430.13.

1/ Awards are not provided for other Authority proceedings described in 5 U.S.C. § 7105, because unfair labor practice proceedings are the only Authority proceedings which qualify as "adversary proceedings" under 5 U.S.C. § 554.

C. The 1985 Extension of the EAJA

The Equal Access to Justice Act was renewed and made permanent by the Equal Access to Justice Act of 1985, Pub. L. No. 99-80, 99 Stat. 183, with clarifications and amendments. As explained by the House Committee which reported the legislation to the House of Representatives, the amendments to the law were intended to apply to matters pending on or commenced after August 5, 1985, the date of the new law's enactment. The clarifications to the prior law were intended to be applicable to these matters and to matters which were pending on, or commenced on or after October 1, 1981, the effective date of the prior law. H.R. Rep. No. 120, 99th Cong., 1st Sess. 11 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 183.

We have reviewed the new law and the House Committee's report in connection with the Authority's proceedings and have concluded that the clarifications which were intended to be applicable to matters pending under the 1980 EAJA prior to August 5, 1985, id. at 11-17, do not affect the result to be reached on the application for attorney fees in this case. However, we urge parties who may wish to file applications under the EAJA in the future to be attentive to the contents of the EAJA in its new form.

D. The Union's Application

1. Eligibility: The Judge found, without dispute by the General Counsel, that the Union is a labor organization within the meaning of 5 CFR part 2430, that it timely filed its application within 30 days of the final order in the underlying case, and that it was the prevailing party in that case. He also found that the Union meets the other eligibility requirements of 5 CFR part 2430 and that the content of its application complies with the Authority's Rules and Regulations. These findings are correct and are adopted.

2. Whether the General Counsel's position in the underlying case was reasonable: In deciding whether the General Counsel had met the test of reasonableness in the underlying case, the Judge reexamined his two key conclusions in the case. First he reexamined his conclusion that the case should be dismissed for lack of jurisdiction, based on the Authority's prior decision in American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA 718 (1982), and considered whether the General Counsel's position in the case was reasonable in the face of

that conclusion. He reaffirmed the jurisdictional result and decided that the General Counsel should have known that this would be the result when the case was initiated. On this reasoning he decided that the General Counsel's action in prosecuting the case was not reasonable "in law." Second, the Judge reexamined his alternative finding in the underlying case that the General Counsel's action in prosecuting the case was not reasonable because the General Counsel did not produce evidence to prove a prima facie case.

First, with respect to the reasonableness of the General Counsel's jurisdictional argument, we disagree with the Judge and find it reasonable. However, with respect to the second issue, we agree with the Judge and conclude that the General Counsel was not reasonable in prosecuting the case without sufficient evidence to make a prima facie case. Moreover, as discussed in part D.3, we accept for purposes of our analysis the reasonableness of the General Counsel's legal theory in this case but we make no judgment as to the validity of that theory.

Initially, we disagree with the Judge's suggestion, following n.9 of his decision, that the reasonableness of the General Counsel's position can be discerned from the fact that no exceptions were filed in the underlying case. The Authority's Rules and Regulations state that when no exceptions are filed to a Judge's decision, the Authority will issue an order which adopts that decision as the result of that case, with the understanding that this adoption does not mean that the reasoning or the conclusions of the Judge shall have precedential significance for any other case. 5 CFR 2423.29(a). This being true, the General Counsel or any party can decide not to file exceptions for any reason. It cannot be concluded that a failure to file exceptions means that the party having the opportunity but failing to do so knew that its position was wrong.

As stated above, we disagree with the way in which the Judge applied Local 2000, particularly his reasoning that Local 2000 was applicable to the underlying case because both "ar[ose] out of an internal union disciplinary proceeding alleging violation of the union's constitution and bylaws." The Authority in Local 2000 explicitly stated that the only allegation in the complaint in that case was that the union had failed to comply with its constitution and bylaws. This is not what the complaint against the Respondent Union alleged in the underlying case here.

Rather, it was alleged that the Union had discriminated against the Charging Party, Linda Moore, based on her marital status in violation of section 7116(b)(4) of the Statute.

Because it is exclusively the Authority, and not the Assistant Secretary of Labor, which has jurisdiction over alleged violations of section 7116 of the Statute, cases presenting such statutory questions must be presented to the Authority for decision, not to the Assistant Secretary. See American Federation of Government Employees, Local 1738, AFL-CIO, 19 FLRA No. 66 (1985), petition for review filed sub nom. American Federation of Government Employees, Local 1738 v. FLRA, No. 85-1609 (D.C. Cir. Sept. 25, 1985). Issues which are within the exclusive jurisdiction of the Assistant Secretary under section 7120 of the Statute should be presented separately to the Assistant Secretary under the procedures set forth in 5 CFR 2428. We conclude therefore that the Judge was incorrect in concluding the General Counsel was not reasonable in prosecuting the case because the General Counsel should have concluded that the Authority lacks jurisdiction in this case.

However, we agree with the Judge that the General Counsel was not reasonable in prosecuting a case for which the General Counsel did not present evidence which would prove a prima facie case. In seeking to show that the Union had discriminated against the Charging Party, Linda Moore, the General Counsel asserted that Jimmy Moore, her spouse, had acted against the Union's interests and that the Union had disciplined Linda because Linda and Jimmy were married. Even assuming that this would amount to discrimination based on marital status under section 7116(b)(4) of the Statute, it is readily apparent that the General Counsel did not present evidence to support such a claim.

The evidence presented by the General Counsel shows the following:

Jimmy and Linda Moore were elected officers of the Union in 1981, and both had become dissatisfied with the Union leadership. Jimmy initiated meetings with a representative of another union to discuss how he might go about circulating a petition among employees to require a vote to oust the incumbent Union. The extent of Linda's participation at these meetings is not certain. Jimmy did circulate a petition, which was signed by Linda. Eventually, both Jimmy and Linda resigned from the Union, and copies of their letters of resignation, criticizing the union, were posted on the Union's bulletin board. The Union saw the posting of Jimmy's and Linda's letters, learned of Jimmy's activity on behalf of the rival labor organization, and decided to initiate disciplinary action against Jimmy and Linda.

Linda was notified that a hearing was to be conducted by a trial committee on a specified date. She did not attend. The chairperson of the committee then, by letter, asked Linda for certain information. She refused to supply any. A second request for information was made by letter, and Linda was also informed that the trial committee had not yet decided her case and that another hearing would be held on a specified date. Linda refused to give any information and did not attend the hearing. She then filed the unfair labor practice charge which was the basis for the complaint in this case, alleging that the Union had discriminated against her on the basis of her marital status, in violation of section 7116(b)(4) of the Statute. The Union expelled her (adjudged her ineligible for membership) for a period of four years.

Based on our review of this presentation of evidence, it shows that the Union was not without a reasonable basis for pursuing disciplinary action against Linda for participating in activity which was detrimental to the Union. For the General Counsel to have succeeded in its theory of the case, the General Counsel needed to either (1) present direct evidence showing that one of the reasons the Union pursued discipline against Linda was because she was married to Jimmy or (2) present evidence that it was so clearly unreasonable for the Union to have pursued discipline against Linda that the trier of fact could permissibly infer that the reason was because Linda was married to Jimmy. The General Counsel did neither.

In view of the evidence presented, it should be apparent that the General Counsel's case was appropriate for summary judgment in favor of the Respondent Union as soon as the General Counsel's case was completed. The General Counsel was unable to show that the facts alleged would reasonably support the legal theory advanced for the case. United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984). It was not able to present evidence which, if credited, would constitute a prima facie case. Derickson Company, Inc., 270 NLRB 516, 518 (1984); SME Cement, Inc., 267 NLRB 763, n.1 (1983). Accordingly, on this basis we decide the General Counsel was not reasonable in prosecuting the case.

3. Whether special circumstances exist which would make an award unjust: In deciding that special circumstances did not exist in the case to justify denial of the application, the Judge relied upon his jurisdictional conclusions. As explained above, his dismissal of the complaint for lack of jurisdiction was erroneous. He also relied on his evaluation of Linda's conduct in the proceedings. While we do not rely on any assessment of her conduct, we do agree with his ultimate conclusion that the General Counsel has not been able to show that special circumstances exist which would justify denial of the Union's application for an award.

We agree with the General Counsel that the case was novel because it was the first to allege unlawful discrimination based on marital status under section 7116(b)(4) of the Statute and because it sought to find that this proscription against discrimination based on marital status encompasses discrimination against someone because of the identity of the person's spouse.

We also strongly agree that there is a need for vigorous enforcement of the law in Federal labor relations and that the General Counsel must not be deterred from advancing novel or untested legal theories and cases in such an effort. Indeed, the "special circumstances" proviso of the EAJA was intended to prevent deterrence.

It remains, however, that while the underlying case was "novel" in the above respects, the General Counsel is not being penalized by an adverse EAJA award in this case because of its pursuit of a novel theory. Rather, the EAJA award is based upon the conclusion that the General Counsel has failed to present a prima facie case of discrimination under the General Counsel's own theory of what would constitute prohibited discrimination.

We conclude that the Union should not have been forced into the expense of defending against the General Counsel's action. Further, there is no suggestion in this case that the EAJA applicant unduly or unreasonably protracted the proceeding. This is precisely the type of case to which the EAJA was intended to apply.

E. Allowable fees and expenses

The Union's application provides documentation for the amount of attorney fees and expenses requested as required in 5 CFR 2430.4 and 2430.6. The billing rates of $75.00 per hour for attorney fees and $35.00 per hour for paralegal services have been justified as being customary for the services rendered and as being comparable to the prevailing rate in the community in which the services were rendered.

We also find that, with one exception discussed below, the time which was billed for the Union's defense in the underlying case, the presentation of the application, the Union's opposition to the General Counsel's exceptions to the attached Decision, the Union's Supplementary Motion citing authorities, and the associated expenses, are reasonable in relation to the matters which have been presented for decision. See Tyler Business Services v. NLRB, 695 F.2d 73, 77 (4th Cir. 1982) and DeBolt Transfer, Inc., 271 NLRB 299, 300 (1984), where it was explained that it would be inconsistent with the EAJA to deny a request for fees and expenses which arises from the need to process an EAJA application.

The application includes a request for $34.91 for the expense of a dinner conference. We understand that conferences with clients and potential witnesses are necessary, particularly in planning for a hearing. However, where such conferences are necessary, we believe that the billing should be for the attorney's time. Billings for the expenses of meals have great potential for abuse and will not be reimbursed.

As provided in 5 CFR 2430.4 and based on the above considerations, we conclude that the application should be granted in the amount of $6,194.40. This amount represents the amount recommended by the Judge ($5,658.02), plus the fees and expenses associated with the processing of the matter before the Authority ($571.29), less the amount claimed for a dinner conference ($34.91).

V. Conclusion

The Union was the prevailing party in the underlying case and it meets the other eligibility requirements for an award of attorney fees and expenses set forth in 5 CFR part 2430. The General Counsel has not been able to show that his position in initiating that proceeding was reasonable in fact or that special circumstances existed in that proceeding which would make an award unjust as provided in 5 CFR 2430.5. The application is granted, as adjusted above, in the amount of $6,194.40, and payment shall be made in the name of the Union, the American Federation of Government

Employees, Local 495, AFL-CIO. To obtain payment, the applicant must follow the procedures set forth in 5 CFR 2430.14, which provides:

§ 2430.14 Payment of award.

> To obtain payment of an award made by the Authority the applicant shall submit to the Executive Director of the Authority a copy of the Authority's final decision granting the award, accompanied by a statement that the applicant will not seek court review of the decision. The amount awarded will then be paid unless judicial review of the award, or of the underlying decision, has been sought by the applicant or any other party to the proceeding.

ORDER

As provided in 5 CFR 2430.13, IT IS ORDERED that the application for attorney fees and expenses be, and it hereby is, granted, in the amount of $6,194.40.

Issued, Washington, D.C., July 31, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[22 FLRA No. 98]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 495, AFL-CIO
(VETERANS ADMINISTRATION MEDICAL
CENTER, TUCSON, ARIZONA)

Respondent

and

LINDA S. MOORE, AN INDIVIDUAL

Charging Party

Case No.: 8-CO-20006-2

E. A. Jones, Esq.
Gerald M. Cole, Esq.
For the General Counsel

Stanley Lubin, Esq.
For the Respondent

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION AND ORDER
GRANTING APPLICATION FOR AWARD OF FEES AND EXPENSES

This proceeding under the Equal Access to Justice Act (herein EAJA), 5 U.S.C. § 504, 94 Stat. 2325 (1980), was instituted by the filing of an Application For An Award of Attorneys' Fees and Expenses (herein the application) by Stanley Lubin, Esq. of McKendree & Lubin, Phoenix, Arizona, on behalf of American Federation of Government Employees, Local 495, herein referred to as AFGE Local 495, Applicant, or Respondent. The application was filed pursuant to Part 2430, Sections 2430.1 through 2430.14, inclusive, of the Rules and Regulations of the Federal Labor Relations Authority. In accordance with the requirements of section 2430.7, the application was referred to me for consideration.

On October 26, Counsel for the General Counsel filed a motion to dismiss the application, contending that the action of the General Counsel in initiating this proceeding, i.e., the issuance of a complaint and notice of hearing, was reasonable in law and fact.1/ Since the issue raised by the General Counsel's motion is the same issue I would have to decide and include in a decision prepared pursuant to Section 2430.12(a), I believed it inappropriate to rule on such issue until I had received the General Counsel's answer and the Applicant's reply thereto. Accordingly, I so advised the parties in my order of December 29, 1983 denying the motion to dismiss.

Thereafter, the General Counsel filed a timely answer which raised no issues not previously raised in the motion to dismiss.2/ The Applicant filed no reply. Neither party has requested an evidentiary hearing and such hearing appears unnecessary as no factual issues were raised concerning Respondent's application. Upon consideration of the entire record,3/ I make the following findings and conclusions.

Discussion and Analysis

A. Statutory and Regulatory Background - General Counsel has Burden of Proving Applicant's Ineligibility.

The Equal Access to Justice Act, which became effective October 1, 1981, permits prevailing parties to obtain awards of attorney fees and other expenses against the United States in certain administrative

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1/ The Rules and Regulations do not specifically provide for the filing by the Applicant of a response to the motion to dismiss. However, I have authority to grant leave to submit a reply or to issue an order to show cause why the motion to dismiss should not be granted. (See section 2430.11 and 2423.19). In fact, the Applicant filed Opposition by memorandum dated October 31, 1983 accompanied by a request for additional fees and expenses incurred in preparing its opposition.

2/ The "motion to dismiss" procedure is designed, I assume, to avoid the unnecessary expenditure of time and resources in litigating such questions as an organization's net worth and number of employees or the reasonableness of fees and expenses until after a threshold determination has been made by the adjudicative officer that the application is timely filed and the government's position is not substantially justified. However, where the sole issue to be resolved is whether the government's position is substantially justified, it seems to me that filing a motion to dismiss is inappropriate as it only adds an unnecessary step in the fee-adjudication procedure, as illustrated by this case.

3/ See section 2430.12(b) of the Rules and Regulations.

proceedings and judicial actions. The EAJA accomplishes this end by creating a new section 504 to Title 5 of the United States Code and by amending 28 U.S.C. 2412. The first of these two provisions, the new section 504, concerns the award of fees and expenses in certain administrative proceedings such as the one involved herein. The latter provision, the amended section 2412, concerns the award of fees and expenses in certain court cases.

The "findings and purpose" of the EAJA are set forth in Section 202 thereof, as follows:

> Sec. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.
>
> (c) It is the purpose of this title--
>
> (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and
>
> (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

The Authority's implementation of the EAJA is set forth in Part 2430 of its Rules and Regulations which, in pertinent part, provides as follows:

> Section 2430.3 Standards for awards.
>
> (a) An eligible applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete portion of the proceeding, unless the position of the General Counsel over which the

> applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that its position in initiating the proceeding was reasonable in law and fact.
>
> (b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted (sic) the proceeding or if special circumstances make the award sought unjust.[4]

Therefore, the General Counsel has the burden of proving in this fee-adjudication proceeding before me that its position in initiating the unfair labor practice proceeding was reasonable both in law and fact,[5] or that special circumstances exist which make the award unjust.

B. The Unfair Labor Practice Proceeding: A Summary of My Findings and Conclusions.

1. On June 4, 1981, Jimmy Moore resigned his position as First Vice President of AFGE Local 495. Between June 4 and June 12 he met several times with Dick Coffey, national representative of a rival union, National Federation of Federal Employees. On two occasions his wife Linda Moore was with him.

2. On June 11, 1981 Linda Moore submitted her letter of resignation as Second Vice President of AFGE Local 495. Her letter was highly critical of the Union and its President, Evelyn Greeson. She gave a copy of her letter to her husband, Jimmy Moore.

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[4] The General Counsel does not contend that Respondent unduly or unreasonably protracted the proceeding.

[5] The legislative history behind this language discloses that

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. [See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4989.]

This standard has been recognized in the application of the EAJA to the National Labor Relations Board. Tyler Business Services v. N.L.R.B., 695 F 2d 73 (CA-4), 111 LRRM 3001 (1982). See also Jim's Big M, 266 NLRB No. 119, 113 LRRM 1019 (1983).

3. On June 13, Jimmy Moore circulated an election petition which both had signed. A week later he returned the petition to a representative of the National Federation of Federal Employees. During this same period, Jimmy and Linda Moore's resignation letters were found by AFGE Local 495 officers on bulletin boards at the VA Medical Center. Linda Moore was out of the state during this period in which the petition was being circulated.

4. By letter dated July 28, the Union notified Linda Moore that charges had been preferred against her which could lead to expulsion. Hearings were held but Linda did not appear to testify, although she had notice of the hearings.

5. On December 21, Linda Moore filed this unfair labor practice charge alleging she had been expelled because of her marital status. In truth, she was not actually expelled until a vote of the membership on January 4, 1982. She appealed this decision. It appears from the application (p. 2) herein that the charge was dismissed by the Regional Director and later reinstated by the General Counsel. The dates of these latter actions are not indicated.

6. In exercising his discretion to issue the complaint against AFGE Local 495, the General Counsel chose not to be influenced by the terms of a Release (Resp. Exh. No. 3), signed by both Linda and Jimmy Moore, dismissing with prejudice their civil lawsuit in the U.S. District Court for the District of Arizona.[6] The terms of the Release executed on April 28, 1982 included a promise by both Jimmy and Linda Moore that they,

> ". . . shall not file any further litigation on any present and/or future claims arising out of or in connection with action taken against the Plaintiffs by AFGE Local 495 at its January 1982 membership meeting or prior thereto concerning the matters covered by this lawsuit. Further, in this regard the Plaintiffs recognize that Plaintiffs shall be bound by the decision or decisions to be issued by AFGE in connection with any appeals emanating from the aforesaid action taken by AFGE Local 495 and expressly agree that Plaintiffs shall not file any litigation arising out of or in connection with such appeals."

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[6] In the interim, Linda and Jimmy Moore had filed suit in October 1981, alleging various causes of action against the Respondent Local Union, as well as several of its officers individually, for violations of their civil rights, breach of contract, and defamation (Resp. Exh. No. 4). Linda Moore admitted that the facts underlying that lawsuit center on the same allegations she made here - that she was improperly expelled from the Respondent Local Union. Throughout the civil litigation, Linda Moore was represented by an attorney, Debra Hillary.

Ultimately, AFGE determined that her appeal to the National was untimely.

7. In the unfair labor practice proceeding before me, Respondent protested that Linda Moore, who had already refused to attend two union hearings, was now attempting to get out from under a legally binding "accord and satisfaction" in the District Court lawsuit by seeking relief from the Authority concerning the same dispute. In passing on this defense, I first ruled that it was proper for the General Counsel to amend the complaint at the hearing to state the correct date of expulsion as being in January 1982, albeit after the charge was filed. However, I further stated as follows:

> I feel compelled to point out, however, that such ruling permits Charging Party Moore to do indirectly (via the General Counsel) precisely what she could not do herself directly. Because of the clear language of the Release executed on April 28, 1982, Moore was precluded from thereafter filing an amended charge (should one have been legally necessary), or a new charge (should her first charge already have been dismissed on the grounds, for example, that it was premature or lacked merit, or both). Although a different judicial forum might conclude that Moore's conduct violated the spirit of the Release, the issue raised by the Respondent is whether the terms of the Release estop Moore from proceeding with this case. Although I will address this issue I must observe at the outset that resolution of this issue is not critical. The real issue is whether Moore's Release estops the General Counsel from litigating this matter.
>
> Since Moore did not, in fact, file any further litigation, she technically complied with the literal language of the Release. In this regard, I note that the Release did not expressly require Moore to withdraw the related unfair labor practice charge then pending before the Regional Director of the Authority. Therefore, she was not estopped.
>
> . . . . .
>
> . . . More importantly, the Regional Director was not barred because he was not a party thereto. Accordingly, the motion to dismiss on this ground is denied.

In the absence of exceptions by Respondent (because it prevailed on other grounds) my ruling on this contention is nonprecedential and not binding upon the Authority.

8. On May 20, 1982 the Authority issued its decision in American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA No. 125, 8 FLRA 718 (1982) finding that the allegations at issue could not be litigated under section 7116 of the Statute because such allegations involved matters within the exclusive jurisdiction of the Assistant Secretary pursuant to section 7120 of the Statute. The complaint therein alleged a failure to comply with section 7116(c) in violation of section 7116(b)(1) and (8). Notwithstanding the foregoing decision, the Complaint in the instant case was issued on August 12, 1982.

9. In my decision below, I granted Respondent's motion to dismiss on jurisdictional grounds. In reaching this conclusion I noted at footnote 11 that the proviso to section 7116(c) states that this subsection "does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter." I also quoted from the legislative history as follows:

> . . . The initial jurisdiction to decide alleged violations of the standards of conduct for labor organizations will be retained by the Assistant Secretary, who administers similar standards in the private sector. [Emphasis supplied].7/

Finally, I recommended dismissal of the complaint noting that:

> Here, as in AFGE Local 2000, the thrust of the allegations against the Respondent concern purely internal union matters, to wit: whether the Respondent had sufficient reason to expel Linda Moore from membership and, if so, whether its constitution and bylaws were followed in that procedure. Under the case law cited above, therefore, I find that the matters at issue involve allegations that certain of Respondent's conduct was inconsistent with and violative of its constitution and bylaws, and thus are matters within the exclusive jurisdiction of the Assistant Secretary of Labor pursuant to the provisions of Section 7120 of the Statute. (footnote omitted).

In the absence of exceptions by the General Counsel, my decision is, of course, nonprecedential and not binding upon the Authority.

7/ Legislative History of the Federal Service Labor-Management Relations Statute, Title 7 of the Civil Service Reform Act of 1978, Comm. Print No. 96-7, Committee on Post Office and Civil Service, House of Representatives, 96 Congress, First Session, November 19, 1979, page 760.

C. Whether the Position of the General Counsel in Initiating this Proceeding was Reasonable in Law.

1. As authority for its legal position, the General Counsel cites National Treasury Employees Union and National Treasury Employees Union, Chapter 53 (Internal Revenue Service and Brooklyn District Office), 6 FLRA No. 37, 6 FLRA 218 (1981), where the Authority found that a union had committed an unfair labor practice in removing a steward from office for having testified in an Authority proceeding--a right found to be protected under section 7102 of the Statute. The Authority noted "this should not be construed as abrogating the union's control of its own internal affairs in the absence of a statutory violation such as here involved." (Emphasis added). Thus the Authority was very carefully limiting its decision to the type of conduct involve therein; i.e. discrimination because a person appeared as a witness and gave testimony in an Authority proceeding. The Authority did not indicate that its decision was applicable to any alleged violation of section 7116(b) and no issue was raised as to whether the Assistant Secretary also had jurisdiction pursuant to section 7120 of the Statute and section 208.37 of the Rules and Regulations.[8] In my opinion, therefore, the NTEU case lends no support for the General Counsel's position.

2. The General Counsel also contends that Respondent's reliance (and therefore my reliance) on American Federation of Government Employees, Local 2000, AFL-CIO, 8 FLRA No. 125, 8 FLRA 718 (1982), herein AFGE Local 2000, is misplaced because that decision is distinguishable and

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[8] For an extensive and enlightening discussion of case law involving "utilization and participation in the processes" of the National Labor Relations Board, see Judge William B. Devaney's recent decision in National Association of Government Employees, Local R5-66, Case No. 4-CO-30026, OALJ 84-47 (March 12, 1984), in which he found a violation of section 7116(b)(1) because a union disciplined a member who caused other employees to file unfair labor practice charges with the Authority. As noted therein at p. 14: "Where, as here, union discipline is imposed, in whole or in part, because a member has invoked the procedures of the Statute, it does not concern an internal union matter, subject to the exclusive jurisdiction of the Assistant Secretary, but touches a part of the public domain covered by the Statute." In this regard I agree with Judge Devaney who said at fn. 9: "At most, the jurisdiction of the Assistant Secretary over prohibited discipline 'for exercising any right . . . under the . . . Act or this chapter' is concurrent with the jurisdiction of the Authority under § 16 of the Statute, but in any event is not exclusive."

inapposite.[9] Although the General Counsel probably has no choice but to make this contention, I cannot help but note that he is indirectly challenging the basis for my dismissal even though he already elected not to file exceptions with the Authority and challenge it directly. Whether the Authority would want to deal with this contention is a matter for the Authority to decide. As for me, I still believe AFGE Local 2000 governs this case. What needs to be emphasized, however, is that the issue here is not whether I correctly decided the jurisdictional issue or even whether the Authority may have reached a different conclusion. Rather, the issue is whether the General Counsel - armed with whatever evidence was gathered in its investigation of the charge, and charged with knowledge of the state of the law as it existed at that time - had a reasonable basis in law and fact for issuing a complaint on August 12, 1982 and putting Respondent to the expense of defending against this governmental action.

The only reason asserted for attempting to distinguish that case from this one is the contention that AFGE Local 2000 "did not involve the violation of other statutory rights." Actually, however, the cases are similar. Thus, they both arise out of an internal union disciplinary proceeding alleging violation of the union's constitution and bylaws and in both cases the General Counsel is arguing that discipline resulting from "improper motivation" is a violation of another statutory right. In AFGE Local 2000, the statutory section allegedly violated is section 7116(b)(1); here the statutory section is section 7116(b)(4). To me, it makes no difference. To claim jurisdiction by merely alleging a violation of section 7116 is not the same as proving the Authority has jurisdiction. A more persuasive "legal position" is required.[10] The General Counsel's position was rejected in AFGE Local 2000 by the Authority and in its decision it emphasized the fact that the Assistant Secretary of Labor had exclusive jurisdiction. As noted earlier (see fn. 7), I quoted from the legislative history indicating that, at least, the Assistant Secretary had initial jurisdiction. In view of the AFGE Local 2000 decision, and no persuasive arguments to distinguish its applicability, it's my opinion that the General Counsel's position is not substantially justified because it is not reasonable in law.

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[9] In its brief dated December 17, 1982, in the unfair labor practice proceeding before me, the General Counsel never even mentioned the AFGE Local 2000 case.

[10] It has also been held by one court that the "position of the United States" (section 2412 (d)(1)(A) of EAJA) means the arguments relied upon by the government in litigation, rather than the "underlying (governmental) action" that precipitated the lawsuit. Spencer et. al. v. N.L.R.B. et. al., 712 F 2d 539, DC Cir. (June 28, 1983).

D. Whether the Position of the General Counsel in Initiating this Proceeding was Reasonable in Fact.

1. The General Counsel contends, and I agree, that the mere fact that Respondent prevailed before the Administrative Law Judge does not alone justify the granting of an award of fees and expenses. As noted in the legislative history: "The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case." [See H.R. Rept. No. 1418, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S. Code Cong. and Ad. News 4990.] On the other hand, if it is found that no prima facie case has been established by the General Counsel, and additionally, if no exceptions are filed to such finding, does it follow from this that the General Counsel's position was not reasonable in fact? The answer, I believe, is that it depends upon the facts of each case. Accordingly, like the National Labor Relations Board, it is necessary to resolve these questions on a case-by-case basis.[11]

2. The General Counsel also contends that "the fact that the Administrative Law Judge's findings of fact differed from the investigative evidence on which the issuance of the Complaint was based does not have any substantial significance here." In theory, I agree with the foregoing statement; in fact, I disagree as to its application here. This is because I reject the suggestion that my findings "differed from the investigative evidence" on which the complaint was based. In this regard I assume that the General Counsel's case-in-chief represents the evidence upon which the complaint was based. Essentially this consisted of the testimony of Jimmy and Linda Moore and certain documentary evidence, primarily the transcript of the disciplinary hearing. From the very beginning of this proceeding the General Counsel has proceeded on the erroneous assumption that if I accepted Linda Moore's testimony that she was not involved in Jimmy's campaign to replace AFGE with NFFE and that she did not authorize him to use her resignation letter as part of his campaign, then I necessarily would have to infer that the Union's motive in preferring charges against her was her marital status. But, in fact, it is insufficient to merely prove her lack of participation in Jimmy Moore's campaign. The General Counsel also has to prove the Union knew or had reason to know of her lack of involvement, but preferred charges anyway, and presumably for one

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[11] Even where a prima facie case was found by the Judge and no exceptions were filed, the NLRB declined to find whether the establishment of a prima facie case is a prerequisite to finding the General Counsel's position reasonable in law and fact. Enerhaul, Inc., 263 NLRB 890 (at fn. 3), 111 LRRM 1085 (1982). On appeal, the Eleventh Circuit Court of Appeals reversed the NLRB and awarded fees and expenses. 113 LRRM 3636.

reason only, namely, her marital status.12/ In other words, the General Counsel would have to prove that the Union's charges against Linda were baseless and from this fact argue that the Union must have had an unlawful motive. The fact that Linda Moore, in her pretrial affidavit and at the hearing, denied being involved in Jimmy's circulation of a petition does not make the Union's charges baseless. When the General Counsel issued his Complaint, he already had before him the transcript of the Union's hearing of August 1, which stated that Linda's resignation letter was placed on the "VA Medical Center Bulletin Boards" (G.C. Exhibit No. 8, pages 1 and 6). Therefore, the General Counsel was aware that the Union had reason - whether mistaken or not - for suspecting complicity on the part of Linda Moore in her husband's activities. The burden was on Linda Moore to respond to these charges and inform the Union that it was mistaken in preferring charges against her. Because Linda refused to participate in the Union's disciplinary proceeding, the evidence against her was undenied and unrebutted. As a result, she was found guilty and expelled. I reject the General Counsel's reliance on a so-called "marital assumption." There is absolutely no evidence in the hearing transcript to suggest that Linda's marital relationship played any part in the Union's decision to prefer charges in the first place and find her guilty in the second place. The foregoing evidence was known to the General Counsel before he issued his complaint and was unchanged as a result of the evidence adduced at the hearing. In footnote 17 of my decision I stated as follows: "Assuming, arguendo, that the authority has jurisdiction here, I would find and conclude that the General Counsel failed to prove a prima facie case of any violation of section 7116(b)(4)." With respect to this conclusion, I would like to make these two points: (a) My recommendation was not based in any way on the fact that I discredited Jimmy Moore; his testimony was corroborative only. Linda's testimony, if credited, could still stand alone; (b) I did not discredit Linda Moore; rather, I specifically declined (in paragraph 6) to decide whether Linda Moore gave Jimmy "carte blanche authority" to utilize her resignation letter as he saw fit. Indeed, I further stated that "the possibility exists that she did not know what use he was going to make of it." In the

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12/ I have difficulty understanding why the fact of her marital status is necessarily the only reason to be inferred. Is the General Counsel suggesting that the Union would have taken no action against Linda Moore if she were merely a co-worker who had written the same letter which was found posted on a bulletin board? Isn't it possible, and indeed more likely, that the charges were preferred against Linda Moore because of the contents of her resignation letter; i.e. the harsh criticism and accusations concerning Union President Greeson's integrity and competence? No evidence was introduced to show that similar letters were written and disseminated by other members, but that charges were not preferred against them (thus inferring disparate treatment).

light of the foregoing, I am at a loss to understand the General Counsel's statement (brief, p. 9) that "the facts as credited would not support the taking of exceptions. . ." My view of the case is that the General Counsel, if he wished, could have filed exceptions both to my recommended dismissal on jurisdictional grounds as well as to my finding that there was no prima facie case on the merits. However, since there may be a myriad number of reasons why the General Counsel decided not to file exceptions, I agree with the contention that as far as this case is concerned, the failure to file exceptions is not dispositive.

3. The General Counsel further contends in his Answer as follows:

> In the investigation and resolution of unfair labor practices, the General Counsel is not empowered to resolve credibility conflicts which may arise. Under the statutory scheme of the Federal Service Labor-Management Relations Statute, it is the role of the Authority, through its Administrative Law Judges, to credit or discredit witnesses,through the mechanism of the adversary hearing whereat witnesses testify under oath, are subject to direct and cross-examination and can be observed in their demeanor by the Administrative Law Judge.

I agree with the foregoing statement and I am sure there will be many cases where the General Counsel will be required to issue a complaint in order for a judge to resolve crucial factual questions which hinge upon making a credibility determination. However, as I have indicated above, this is not the case here and it is for this reason that I reject, as misleading, the General Counsel's assertion that the factual basis for its case was undermined because I "substantially discredited the testimony of Jimmy Moore." As noted above, Jimmy Moore's testimony was corroborative only. Assuming, arguendo, that I credited both Linda and Jimmy in all respects, the result in this case would be no different. Proving a negative proposition (i.e. Linda's noninvolvement) isn't the same as proving an affirmative proposition (i.e. that the Union's charges were based upon her marital status, rather than upon a mistaken belief that she posted or authorized someone else to post her resignation letter on the bulletin board.)

4. For the reasons stated in the preceding paragraphs of this section, I find and conclude that the General Counsel's position was not substantially justified because it had no reasonable basis in fact. Inasmuch as the complaint alleged no statutory violations other than section 7116(b)(4), I find it in unnecessary to address the arguments raised in the General Counsel's brief at pp. 7 and 8.

E. Whether Special Circumstances make the Award sought Unjust.

1. The General Counsel contends, and I agree, that the EAJA was not intended to stifle the good faith exploration of novel issues through the administrative process. Section 2430.3(b) of the Authority's Rules and Regulations provides that "special circumstances" may make the award of fees sought unjust. The legislative history on this point is enlightening:

> This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made. [See H.R. No. 1418, 96th Cong., 2d Sess. 11 (198), represented in 1980 U.S. Code Cong. & Ad. News 4990.]

The foregoing is applicable here, according to the General Counsel, because of his assertion "that the section 7116(b)(4) allegation at issue here--involving marital status--appears to be one of first impression." But, in my opinion, the General Counsel is putting the cart before the horse. The threshold issue is jurisdiction. Once you get past that threshold issue, you can argue whether certain conduct is violative of section 7116(b)(4). The jurisdictional fence to hurdle in this case is the fact that a union has a statutory right under section 7116(c) to enforce discipline, and this entire proceeding arose in that context. Moreover, section 7120 of the Statute gives the Assistant Secretary of Labor the responsibility to review violations of a union's conduct in this respect.

2. We would have a completely different situation if Linda Moore, for example, were attempting to gain admission to the union and was refused membership because of her marital status[13] or any of the other factors set forth in section 7116(b)(4). Such alleged discrimination would not arise out of a union disciplinary proceeding and, in my opinion, - although dicta herein - the Authority would have jurisdiction. Therefore, the

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[13] The General Counsel assumes that the term "marital status" in section 7116(b)(4) is not confined to the fact that a person may be married, single or divorced. Thus it is alleged that the Union discriminated against Linda Moore not because she was a married woman (i.e. her individual marital status), but because of whom she was married to (i.e. Jimmy Moore). Assuming that the Authority had jurisdiction in this matter, a novel issue for it to then decide would be the meaning and scope of the statutory term "marital status."

General Counsel is not being precluded from advancing novel legal theories concerning the applicability of section 7116(b)(4) as well as section 7116(c) and (b)(1), so long as he does it in appropriate cases, and this is not one of them.[14] My view of the case before me is that there are no special circumstances which would make the award of fees unjust.[15]

Findings and Conclusions

1. Section 7118(a)(6) of the Federal Service Labor Relations Statute (herein the Statute) and section 2423.14 of the Authority's Rules and Regulations provide that hearings in complaints be conducted in accordance with subchapter II of chapter 5 of title 5 of the United States Code. Therefore, the hearing before me was an "adversary adjudication" within the meaning of section 504(b)(1)(C) of the EAJA.

2. Section 7105(d) of the Federal Service Labor-Management Relations Statute authorizes the Authority to appoint administrative law judges under section 3105 of Title 5. Pursuant to Part 2423 of the Authority's Rules and Regulations, hearings on unfair labor practice complaints are conducted by administrative law judges. There is no dispute that the undersigned is an "adjudicative officer" within the meaning of section 504(b)(1)(D) of the EAJA.

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[14] I would emphasize that the case before me is not one in which the charges against Linda Moore were admittedly based upon a factor prohibited by section 7116(b)(4). Nor is this a case, for example (hypothetically), where a woman is expelled from union membership admittedly and specifically because she married a high-level management official and the union is concerned that her continuing membership may result in the unauthorized disclosure to management of information about the union's internal affairs. In such event, an arguable case for concurrent jurisdiction might be a defense to an EAJA fee application, even though the Authority - in a case of first impression - might decide the Assistant Secretary had initial or exclusive jurisdiction. Such a factual situation might arguably be distinguishable from AFGE Local 2000.

[15] Indeed, if there are any special circumstances in this case, they cut the other way. Linda Moore can hardly be regarded as having "clean hands," having pursued this litigation after signing a Release in the District Court of Arizona agreeing to "be bound by the decision or decisions to be issued by AFGE in connection with" her appeals of her expulsion. Without her cooperation and testimony, the General Counsel could hardly have issued the complaint herein. Moore's conduct, however, is not relevant to the issues actually been considered and decided in this proceeding before me. Rather, it is the General Counsel's decision to issue a complaint which is at issue.

3. My decision recommending dismissal of the complaint for lack of jurisdiction was issued on July 22, 1983. Since no exceptions were filed to my decision, the Authority issued an Order dated August 31, 1983 dismissing the complaint in accordance with the provisions of section 2423.29(a) of the Rules and Regulations. In its Order the Authority stated: "Therefore, . . . the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes." On the basis of the foregoing, I find and conclude that the Authority's Order of August 31, 1983 constitutes a "final disposition" of an adversary adjudication within the meaning of section 504(a)(2) of the EAJA. I further find that the Authority's Order of August 31, 1983 constitutes "the entry of a final order establishing that the applicant has prevailed" within the meaning of section 2430.7 of the Rules and Regulations. Accordingly, Respondent is a "prevailing party" within the meaning of section 504 of the EAJA.

4. The application herein was received by the Authority on September 28, 1983. I find and conclude that the Application was timely filed within the meaning of section 2430.7(a) of the Rules and Regulations.

5. The application asserts, and the answer admits, that AFGE Local 495, AFL-CIO is a small local union with less than 300 members. Its office is in Tucson, Arizona. The organization is in existence solely to represent employees at the Veterans Administration Medical Center in Tucson, Arizona. It has never had any employees of any kind. Its net worth has always been substantially less than $5,000,000. In compliance with section 2430.6(f), a net worth exhibit was attached to the application.

6. The application asserts, and the answer admits, that AFGE Local 495, AFL-CIO is a labor organization described in § 501(c)(5) of the Internal Revenue Code (26 U.S.C. § 501[c][5]) and is a tax exempt organization.

7. The application asserts, and the answer admits, that the Applicant incurred legal fees and expenses in defending against the unfair labor practice complaint in Case No. 8-CO-20006-2. Since the answer does not specifically deny or contest the amount of the fees and expenses, I deem the assertions set forth in paragraph 5 of the application to be admitted. Accordingly, I find and conclude that the Applicant incurred legal fees for services rendered which equal $5,325.00. In addition, costs and expenses incurred in connection with the rendering of such legal services totalled $144.83. By supplemental affidavit dated October 31, 1983 in connection with its opposition to the motion to dismiss, the Applicant requested additional attorney fees in the amount of $172.50 and expenses of $15.69 for a total of $188.19. This request was also

unopposed. Thus the total of services and costs incurred by Applicant in defending itself against the charges alleged in this matter equals $5,658.02. I find and conclude that the application filed by the Applicant complies fully with the requirements of section 2430.4 of the Rules and Regulations.

8. For the reasons more fully set forth above in Sections C and D of the Discussion and Analysis, supra, I find and conclude that the position of the General Counsel over which the Applicant has prevailed was not substantially justified because the General Counsel has not met its burden of showing that its position in initiating the proceeding was reasonable in law and fact.

9. For the reasons more fully set forth above in Section E of the Discussion and Analysis, supra, I find and conclude that no special circumstances exist which would make the award sought unjust. (Section 504(a)(1) of the EAJA and section 2430.3(b) of the Rules and Regulations.)

AWARD [16]

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[16] Section 504(a)(1) of the EAJA provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust. (Emphasis supplied.)

In this regard, section 504(c)(1) of the EAJA provides that a party dissatisfied with the fee determination made under section 504(a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adverse determination. However, compliance with section 2430.13 of the Rules and Regulations requires the filing of exceptions with the Authority.

It is hereby ORDERED that American Federation of Government Employees, Local 495, AFL-CIO,[17] be awarded $5,658.02 for fees and expenses.

Francis E. Dowd

FRANCIS E. DOWD
Administrative Law Judge

Dated: May 4, 1984
Washington, DC

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[17] Section 2430.14 of the Rules and Regulations requires applicants seeking payment of an award to file a copy of the Authority's "final decision granting an award" to its Executive Secretary. Notwithstanding a request for payment directly to the attorney involved, my reading of the EAJA and the Authority's Rules and Regulations indicates that payment should be made to the Applicant. Therefore, I direct that the Authority's check for $5,658.02 should be made out for payment to AFGE Local 495, AFL-CIO and mailed directly to its authorized representative, Stanley Lubin, Esq. of McKendree and Lubin, La Hacienda Antiqua, 902 West McDowell Road, Phoenix, Arizona 85007.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. 0-NG-1275

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, REGION X,
SEATTLE, WASHINGTON

Activity

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of a negotiability issue filed by the Union.

From the record before the Authority, it appears that during the course of proceedings before the Federal Service Impasses Panel, the Activity by letter dated May 5, 1986, notified both the Panel and Union that it considered the issue before the Panel as contradictory to section 7114(c) of the Statute and not negotiable. On May 13, 1986, pursuant to section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, the Union filed a petition for review as to whether the disputed proposal was within the duty to bargain. Subsequently, in a letter dated June 13, 1986, the Agency withdrew the allegation of nonnegotiability.

Since the Agency has withdrawn the allegation concerning the Union's proposal, there is no longer an issue as to whether the proposal is within the parties' duty to bargain under the Statute.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., July 31, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

22 FLRA No. 100

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

COLUMBIA POWER TRADES COUNCIL

Union

and

Case No. O-NG-1031

UNITED STATES DEPARTMENT OF
ENERGY, BONNEVILLE POWER
ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and presents issues as to the negotiability of twenty-one provisions of a local agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute.[1]

II. Positions of the Parties

The fundamental dispute in this case concerns the interpretation of section 704 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1218,[2] codified at 5 U.S.C. § 5343 (Amendments) (1982 ed.). That section provides, in essence, that matters pertaining to terms and conditions of employment and pay and pay practices which were subject to bargaining by prevailing rate employees covered under section 9(b) of Pub. L. No. 92-392,[3] codified at 5 U.S.C. § 5343 (Amendments, note) (1982 ed.), prior to August 19, 1972 shall continue to be subject to bargaining without regard to the provisions of chapter 71 (the Statute), subchapter IV of chapter 53 (prevailing wage rate systems), and subchapter V of chapter 55 (premium pay), of title 5 of the United States Code. The parties agree that the units of exclusive recognition involved in this case are covered by section 704.[4] The Agency contends, however, that the Union's interpretation of section 704 to permit negotiation on the disputed provisions, which primarily concern employee work rules, is overly broad.

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[1] The disputed provisions in the instant case are set forth in Appendix A attached to this decision.

[2] For the text of section 704 of the Civil Service Reform Act of 1978, see Appendix B at 1, attached to this decision.

The Agency contends, generally, that notwithstanding section 704 of the Civil Service Reform Act of 1978, the disputed provisions of the local parties' agreement are nonnegotiable because they directly interfere with management's rights under section 7106 of the Statute or are otherwise inconsistent with the Statute. The Agency argues further that section 704 is intended only to preserve the right of affected employees to negotiate on pay related matters and does not authorize bargaining on terms and conditions of employment unrelated to pay and pay practices. The Agency concludes that since the provisions at issue herein concern terms and conditions of employment unrelated to pay matters, e.g., work rules, those provisions are not protected by section 704.

The Union, on the other hand, contends that section 704 requires the negotiation of matters, including pay and pay practices and other terms and conditions of employment, which had been subject to bargaining prior to August 19, 1972, notwithstanding the management rights provisions of the Statute. The Union argues that section 704 exempts matters pertaining both to terms and conditions of employment and to pay and pay practices from otherwise applicable limitations on bargaining and, since the provisions in dispute concern conditions of employment subject to negotiation prior to August 19, 1972, they are protected by the exemption in section 704.[5]

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[3] For the text of section 9(b) of Pub. L. No. 92-392, see Appendix B at 1, attached to this decision.

[4] Union Response to Agency Statement of Position at 1. The Agency concedes that if its position with regard to section 704 is incorrect, certain disputed provisions (all but three) are negotiable. Agency Statement of Position at 2.

III. Analysis and Conclusion

The issues in this case concern whether section 704 of the Civil Service Reform Act of 1978 applies to conditions of employment other than pay and pay practices, and, if so, whether it exempts those conditions of employment from the limitations on bargaining set forth in the management rights provisions of section 7106 of the Statute. The Agency concedes that if section 704 applies to conditions of employment other than pay and pay practices and if it exempts those conditions of employment from the management rights provisions and other limitations on bargaining contained in the Statute, all but three of the disputed provisions herein are negotiable because those provisions, or substantially similar provisions, were contained in the parties' agreements prior to August 19, 1972. As to the other three provisions, however, the issue is whether they concern matters which were subject to negotiation prior to August 19, 1972 within the meaning of section 704.

A. The Language of Section 704

In agreement with the Union, the Authority finds that both the language and structure of section 704 support the conclusion that under that provision, agencies must continue to negotiate on terms and conditions of employment, other than pay and pay practices, of prevailing rate employees where those terms and conditions of employment were subject to negotiation prior to August 19, 1972. In particular, section 704(a) and section 704(b) respectively provide for the negotiation of "terms and conditions of employment and other employment benefits" and "pay and pay practices." Not only does section 704 explicitly authorize negotiation on terms and conditions of employment, its requirements with respect to these matters are entirely separate from its requirement that pay and pay practices also be negotiated. The Agency's contention that section 704 concerns only matters related to wages would make section 704(a) and

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[5] There is no dispute that the provisions at issue herein concern "conditions of employment" within the meaning of section 704 of the Civil Service Reform Act of 1978 and section 7103(a)(14) of the Statute. Union Response to Agency Statement of Position at 9. Agency Statement of Position at 2.

704(b) redundant and section 704(a) unnecessary.[6] This distinction by Congress between "terms and conditions of employment" and "pay and pay practices" leads to the conclusion that section 704 provides for the negotiation of matters other than pay related matters.

B. The Legislative History of Section 704

Not only does the language of section 704 demonstrate that terms and conditions of employment unrelated to pay matters are preserved thereby for negotiation; the legislative history of section 704 further reinforces our conclusion. Section 704 was introduced in the House of Representatives as a part of the House Committee bill (H.R. 11280).[7] The House Committee Report accompanying the bill specifically states that the provision is intended to "preserve the existing right of certain Federal prevailing rate employees to negotiate terms and conditions of employment" and to "preserve unchanged the scope and substance of the existing collective bargaining relationship. . . ."[8]

During the debate in the House on the labor relations provisions of H.R. 11280, Congressman Ford of Michigan, who had introduced section 704, not only affirmed that it was intended to preserve the existing scope of bargaining for specific groups of prevailing rate employees, but also specifically stated that the purpose of the provision was to overrule two Comptroller General decisions.9/ In those decisions, the Comptroller General held that while section 9(b) exempted certain bargaining agreements from the other provisions of the prevailing rate statute, it did not exempt those agreements from other applicable laws and regulations such as those pertaining to overtime compensation. In addressing the legislative history of section 704, the Agency appears to base its interpretation of section 704 on the fact that these decisions, which, according to Congressman Ford, section 704 was designed to overrule, concern pay matters. The Agency reads this part of the legislative history too narrowly.

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[6] Union Response to Agency Statement of Position at 2, 8-10. Even if section 704(a) were interpreted to mean "terms and conditions of employment related to pay," the redundancy would not disappear, since whatever matters would be included in the phrase would be indistinguishable from "pay practices" under section 704(b).

[7] As set forth in the House Committee bill, the section which is currently section 704 was denominated section 704(c). As set forth in the bill passed by the House (the "Udall substitute") section 704 was denominated section 704(d). Between the issuance of the House-Senate Conference Report and the passage of the bill by Congress, the other provisions of section 704 had been stripped from the section and what had been section 704(d) became section 704.

[8] For the relevant text of the House Report, See Appendix B at 2, attached to this decision.

In the first place, Congressman Ford's statement makes it clear that section 704 is intended to preserve the existing scope of bargaining for employees covered by section 9(b) not only as to other laws pertaining to pay matters but also as to limitations in the Statute pertaining to the negotiation of terms and conditions of employment, including "wages, pay practices, and other practices" (emphasis added), unrelated to pay. Thus, Congressman Ford speaks more generally of preserving the right of those employees to negotiate terms and conditions of employment in accordance with the "prevailing practice principle," rather than tying such negotiations to the specifically wage-related "prevailing rate principle." Congressman Ford further states that the purpose of section 704 is to insure that qualified craft employees of the Federal Government "enjoy comparable terms and conditions of employment" to employees in the same crafts in the private sector, so that such employees are not lost to Federal service.10/

9/ Comptroller General Decision B-189782 (Feb. 3, 1978), published at 57 Comp. Gen. 259 (1978); Comptroller General Decision B-191520 (June 6, 1978). For the text of Congressman Ford's Statement, see Appendix B at 2-3, attached to this decision.

10/ Id. In this regard, see Appendix B at 2-3, the Conference Committee Report, at 159, Legislative History at 827, wherein it is stated:

> This section also provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with

(Continued)

Moreover, the Agency's narrow interpretation of section 704 is contradicted by the subsequent history of the legislation. The Conference Committee Report reaffirms that section 704 is intended, as stated by Congressman Ford, to overturn the aforementioned Comptroller General decisions. But the report goes on to state that section 704 is "also" intended to provide specific statutory authority for the negotiation of "wages, terms and conditions of employment and other employment benefits."11/ [Emphasis added.] Consistent with the structure of section 704, as discussed above, the Report addresses separately the right preserved in section 704 to negotiate on terms and conditions of employment and the right to negotiate on pay matters. Contrary to the Agency, therefore, the legislative history of section 704 demonstrates that that provision is intended to authorize negotiation not only on pay and pay practices, but also on other terms and conditions of employment unrelated to pay matters.

C. The Language and Legislative History of Section 9(b)

Section 9(b) of Pub. L. No. 92-392 does not support the claim that section 704 relates only to pay matters. Although section 9(b) was enacted as part of the statutory provisions governing the establishment of wage rates for prevailing rate employees, the terms of section 9(b) concern general terms and conditions of employment as well. Section 9(b)(1) provides, essentially, that the provisions of Pub. L. No. 92-392 establishing the prevailing rate system shall not be interpreted in any way to nullify or otherwise affect the provisions of existing negotiated agreements relating to wages, terms and conditions of employment, and other employment benefits of certain specified groups of prevailing rate employees. Here also Congress provided separately for the negotiation of pay matters and of terms

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> prevailing practices in the private sector of the economy. [Emphasis added.]

See also section 704(a), set forth in Appendix B at 1, which specifically provides for the continued negotiation of matters "which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972 . . . ." [Emphasis added.]

11/ For the relevant text of the Conference Committee Report, See Appendix B at 3-4 attached to this decision.

and conditions of employment unrelated to pay. Thus, even though the statutory provisions of which section 9(b) is a part pertain to pay-setting for prevailing rate employees, section 9(b) is clearly intended to preserve for negotiation all matters previously negotiated by those employees, not just matters pertaining to wages.

This conclusion is confirmed by the legislative history of section 9(b). The House Committee Report, for example, states as follows:[12]

> The provisions of section 9(b) are directed at those groups of Federal employees whose wages and other terms or benefits of employment are fixed in accordance with contracts resulting from negotiations between their agencies and employee organizations. . . . It is not this committee's intent to affect, in any way, the status of such contracts or to impair the authority of the parties concerned to renegotiate existing contracts or enter into new agreements. [Emphasis added.]

Section 9(b) of Pub. L. No. 92-392 is intended to preserve the whole range of matters subject to negotiation by certain prevailing rate employees in existing bargaining relationships, not just that portion which pertains to pay and pay practices. Section 704 continues this policy.

D. Congressional Intent in Enacting the Statute

The Agency also argues that the Union's interpretation of section 704 to require bargaining on matters pertaining to the exercise of management rights is inconsistent with Congress' intent, in enacting the Statute, to protect those rights. In support of this argument, the Agency refers to statements in the legislative history of the Statute which describe the management rights set forth in section 7106 as "essential."[13] Such generalized discussion of management rights, however, is not sufficient to override the specific terms of section 704(a) as confirmed by the pertinent legislative history. Section 704(a) provides that agencies are required to bargain on terms and conditions of employment contained in collective bargaining agreements prior to August 19, 1972 without regard to chapter 71 of title 5 (the Statute), to the extent that the provisions of chapter 71 are inconsistent with section 704.[14] The plain meaning of that subsection is that it exempts provisions of specified collective bargaining agreements from the limitations on the scope of bargaining set forth in the Statute, including the management rights provisions of section 7106.[15] The House Committee Report confirms this interpretation, stating: "The subsection excludes these employees from the restrictions on the scope of collective bargaining under chapter 71 . . . ."[16] The Conference Committee Report states that the subsection is not to be construed, among other things, to "nullify" the right of any party to bargain on "benefits" previously negotiated.[17] Yet that is precisely what the Agency's interpretation of section 704 would do -- nullify long-standing provisions of the parties' collective bargaining agreement based upon a purported conflict with management rights under section 7106. The Agency's interpretation, therefore, is contrary to the plain terms and legislative history of section 704(a).

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[12] H.R. Rep. No. 339, 92d Cong., 1st Sess. 22 (1971). The Senate Committee Report, S. Rep. No. 791, 92d Cong., 1st Sess. (1972), reprinted in 1972 U.S. Code Cong. and Ad. News 2980, 2985, states that section 9(b) "is a savings clause to prevent disruption or modification of existing wage board bargaining agreements now in effect." The plain language of this statement indicates that Congress intended to preserve bargaining on all provisions of existing wage board agreements, not just those pertaining to wages. The Conference Committee Report, H.R. Rep. No. 1275, 92d Cong., 2nd Sess. (1972), reprinted in 1972 U.S. Code Cong. and Ad. News 2994, 2997, is silent on section 9(b).

E. Conclusion

In sum, contrary to the Agency's contentions, as to matters subject to bargaining by prevailing rate employees prior to August 19, 1972, section 704 of the Civil Service Reform Act of 1978 provides for the negotiation of terms and conditions of employment unrelated to pay and pay practices of employees subject to its provisions, such as the work rules and other provisions at issue in this case, notwithstanding the management rights provisions of the Statute. With certain exceptions discussed below, the Agency concedes that the provisions pertaining to terms and conditions of employment of unit employees at issue herein were subject to negotiations between the parties prior to August 19, 1972. We hold, therefore, that the Agency is required to negotiate on those provisions, notwithstanding their possible conflict with management rights under section 7106 of the Statute.[18] *See The Columbia Basin Trades Council, Grand Coulee, Washington and The Grand Coulee Project Office, Bureau of Reclamation, U.S. Department of the Interior, Grand Coulee, Washington*, 20 FLRA No. 40 (1985).

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[13] For example, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978), Legislative History at 689-90. See Agency Statement of Position at 7-10.

[14] See Appendix B at 1, attached to this decision.

[15] Compare Columbia Power Trades Council v. United States Department of Energy, 691 F.2d 325 (9th Cir. 1982) (section 704 does not exempt union from coverage of Statute and jurisdiction of Authority but preserves scope of bargaining).

[16] See Appendix B at 2, attached to this decision.

[17] See Appendix B at 2, attached to this decision.

IV. Analysis and Conclusion With Respect to the Remaining Issues

The Agency contends that three of the disputed provisions are not protected by section 704 because they concern matters which were not contained in any of the parties' collective bargaining agreements prior to August 19, 1972.[19] However, the record indicates that the provisions remaining in dispute involve subject matters which had previously been negotiated by the parties. While the provisions themselves had not been included in previous agreements, they constitute changes in previously negotiated provisions rather than the introduction of entirely new subject matter.[20] That is, as to Provision 1, the Agency contends that the provision constitutes a substantial change in the role of the Union on the joint labor-management apprenticeship committees and in the authority of those committees. See Agency Statement of Position at 15-22. As to Provision 2, the Agency contends that the grievance procedure in effect prior to August 19, 1972 did not prohibit management from invoking arbitration. In addition, the Agency contends that Provision 2 violates section 7121(b)(3)(C) of the Statute which requires negotiated grievance procedures under the Statute to provide that either the agency or the exclusive representative may invoke arbitration. See Agency Statement of Position at 23-24. This is the only provision alleged by the Agency to be nonnegotiable under the Statute on a ground other than management rights under section 7106. However, as discussed above, section 704 protects the right of the parties to negotiate on matters without regard to limitations on the scope of bargaining established by the Statute, which would include section 7121. As to Provision 13, the Agency contends that the parties' prior agreements contained no restrictions on how much work could be assigned, or at what times it could be assigned, to heavy truck drivers. See Agency Statement of Position at 49-54.

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[18] The Agency concedes that eighteen of the disputed provisions were included in the parties' agreements prior to August 19, 1972: Provisions 3-12, 14-21. *See* Agency Statement of Position at 27, 30-31, 32, 35, 38, 39-40, 41, 45, 46, 49, 53, 56, 58, 59, 61, 65, 66, 68-69, and 70. The instant case is distinguishable from *International Brotherhood of Electrical Workers, Local 640 and U.S. Department of the Interior, Bureau of Reclamation*, 18 FLRA No. 102 (1985). In that case, the Authority held that section 9(b) and section 704 do not authorize negotiation on matters inconsistent with law where such law is *not* specifically referenced in section 9(b) or section 704. In this case, we hold that matters inconsistent with management rights are negotiable because those rights *are* specifically referenced in section 704.

[19] The disputed provisions, as set forth in Appendix A attached to this decision, are Provision 1 at pages 1-2 of the Appendix, Provision 2 at page 2 of the Appendix, and Provision 13 at pages 12-14 of the Appendix.

Thus, the issue is whether section 704 permits the negotiation of changes in previously negotiated subject matter without sacrificing the protection which that section affords. For the following reasons, we conclude that the three provisions are negotiable.

Section 704 provides that matters subject to negotiation by certain prevailing rate employees prior to August 19, 1972, shall be negotiated after the enactment of the Civil Service Reform Act of 1978 "in accordance with the provisions of section 9(b) of Pub. L. No. 92-392." Section 9(b) of Pub. L. No. 92-392, see Appendix B at 1, provides, in essence, for parties covered by that section to negotiate, after the enactment of Pub. L. No. 92-392, for the "modification, or improvement" of provisions of agreements entered into prior to the enactment of that law. Parties covered by section 9(b) are not confined merely to the continuation of the terms of previously existing agreements but could, in a new agreement, change those terms or alter the rights of the respective parties concerning the matters involved. The legislative history of section 9(b) not only confirms this interpretation, but suggests, further, that that provision permits the inclusion of "new terms" -- presumably items not in previous agreements -- in any renegotiated agreement.21/ Moreover, the legislative history of section 704 indicates that it was intended to continue the policy established by section 9(b): "[Section 704] may not be construed to nullify, curtail, or otherwise impair the right or duty of any party to negotiate for the renewal, extension, modification, or improvements of benefits negotiated."22/ By the use of terms such as "modify" and "improve," it is clear that Congress did not intend to preclude parties from negotiating changes in the provisions of previous agreements or to prevent them from adding to or increasing the rights already negotiated.

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[20] For reference to the provisions of the parties' agreements prior to 1972 which relate to the subject matter of Provisions 1, 2, and 13 in this case, see Appendix B at 4, attached to this decision.

Therefore, to the extent discussed above, section 704 and section 9(b) require an agency to continue to negotiate on subject matters which were included in agreements to which it was a party prior to August 19, 1972. The record indicates that the three provisions in dispute concern subject matters included in the parties' agreements prior to August 19, 1972: joint labor-management apprenticeship committees, arbitration, work rules for heavy truck drivers.23/ Since section 704 permits bargaining on

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21/ For the relevant text of the House Report, see Appendix B at 5, attached to this decision.

22/ See Conference Committee Report, Appendix B at 3-4, attached to this decision.

23/ In deciding that the subject matters of the disputed provisions are protected by section 704 because those matters were contained in the parties' agreement prior to August 19, 1972, it is unnecessary to reach the Union's additional argument that in order for a matter to be covered by section 704 it is enough that it was included in an agreement of *any* of the parties subject to section 9(b) prior to August 19, 1972, not just in an agreement of the

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modifications and improvements of matters about which the parties had negotiated prior to August 19, 1972, without regard to limitations imposed by the Statute, negotiation of provisions which, for example, would be more restrictive of management's rights than previous agreements, is protected by section 704. Therefore, negotiation of such restrictions on management's rights is not an expansion of the scope of bargaining which is inconsistent with section 704, as the Agency contends, since it does not involve an entirely new subject matter which had not been negotiated by the parties prior to August 19, 1972. Rather, it constitutes a permissible "modification or improvement" in employee "benefits" which is within the scope of bargaining protected by section 704.

In each instance herein, the disputed provisions merely add to or otherwise modify already existing limits on management action. For example, Provision 1 increases the authority of the joint labor-management apprenticeship committees over aspects of the apprenticeship program beyond the limits on the role of those committees set forth in previous agreements. Provision 2 substitutes the Union for the aggrieved employee as the party which may invoke arbitration; but in precluding the Agency from invoking arbitration, it represents no change from prior agreements. Provision 13 merely adds new restrictions to the already existing limitations on the assignment of work to heavy truck drivers which were set forth in the work rules governing those employees. As changes or modifications of the rights of the Union and of employees, or of the restrictions on management action, which had been negotiated by the parties prior to August 19, 1972, Provisions 1, 2, and 13 are protected by section 704 of the Civil Service Reform Act of 1978 from the limitations on bargaining set forth in the Statute and are within the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

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particular parties involved in a given dispute. See Union Response to Agency Statement of Position at 34-36; Agency Statement of Position at 11-12.

Agency rescind its disapproval of the disputed provisions herein.[24]

Issued, Washington, D.C., July 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

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[24] In finding the disputed provisions to be negotiable, the Authority makes no judgment as to the merits of those provisions.

APPENDIX A

Provisions At Issue In The Instant Case:

Provision 1

11. APPRENTICESHIP

11.01 An appropriate system of apprenticeship shall be established and maintained for employees covered by this Agreement.

11.02 The minimum standards for apprenticeship shall conform to the standards of and shall be approved by the Bureau of Apprenticeship, U.S. Department of Labor, prior to adoption.

11.03 A Central Joint Council on Apprenticeship consisting of three representatives appointed by the Administrator, and three representatives designated by the Council shall be maintained. The Administration's Supervisor of Apprentice Training will be an ex-officio member.

11.04 The powers and functions of the Central Joint Council on Apprenticeship shall be as follows:

(1) To select a chairperson, establish its own rules of procedure, and determine the time and place of its meetings;

(2) to prepare and revise as deemed advisable the Standards of Apprenticeship to be recommended to the Bureau of Apprenticeship, U.S. Department of Labor;

(3) to direct and to review and approve the work of the various craft committees (see paragraph 11.05);

(4) to monitor the progress and effectiveness of the apprenticeship program and take action, through the Craft Committees, to improve program effectiveness.

11.05 For each craft in which apprentices are to be trained, there shall be established a craft committee consisting of two members of the Administration's supervisory staff and two members representing labor. When the appropriate labor representative cannot attend an apprentice examination, one journeyman from the location at which the examination is being held can be designated to attend on official time for the time spent in the examination. The Administration's supervisor of Apprentice Training shall be an ex-officio member of each such committee.

11.06 The powers and functions of the craft committees are as follows:

(1) To prepare and recommend to the Central Joint Council craft apprenticeship standards that include a program of work experience, a program of related training, and the maximum ratio of apprentices to journeymen;

(2) To select a chairperson who will be a BPA Management official;

(3) To evaluate and select candidates for the craft apprentice program;

(4) To conduct periodic examination of apprentices;

(5) To advance apprentices, if appropriate; and

(6) To terminate apprentices from the craft apprenticeship program if appropriate. [Only the underlined portion of the provision is in dispute]

Provision 2

12. GRIEVANCE PROCEDURE

12.09 The expenses of arbitration, including the compensation and expenses of any outside arbitrator, shall be borne equally by the Administration and the Council. Only the Council or an affiliated union may take an issue to arbitration.

Provision 3

16. SPECIAL LEAVE FOR UNION ASSIGNMENTS

16.01 Unions affiliated with the Council may request leave of absence for Administration employees for the purpose of accepting assignments with the union. Such employees, if they have worked at least one year for the Administration, may be granted leave without pay for a period not to exceed one year. Subject to DOE regulations on leave without pay provisions, they may be granted an additional year of leave without pay. If at the end of that period they wish to remain with the union, they will resign their Federal employment with the understanding that when they wish to return to the Administration, they will be reemployed subject to the following conditions:

(1) Evidence of satisfactory physical and mental qualifications.

(2) The individuals must have acquired career or career-conditional status, and have served the time requirements outlined in FPM 315, 4-5.

(3) The individual must notify the Administration of a desire for reemployment within 30 days after the termination of the union assignment. Subsequent to receiving this notification and subject to other conditions listed here, the individual will be offered the first vacancy to occur in the branch of the trade at the grade left or below. The individual will not be obligated to accept a position below the grade formerly held but upon accepting any employment with the Administration or upon declining to accept a position equal in grade to the one left all obligations under this plan would be terminated.

(4) There is no qualified priority placement person required by law who wants the vacant position.

After being reemployed, such individual will not be granted further leave without pay for a union assignment until having been reemployed for a period at least equal to that of the preceding union assignment, or 2 years whichever is less.

Provision 4

17. JURISDICTIONAL BOUNDARIES AND DISPUTES

17.01 The determination of jurisdiction boundaries between and among the various unions affiliated with the Council shall be the sole and exclusive responsibility of the national and international unions representing employees of the Administration. Where such jurisdictional agreements or awards affect the assignment of work by the Administration, the Council shall so notify the Administration.

17.02 The Administration shall assign work in conformance with such traditional jurisdictions, agreements or awards in a manner consistent with its responsibility to meet operating and construction requirements and to accomplish the duties and responsibilities assigned to it.

17.03 Where work boundaries for the unions affiliated with the Council have been established through custom, practice or tradition or by agreements between unions or by decisions of jurisdictional award bodies which are on record with the Administration, the employee represented by each union shall normally perform the work within the established boundary. However, in emergencies unusual circumstances, or in the absence of jurisdictional agreements, awards or understandings, the Administration retains the right to assign work, until an agreement is reached between the unions, or an award is rendered. Thereafter, and as soon as possible, the Administration shall alter its assignments and schedules to conform to such agreement or award.

Provision 5

18. WORK OUTSIDE OF CLASSIFICATION

18.01 Employees shall not be required to perform work outside their classification, except in cases of extreme emergencies; in such a case the employees affected shall be under the direct supervision of a foreman or other regular worker regularly performing this work.

18.02 Employees classified as helpers will in no event be used to replace journeymen.

Provision 6

SUPPLEMENTARY AGREEMENT NO. 2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-1. GENERAL

2-1.04 In subsequent paragraphs of these working rules which define the work of journeymen, it shall be understood that apprentices and trainees may perform such work for training purposes subject to the ratio limits established by Apprenticeship Standards and provided that only grade V and VI line apprentices shall be permitted to work on poles or structures performing hot line work.

2-1.05 Foremen at all levels (I, II, and III) shall have journeyman qualifications in the branch of the trade in which they are employed.

2-1.06 Journeymen-in-Charge, Foremen I and II (or their equivalents) will be required to handle tools and do that class of work required of a journeyman, except that Foremen II shall not do this type of work while supervising a crew larger than may be supervised by a Journeyman-in-Charge, unless:

a. life or property is in danger and there are no other qualified persons available to do the work, or

b. the only work being supervised is transmission line right-of-way maintenance work and there is no electrical hazard involved.

2-1.07 Foremen III shall not normally handle tools or do that class of work required of their crews except in situations such as the following:

a. When necessary to check the work of others.

b. When necessary to train others.

c. When life or property is in danger and there are no other qualified persons available to do the work.

2-1.08 When two journeymen are assigned to work together without other supervision, one shall serve as a Journeyman-in-Charge and be paid accordingly. This does not apply to operators, craftsmen or to situations where a Lineman is supervising journeymen from other crafts as provided in paragraph 2-5.05. Journeymen will not be considered to be working together when they are performing work at the same location and at the same time which each was assigned to do separately.

2-1.10 Operation of hydrolifts assigned to electrical crews shall be by Line Equipment Operators or journeymen of the electrical craft.

Provision 7

SUPLEMENTARY AGREEMENT NO.2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-2. LINEMEN

2-2.06 An Aircraft Patrol Observer shall be or shall have been journeyman Lineman.

2-2.07 A Line Equipment Operator A operates the following vehicles and equipment when it is assigned to a line crew:

a. Line trucks equipped with a boom and winch.

b. Trucks pulling pole trailers or heavy material trailers.

c. Snow-cats of one (1) ton or more capacity and tractors.

In addition a Line Equipment Operator A operates "tractors that are used by but not assigned to line maintenance crews shall be confined to the stringing and sagging of conductors and other directly related line work, and shall not be used to repair or build roads or for general excavation" as provided by the Memorandum of Understanding dated May 28, 1968.

2-2.08 A Line Equipment Operator B operates vehicles and equipment assigned to a line crew except vehicles and equipment listed in 2-2.07. The operation of vehicles and equipment covered by the above sentence includes all operation at the work site associated with the use of winches for work on transmission lines.

Other driving of trucks under 1-1/2 tons may be performed by any licensed motor vehicle operator.

2-2.09 A Groundman is a Lineman's helper. The Groundman shall not serve two or more linemen when these linemen are on separate structures or towers. Stubbing of poles and digging of holes by hand shall be done by groundmen under the supervision of a journeyman Lineman or a Lineman of higher grade.

2-2.10 All framing and erecting of poles and transmission line towers shall be done by journeyman linemen who may be assisted by groundmen.

2-2.11 Patrolling of lines shall be done by journeyman linemen who may be assisted by groundmen.

2-2.16 Maintenance of microwave towers and airway lighting installations on these towers shall be done by linemen.

Provision 8

SUPPLEMENTARY AGREEMENT NO. 2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-3. ELECTRICIANS

2-3.08 The operation of oil filtering or purifying equipment (either portable or stationary) may be performed by any Member of an electrician crew classified as an Oil Filter Operator or above. Oil Filter Operators, when not engaged in this type of work, shall work as Electrician Helpers at the Oil Filter Operator rate of pay.

2-3.09 All installation, repair or removal of electrical equipment and fixtures in any station or substation shall be done by electricians except for overhead line work normally done by line crews, or work requiring the use of line maintenance equipment to remove or place electrical equipment and fixtures when line crews can be more efficiently employed to do the removal or placing.

2-3.10 The adjustment of antennas on microwave towers shall be performed by either electricians or linemen, depending upon availability of either classification in the immediate area.

2-3.11 Installation and maintenance work on other communications equipment and on meters and relays shall be governed by the memorandum from the Branch of Maintenance to Area Managers and O&M Supervisors dated May 8, 1956, on "Responsibilities of Meter, Relay and Communications Personnel."

Provision 9

SUPPLEMENTARY AGREEMENT NO. 2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-5. CABLE SPLICERS

2-5.01 All splicing of lead-covered cables or substitutes therefor, and the installing and repairing of compound filled junction boxes and terminals shall be considered work belonging to the Cable Splicers and shall be done by Cable Splicers.

2-5.02 When working on power cables or power equipment, a Cable Splicer shall be assisted by a Lineman or Electrician. When work is done in a manhole, an Electrician, Lineman, Electrician Helper, or Groundman shall be stationed at the manhole to prepare and lower materials and as a safety measure.

2-5.03 Crews pulling lead-covered cable shall consist of a Cable Splicer or Electrician Foreman II and at least two journeymen. The Cable Splicer shall not be required to supervise such crews while splicing cable.

Provision 10

SUPPLEMENTARY AGREEMENT NO. 2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-6. DISPATCHERS, SCADA CONTROLLERS AND SUBSTATION OPERATORS

2-6.01 a. A Senior System Dispatcher is an employee having System Dispatcher qualifications who is:

(1) in charge of an Area Control Center, or

(2) in charge of a shift at the System Control Center, or

(3) in charge of the outage dispatching function at the System Control Center.

b. A Senior System Dispatcher, Relief, is a System Dispatcher who is subject to shift and schedule changes in accordance with paragraph 2-6.17.

2-6.02 A Generation Dispatcher is assigned to the generation console function.

2-6.03 a. A System Dispatcher is an employee who has satisfactorily completed at least 1 year of training in the dispatching activity who is:

(1) Assigned to the switching and clearance function at the System Control Center, or

(2) In charge of a shift at an Area Control Center, or

(3) Assigned to assist with the outage dispatching function.

b. A System Dispatcher, Relief, is a System Dispatcher who is subject to shift and schedule changes in accordance with paragraph 2-6.17.

2-6.07 A Chief Substation Operator III is an employee, having journeyman operator qualifications, who is in charge of an operating district.

2-6.08 A Senior Substation Operator is an employee, having journeyman operator qualifications, who is in charge of a shift and is headquartered at a location that is normally manned 24 hours a day, 7 days per week.

2-6.09 A Senior Substation Operator, Relief, is an employee, having journeyman operator qualifications, who is subject to shift and schedule changes in accordance with paragraph 2-6.17 and whose routine duties include relieving Senior Substation Operators.

2-6.11 Substation Operators are journeymen in their particular branch of the trade.

2-6.12 Assistant Substation Operators are employees who have at some time held a journeyman rating in their branch of the trade. Assistant Substation Operators work under the supervision of a Substation Operator, or an operator of higher classification, but perform switching only as specifically ordered by their supervisor and when the supervisor is present at the station where the switching is to be performed.

2-6.23 Operators shall be required to perform only those duties directly connected with the operation of their substation while in charge of a shift. Operators may be relieved of duties at another station in the vicinity. These duties may include certain substation cleaning and maintenance of grounds which will not affect the quality of service the substation is expected to give.

2-6.24 All switching in attended stations shall be performed by employees in the Substation Operator classifications. Switching in unattended stations shall be performed by qualified workers designated by the System Dispatchers.

Provision 11

SUPPLEMENTARY AGREEMENT NO. 2

WORKING RULES FOR ELECTRICAL WORKER CRAFT SERIES

2-7. CRAFTSMEN

2-7.01 A Craftsman is an employee above the journeyman electrical worker level who specializes in a technical activity such as communications, metering, relaying, laboratory activities, and other work.

Provision 12

SUPPLEMENTARY AGREEMENT NO. 3

WORKING RULES FOR PLUMBER, PIPEFITTER, AND WELDING CRAFT SERIES

3-1 The Ross Welding Shop shall be supervised by a Welder Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Welder Foreman I may be assigned to assist the Foreman

III in the shop. When the regular Foreman III is on leave, the Foreman I will be assigned the responsibility of the shop and after 15 consecutive working days, paid at the Welder Foreman III rate of pay. When both the Foreman III and I (if any) are on leave, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 118 percent rate of pay beginning on the first full half day of such absence.

3-3 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman-in-Charge rate of pay. When members of this craft are assigned the responsibility of doing a job in the field and supervise journeymen of other crafts, they shall receive the Journeyman-in-Charge rate of pay.

3-4 When two or more journeymen are assigned to swing shift duty without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

3-9 The installation, balancing and maintenance of all plumbing and pipefitting relating to refrigeration, evaporation, lubrication, fuel oil separation, and air conditioning shall be the work of this craft.

Provision 13

SUPPLEMENTARY AGREEMENT NO. 4

WORKING RULES FOR TEAMSTER CRAFT SERIES

4-1.03 Heavy truck drivers shall normally be scheduled in accordance with paragraph 1-23.01, except that drivers may be dispatched from 4:00 a.m. until 12:00 noon, as the need arises, with the understanding that they will work no more than 15 hours. Drivers will not be required to drive for any period after having been on duty 15 hours following 8 consecutive hours off duty. All hours in excess of 8 hours in a workday will be at the overtime rate of pay.

4-2.01 Light Truck Drivers operate solo trucks and all light trucks of less than 36,000 GVW and forklift trucks of all sizes.

4-2.04 The operation of hydrolift dual purpose trucks, except where they are assigned to electrical crews (see 2-1.10), shall be as follows: When a hydrolift truck is used to transport material within a yard or to jobsite, it shall be Teamsters' jurisdiction. When truck remains at the jobsite for erection purposes, the crane shall be operated by the Operating Engineer at the Crane Operator rate of pay and the teamster may remain at the job and move the truck as needed, in accordance with the Memorandum of Understanding between the Teamsters and Operating Engineers dated June 20, 1968, (see also 9-2.).

4-2.07 Drivers will be responsible to and will take orders from the supervisor to whom they are assigned by the Truck Foreman III or the Truck Foreman III's designated representative. While so assigned, drivers will be required to perform other minor duties when operation of the truck is not required.

4-3.01 Workers entering the warehousing activity who do not meet the minimum qualifications for Warehouse Worker shall be classified as Warehouse Worker trainees. Such an employee shall be subject to training and periodic examinations in accordance with a standard training plan similar to that for apprentices. Promotion to Warehouseman shall be granted only upon recommendation of a board of experienced employees and supervisors, following appropriate examination and evaluation of the trainee's qualifications for Warehouse Worker.

4-3.02 Warehouse Workers shall be considered journey-men and shall perform all the duties of a Warehouse Worker in receiving, storing, and issuing materials and equipment. They will use the tools of the trade including lift trucks.

Provision 14

SUPPLEMENTARY AGREEMENT NO. 5

WORKING RULES FOR MACHINIST CRAFT SERIES

5-1 The Ross Machine Shop shall be supervised by a Machinist Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Machinist Foreman I may be assigned to assist the Foreman III in the shop. When the regular Foreman III is on leave, the Foreman I will be assigned the responsibility of the shop and, after 15 consecutive working days, paid at the Machinist Foreman III rate of pay. When both the Foreman III and I (if any) are on leave, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 118 percent rate of pay beginning on the first full half day of such leave.

5-4 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman-in-Charge rate of pay.

5-5 When two or more journeymen are assigned to swing shift duty without other supervisors and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

5-6 An Aircraft Machinist (one-machinist shop) is a journeyman who is also responsible for day to day routine operation of a one-machinist shop including making reports and ordering supplies and parts.

5-15.01 The Ross Blacksmith Shop shall be supervised by a Blacksmith Foreman I who is a qualified journeyman in the trade.

Provision 15

SUPPLEMENTARY AGREEMENT NO. 6

WORKING RULES FOR PAINTER CRAFT SERIES

6-1 The Ross Paint Shop shall be supervised by a Painter Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Painter Foreman I may be assigned to assist the Foreman III in the shop. When the regular Foreman III is on leave, the Foreman I will be assigned the responsibility for the shop and paid at the 118 percent rate of pay beginning on the first full half day of such leave.

6-3 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field, and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman- in-Charge rate of pay.

6-4 When two or more journeymen are assigned to swing shift duty without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

Provision 16

SUPPLEMENTARY AGREEMENT NO. 7

WORKING RULES FOR SHEET METAL CRAFT SERIES

7-1 The Ross Sheet Metal Shop shall be supervised by a Sheet Metal Mechanic Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Sheet Metal Mechanic Foreman I may be assigned to assist the Foreman III in the shop. When the regular Foreman III is on leave, the Foreman I will be assigned the responsibility of the shop and, after 15 consecutive working days, paid at the Sheet Metal Mechanic Foreman III rate of pay. When both the Foreman III and I (if any) are on leave, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 118 percent rate of pay beginning on the first full half day of such leave.

7-3 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field and the crew consists of at least one other journeyman, supervision from within this craft shall be provided at the Journeyman-in-Charge rate of pay.

7-4 When two or more journeymen are assigned to swing shift duty without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

Provision 17

SUPPLEMENTARY AGREEMENT NO. 8

WORKING RULES FOR CARPENTER CRAFT SERIES

8-1 The Ross Carpenter Shop shall be supervised by a Carpenter Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Carpenter Foreman I may be assigned to assist the Foreman III in the shop. When the regular Foreman III is absent, the Foreman I will be assigned the responsibility of the shop and, after 15 consecutive working days, paid at the Carpenter Foreman III rate of pay. When both the Foreman III and I (if any) are absent, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 118 percent rate of pay on the first full half day of such absence.

8-3 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field, and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman- in-Charge rate of pay.

8-4 When two or more journeymen are assigned to swing shift duty without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

Provision 18

SUPPLEMENTARY AGREEMENT NO. 9

WORKING RULES FOR OPERATING ENGINEER CRAFT SERIES

9-1 The operation of pull graders, motor patrols, pole hole diggers, hydraulic backhoes, churn and core drills, and crawler and wheeled tractors, and ditchwitch/trenching machines larger than 35 HP with attachments shall be performed by Tractor Operators (provided there are no additional attachments on equipment below 35 HP) except that tractors which are regularly assigned to transmission line maintenance crews may be operated as provided in the Memorandum of Understanding dated May 19, 1954, and tractors may also be operated in accordance with the Memorandum of Understanding dated May 28, 1968.

9-2 Crane Operators operate crawler shovels, truck cranes and hydrocranes, etc., with any of their attachments and hydrolifts in accordance with the Memorandum of Understanding dated June 20, 1968, which reads as follows:

> "When a hydrolift truck is used to transport material within a yard or to jobsite it shall be Teamsters' jurisdiction. When the truck remains at the jobsite for erection purposes the crane shall be operated by the Operating Engineer at the Crane Operator rate of pay and the teamster may remain at the job and move the truck as needed." (See 4-2.04 also.)

9-3 A Truck Crane Oiler-Driver shall normally drive the truck portion of truck-mounted crane, inspect and lubricate the mechanism, flag, check grade, care for and maintain block and chokers, and generally assist the Crane Operator.

9-4 Tractor Operators and Crane Crews will be responsible to and will take orders from the supervisor to whom they are assigned by the Transportation Officer or a designated representative. While so assigned, these personnel will be required to perform other minor duties when operation of their machine is not required.

9-5 When other adequate supervision is not available to lay out and provide general guidance for work performed by this craft in the field and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman-in-Charge, Equipment Foreman I or III rate of pay. When the job includes multiple earth moving activities such as excavating, filling, ditching and grading, and when the finished job must conform to specific elevations as prescribed by surveyors, grade stakes or blue tops, the supervisor shall be a Foreman III.

9-8 Journeymen members of this craft are responsible for the safe and efficient operation of their machines. Operators will not be required to perform any type and work which, in their judgment, endangers themselves or others.

Provision 19

SUPPLEMENTARY AGREEMENT NO. 10

WORKING RULES FOR LABORER CRAFT SERIES

10-1 When two or more journeymen are assigned to a nonstandard shift without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

Provision 20

SUPPLEMENTARY AGREEMENT NO. 11

WORKING RULES FOR HEAVY MOBILE EQUIPMENT MECHANIC CRAFT SERIES

11-1.01 The Ross Garage shall be supervised by a Foreman III who is a qualified journeyman in the trade. When the workload or size of the crew exceeds the ability of the Foreman III to provide effective supervision, a Foreman I may be assigned to assist the Foreman III in the shop. When the regular Foreman III is on leave, the Foreman I will be assigned the responsibility of the shop and after 15 consecutive workdays, paid at the Foreman III rate of pay. When both the Foreman III and I (if any) are on leave, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 118 percent rate of pay beginning on the first full half day of such leave.

11-1.02 Each field garage shall be supervised by a Foreman I (except one-mechanic shops). When the size of the hourly crew supervised exceeds four other employees, the Foreman I will receive 115 percent of journeyman rate. When the Foreman I is on leave, a journeyman member of the craft will be assigned the responsibility for the shop and paid at the 107.5 percent of journeyman rate of pay beginning on the first full half day of such absence. When the journeyman replaces the Foreman I and the size of the hourly crew is four other employees, the journeyman will be paid at the 112.5 percent rate of pay beginning on the first full half day of such absence.

11-3 When other supervision is not available to lay out and provide general guidance for work performed by this craft in the field and when the crew consists of at least one other journeyman, supervision from within the craft shall be provided at the Journeyman-in-Charge rate of pay.

11-4 When two or more journeymen are assigned to swing shift duty without other supervision and no planning, lay out or work scheduling is required, a journeyman member of the craft will be assigned to supervise the crew and will be paid at the Journeyman-in-Charge rate of pay.

11-5 A Heavy Mobile Equipment Mechanic (one-mechanic shop) is a journeyman who is also responsible for day-to-day routine operation of a one-mechanic shop including making reports and ordering supplies and parts.

Provision 21

SUPPLEMENTARY AGREEMENT NO. 12

WORKING RULES FOR LITHOGRAPHER AND REPRODUCTION SHOP SERIES

12.01 The Administrator and the Union agree that, in order to meet workload emergencies and provide training opportunities, employees in the Photographic, Direct Print, Lithographic, and Bindery Sections may be given temporary assignments in other sections of the Reproduction

Branch and employees from other sections of the Reproduction Branch may be given temporary assignments in the above-named Sections. An employee shall not be so reassigned for a period in excess of two pay periods for any one workload emergency. Whenever an employee is reassigned to work at a higher classification and performs duties at the journeyman level of such higher classification, the employee shall be paid at the higher rate for such work unless the reassignment is for training purposes.

APPENDIX B

2/ Section 704 of the Civil Service Reform Act of 1978 (CSRA) provides:

> Sec. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.
>
> (b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--
>
> (A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;
>
> (B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or
>
> (C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code.

3/ Section 9(b) of Pub. L. 92-392 provides as follows:

> Sec. 9.
>
> . . . .
>
> (b) The amendments made by this Act shall not be construed to--
>
> (1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

> (2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or
>
> (3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.

8/ H.R. Rep. No. 1403, 95th Cong., 2d Sess. 61-62 (1978) states as follows:

> Section 704(c) is intended to preserve the existing right of certain Federal prevailing rate employees to negotiate terms and conditions of employment. The committee intends that this subsection preserve unchanged the scope and substance of the existing collective bargaining relationship between the employees' representatives and the agencies involved. The subsection excludes these employees from the restrictions on the scope of collective bargaining under chapter 71, and grants them authority to negotiate pay and pay practices without regard to any provision of chapters 51, 53, and 55 of title 5, or other provisions relating to rates of pay or pay practices with respect to Federal employees.

Reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute of 1978, Committee Print No. 96-7, at 675 (1979) (hereinafter Legislative History).

9/ Congressman Ford stated as follows:

> During committee markup, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective

> bargaining heretofore enjoyed by certain trade and craft employees. . . . This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).
>
> Certainly, we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees. This provision of the bill would have the effect of overruling the two Comptroller General decisions, and would adopt his own suggestion for specific legislative authorization. The provision would specifically authorize the continuation of prior collective bargaining practices, and would allow these employees, whom Congress already sought to protect in the savings provision of 1972 wage board reform law, to continue to negotiate their _terms and conditions of employment_ in accordance with the prevailing practice principle. I do not intend to expand nor contract the scope of bargaining that existed prior to the Comptroller General decisions. In the past, these employees have negotiated wages, pay practices, and other practices in accordance with the prevailing practice principle. This has produced some of the most stable and effective collective bargaining in the history of public employee labor relations. It has enabled the Federal Government to procure and retain qualified craft employees who otherwise might choose employment in private industry, by insuring that they will enjoy comparable terms and conditions of employment. [Emphasis added.]

124 Cong. Rec. 25722 (1978), _Legislative History_ at 857.

_11_/ H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978), _Legislative History_ at 827, states as follows:

> CERTAIN COLLECTIVE BARGAINING AGREEMENTS
>
> Section 704(d) of the House bill provides certain savings clauses for employees principally in agencies under the Department of the Interior and the Department of Energy who have traditionally

negotiated contracts in accordance with prevailing rates in the private sector of the economy and who were subject to the savings clauses prescribed in section 9(b) of Public Law 92-392, enacted August 19, 1972.

The Senate contains no comparable provision.

The conference report adopts the House provision with an amendment.

As revised, section 704(d) overrules the decision of the Comptroller General in cases number B-L89782 (Feb. 3, 1978) [sic] and B-L9L520 (June 6, 1978), [sic] relating to certain negotiated contracts applicable to employees under the Department of the Interior and the Department of Energy. This section also provides specific statutory authorization for the negotiation of wages, terms and conditions of employment and other employment benefits traditionally negotiated by these employees in accordance with prevailing practices in the private sector of the economy.

Section 704(d)(1) authorizes and requires the agencies to negotiate on any terms and conditions of employment which were the subject of negotiations prior to August 19, 1972, the date of enactment of Public Law 92-392. Section 704(d)(1) may not be construed to nullify, curtail, or otherwise impair the right or duty of any party to negotiate for the renewal, extension, modification, or improvements of benefits negotiated.

Section 704(d)(2) requires the negotiation of pay and pay practices in accordance with prevailing pay and pay practices without regard to chapter 71 (as amended by this conference report), subchapter IV of chapter 53, or subchapter V of chapter 55, of title 5, United States Code, in accordance with prevailing practices in the industry.

20/ As to Provision 1, see Union Response to Agency Statement of Position at 30-31. See also Article 11.04 and 11.06 of the Collective Agreement Between the Administrator, Bonneville Power Administration and Columbia Power Trades Council, Revised July 1, 1971, as set forth in Exhibit D attached to the Union's Petition for Review (hereinafter referred to as the "1971 Agreement"), which provides for the joint labor-management apprenticeship committees to develop standard apprenticeship plans and minimum craft standards. As to Provision 2, see Union Response to Agency Statement of Position at 31-32. See also Article 12.10g of the 1971 Agreement, as set forth in Exhibit D attached to the Union's

Petition for Review, which appears to provide only for the employee to invoke arbitration. As to Provision 13, see Union Response to Agency Statement of Position at 32-33. See also Section 4-2.02 of Supplementary Agreement No. 4 of the 1971 Agreement, as set forth in Exhibit D attached to the Union's Petition for Review, which, contrary to the Agency's contention, prescribes limits on heavy truck drivers steering of pole trailers and Section 1-23 of Supplementary Agreement No. 1 of the 1971 Agreement, as set forth in Exhibit D attached to the Union's Petition for Review, which prescribes hours of work for all unit employees, including heavy truck drivers.

21/ H.R. Rep. NO. 339, 92d Cong., 1st Sess. 22 (1971) states as follows:

> Savings clause for existing agreements
>
> Section 9(b)(1) of the bill, with the committee amendment, provides that the amendments made by the Act shall not be construed to abrogate, modify, or otherwise affect the provisions of any existing contract pertaining to the wages, conditions of employment, and other employment benefits of Government employees, which contract resulted from negotiations between agencies and employee organizations. Paragraph (2) of section 9(b) states that the provisions of any contract in effect on the date of enactment of the Act may be renewed, extended, modified or improved through negotiation after the enactment date of the Act. Paragraph (3) of section 9(b) provides that the Act shall not affect any existing agreement between agencies and employee organizations regarding the various items which are negotiable, nor shall the Act preclude the inclusion of new items in connection with the renegotiation of any contract. [Emphasis added.]

9/Case No. 385

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NUMBER 385 REPORT OF CASE DECISIONS August 15, 1986

REPRESENTATION CASE

22 FLRA No. 104 (July 31, 1986)

United States Air Force, Seventh Combat Support Group, Carswell Air Force Base, Texas and American Federation of Government Employees, AFL-CIO, Local 1364, Case No. 6-CU-60001

UNFAIR LABOR PRACTICE CASES

22 FLRA No. 101 (July 31, 1986)

National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio and American Federation of Government Employees, Local 3840, AFL-CIO, Case No. 5-CA-50016

22 FLRA No. 105 (July 31, 1986)

National Treasury Employees Union and Department of the Treasury, Financial Management Service, Case No. 0-NG-1083

22 FLRA No. 106 (July 31, 1986)

American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland, Case No. 0-NG-1216

ARBITRATION CASES

22 FLRA No. 102 (July 31, 1986)

Naval Air Station, Whiting Field and American Federation of Government Employees, Local Union No. 1954 (Fulford, Arbitrator), Case No. 0-AR-562

Y 3.F31/21-3:

22 FLRA No. 103 (July 31, 1986)

Veterans Administration Hospital, Bath, New York and American Federation of Government Employees, Local 491 (La Manna, Arbitrator), Case No. 0-AR-1065

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

July 31, 1986

0-AR-1144

0-AR-1159

0-AR-1179

22 FLRA No. 101

Federal Labor Relations Authority

Nat'l Institute for Occupational Safety and Health, Cincinnati, Operations, Cincinnati, Ohio and AFGE Local 3840,
Case No. 5-CA-50016
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	
Agency Violations	7102(1)
Interference [§ 7116(a)(1)]	7116(a)(1)
Coercive Interrogation of Employee	7118
Protected Union Activity	
Affidavit in District Court Proceeding	
Proposed Suspension of Employee	
Remedy	
District Court Action	
Delete References from Employees Personnel File	
Revoke Suspension	
29 CFR 1613.201 *et seq.*	
5 U.S.C. § 2302(b)(8)(A)(i)	
18 U.S.C. § 1512	
42 U.S.C. § 2000e-16(a) and (b)	

DIGEST NOTES

In agreement with the Judge, the Authority found that the agency violated § 7116(a)(1) by coercively interrogating a unit employee and thereafter proposing disciplinary action against the employee in connection with her refusal to supply the names of employees referenced in an affidavit requested of her pursuant to a pending District Court proceeding. The interrogation of the employee clearly resulted from her exercise of protected activity. Thus, the Authority noted the Judge's finding that the affidavit was prepared by the employee while acting as a representative of the union, and that the questions posed and answered in the affidavit reflect that it was executed by the employee in a representational capacity in an effort to remedy discriminatory practices affecting bargaining unit employees. The Authority agreed with the Judge's finding that management's interrogations and threats necessarily conveyed to the employee and other bargaining unit members the clear message that discipline, harassment, or both would follow as a direct result of pursuing legitimate union interests. The Authority found it unnecessary to pass upon whether the agency contravened established Equal Employment Opportunity Commission (EEOC) regulations and other laws cited by the Judge.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 102

Federal Labor Relations Authority

Naval Air Station, Whiting Field and AFGE Local 1954
(Fulford, Arbitrator), Case No. 0-AR-562
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award
    - Set Aside
      - Award Contrary to Back Pay Act
      - Award Contrary to Statute
        - § 7106(a)(2)(B)
  - Contracting Out
    - Standards for Arbitral Review
  - Exceptions Asserted in Appeal
    - Award
      - Contrary to Back Pay Act
      - Contrary to Statute
        - § 7106(a)(2)(B)
  - Procedure
    - Contentions in Exceptions
      - Disposition of Award Renders Unnecessary Addressing Remaining Contentions
  - Remedy
    - Cancel Procurement Action
    - Reinstatement with Back Pay
- Negotiability
  - Management Rights
    - Contracting Out [§ 7106(a)(2)(B)]
      - Standards for Arbitral Review
  - Generally
    - Arbitral Review
- Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747
- Pub. L. No. 96-342, § 502

STATUTE

7106(a)(2)(B)
7122(a)

DIGEST NOTES

The arbitrator sustained the union's grievance that under Pub. L. No. 96-342, in order to have contracted out the maintenance functions, alone, the agency was required to conduct a new cost comparison after it modified the procurement contract to delete firefighting functions. The arbitrator's award directed the agency to terminate the procurement action and to reinstate the employees involved with appropriate backpay.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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In its exceptions, the agency contended that the award was contrary to management's right under § 7106(a)(2)(B) to make determinations with respect to contracting out. The agency also contended that the direction to reinstate affected employees with backpay is contrary to the Back Pay Act. Addressing for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work, the Authority in Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986) held that an arbitrator can sustain a challenge to a procurement action only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. In the subject case, the Authority found that the arbitrator was not authorized to sustain the grievance on the basis of an obligation that the arbitrator "felt" Congress intended in Pub. L. No. 96-342, but did not specifically provide. Therefore, it was found that the arbitrator's award sustaining the grievance and directing the agency to terminate the procurement action is contrary to § 7106(a)(2)(B). In view of this conclusion, it was determined that the arbitrator's direction to reinstate the affected employees with backpay is likewise deficient. Accordingly, the award was set aside.

Federal Labor Relations Authority

22 FLRA No. 103

VA Hospital, Bath, N.Y.
and AFGE Local 491
(La Manna, Arbitrator),
Case No. 0-AR-1065
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Contrary to Statute
      - § 7106(a)(2)(A)
      - § 7106(a)(2)(B)
  - Exceptions Asserted in Appeal
    - Award
      - Contrary to Statute
        - § 7106(a)(2)(A)
        - § 7106(a)(2)(B)
  - Performance Appraisal System
    - Scope of Arbitral Review
- Negotiability
  - Generally
    - Arbitral Review
  - Management Rights
    - Direct Employees [§ 7106(a)(2)(A)]
      - Arbitral Review of Employee Performance Appraisal
    - Assign Work [§ 7106(a)(2)(B)]
      - Arbitral Review of Employee Performance Appraisal

STATUTE

7106(a)(2)(A) and (B)
7122(a)

DIGEST NOTES

The agency having conceded that the grievant had been improperly evaluated in violation of the collective bargaining agreement, the arbitrator stated the issue to be one of remedy, and directed the agency to: (1) properly reevaluate the grievant's performance for the disputed appraisal period; and (2) issue a fully satisfactory or higher performance rating to the grievant for the disputed appraisal period.

While agreeing that the arbitrator appropriately directed management to properly reevaluate the grievant's performance under the established elements and standards, the agency in its exceptions maintained that by additionally ordering that the grievant's rating be no less than fully satisfactory, the award is, to that extent, contrary to management's rights under § 7106(a)(2)(A) and (B). By directing the agency to rate the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

grievant's performance no lower than fully satisfactory, the Authority found that the arbitrator improperly substituted her judgment for that of management contrary to § 7106(a)(2)(A) and (B). Accordingly, the award was modified to strike any order or direction as to what the grievant's performance rating for the disputed appraisal period should be after reevaluation by management. The Authority has recently held that in resolving disputes pertaining to performance appraisal matters, an arbitrator may: (1) resolve employee grievances claiming that management's application of established performance standards adversely affected the employee's performance appraisal; (2) sustain the grievance on finding that management applied the standards in violation of law, regulation, or an appropriate provision of the parties' collective bargaining agreement; and (3) as a permissible remedy, direct that the grievant's work product be properly evaluated by management. However, the Authority has cautioned that the arbitrator may not substitute his or her own judgment for management's in deciding what the employee's evaluation and rating should be.

Federal Labor Relations Authority

22 FLRA No. 104

U.S. Air Force, Seventh Combat Support Group, Carswell AFB, Texas and AFGE Local 1364, Case No. 6-CU-60001 (Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

Representation
  Procedure
    Standing
      Party, Definition of
      Application for Review
      Clarification of Unit (CU) Petition
5 CFR 2421.11
5 CFR 2422.1(d)
5 CFR 2422.17

STATUTE

7105(e)(1) and (f)

DIGEST NOTES

The Authority dismissed an application for review of a Regional Director's Decision and Order because it was filed by an employee who did not have standing to so file. Under 5 CFR 2422.17, only a "party" can file an application for review in a representation proceeding. Under 5 CFR 2421.11, a party is defined as any person: (1) filing a charge, petition or request; (2) named in a charge, complaint, petition, or request; (3) whose intervention in a proceeding has been permitted or directed by the Authority. The subject employee is not a party to the case. The activity filed the underlying clarification of unit (CU) petition; only an agency/activity or labor organization can file such a petition under 5 CFR 2422.1(d). The employee was: (1) not the subject of the CU petition; (2) not the representative of the union in the proceeding; and (3) not granted intervention status by the Authority.

22 FLRA No. 105

Federal Labor Relations Authority

NTEU and Dep't of Treasury,
Financial Management Service,
Case No. 0-NG-1083
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7103(a)(14)
Conditions for Employment	7105(a)(2)(E)
Travel and Per Diem	
Conditions for Review	
Inconsistent with Government-wide Rule or Regulation	
Federal Travel Regulations [41 CFR, Part 101-7]	
Travel Expense Act [5 U.S.C. §§ 5701 *et seq.*]	

DIGEST NOTES

A proposal concerning travel and per diem is negotiable. The agency's argument that the proposal does not involve conditions of employment was summarily rejected by the Authority for the reasons set forth in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) appealed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986). The proposal is within the duty to bargain as it is within the agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. The negotiability of travel and per diem is based on consideration of whether the travel involved is in the primary interest of the Government so as to constitute official business without consideration of § 7131 official time. The Authority noted the agency did not cite any legal or regulatory provision which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is in the primary interest of the Government. Also, the union acknowledges that provisions of the Travel Expense Act and the Federal Travel Regulations apply. Thus, the Authority finds the proposal is within the duty to bargain.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 106

Federal Labor Relations Authority

AFGE, Local 1923 and
Dep't of HHS, Office of
the Secretary, Office of
the GC, Baltimore, Md.,
Case No. 0-NC-1216
(Decided July 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Contracting Out
    - Arbitral Review
      - Need not Infringe on Management's Reserved Authority
    - Arbitrator May Not Substitute His/Her Judgment for that of Agency
    - OMB Circular A-76 Does Not Restrict Statutory Rights to File Grievances
  - Management Rights
    - Contracting Out [§ 7106(a)(2)(B)]
      - Comply with OMB Circular A-76

STATUTE

- 7103(a)(9)
- 7105(a)(2)(E)
- 7106(a)(2)(B)
- 7114(c)
- 7117(a)(1)
- 7121

DIGEST NOTES

A proposal which provides that "[t]he decision by the employer to contract out work presently being performed by bargaining unit employees will be made in accordance with OMB Circular A-76 (unless application of the Circular is prohibited or not required by the Ciruclar)," is negotiable. The Authority concluded that the proposal would only contractually recognize external limitations on management's right and would not itself establish any particular substantive limitation on management in the exercise of that right. The Authority further noted, that the provision (1) did not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure; (2) would not prevent management from reaching the decision to contract out or from implementing that decision; (3) does not create any new right of appeal since the right to file grievances concerning contracting-out decisions is created by the Statute and nothing in OMB Circular A-76 restricts the statutory right to file such grievances. The Authority again emphasized that in reviewing management's contracting out actions for conformity with applicable laws and regulations, an arbitrator may not substitute his or her judgment for that of the agency. *See Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840*, 22 FLRA No. 72, slip op. at 6-7 (1986).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL INSTITUTE FOR OCCUPATIONAL
SAFETY AND HEALTH, CINCINNATI
OPERATIONS, CINCINNATI, OHIO

Respondent

and

Case No. 5-CA-50016

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3840, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order as modified below.

In agreement with the Judge's conclusion, the Authority finds that Respondent violated section 7116(a)(1) of the Statute, within the totality of circumstances of this case, by coercively interrogating a unit employee and thereafter proposing disciplinary action against the employee in connection with her refusal to supply the names of employees referenced in her court affidavit.1/

1/ In so concluding the Authority finds it unnecessary to pass upon whether the Respondent contravened established Equal Employment Opportunity Commission (EEOC) regulations and other laws cited by the Judge.

In determining that the interrogation of employee Handke resulted from her exercise of protected activity, we note particularly the Judge's findings on page 12 of his decision:

> The circumstances presented in this case indicate that the affidavit was prepared by Handke while acting as a representative of the Union. The questions posed and answered in the affidavit reflect that it was executed by Handke in a representational capacity in an effort to remedy discriminatory practices affecting bargaining unit members . . . . Handke's representational activity dominates the picture presented by the evidence. At the time the affidavit was planned she was concluding her term as president of the Union. She was a Union representative on the Respondent's EEO Committee. Her work location was the focal point of Union activity, and in 1981-1982, she had served as a Union steward.

Further, we fully agree with the Judge's findings on page 16 that "[t]he conduct conveyed to Handke, and other bargaining unit members, the clear message that discipline and/or harassment would follow as a direct result of the pursuit of legitimate Union interests."

ORDER[2/]

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, shall:

[2/] The Authority agrees with the Judge that, in light of the District Court Order providing for the revocation of Handke's suspension and for deletion of all relevant references to insubordination in Handke's personnel file, a cease and desist order, together with a posting, would best effectuate the purposes and policies of the Statute.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Jan Handke, or any other employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute, by conducting interrogations concerning protected union activity, and by threatening disciplinary action for failing to disclose details of information relating to such protected union activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at the National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 31, 1986.

Calhoun

Jerry Lee Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce Jan Handke, or any other employee, in the exercise of rights assured by the Federal Service Labor-Management Relations Statute, by conducting interrogations concerning protected union activity, and by threatening disciplinary action for failing to disclose details of information relating to such protected union activity.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated:____________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604, and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NATIONAL INSTITUTE FOR OCCUPATIONAL
SAFETY AND HEALTH, CINCINNATI
OPERATIONS, CINCINNATI, OHIO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3840, AFL-CIO

Charging Party

Case No. 5-CA-50016

Alan S. Dorn, Esquire
For the Respondent

Judith A. Ramey, Esquire
For the General Counsel

James P. Agee, Esquire
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint alleged that on or about June 19, 1984, and July 16, 1984, the National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio (Respondent or NIOSH), through the conduct of Philip J. Bierbaum and F. Sutton Kay, violated Section 7116(a)(1) of the Statute by interrogating a representative of American

Federation of Government Employees, Local 3840, AFL-CIO (Charging Party or Union) concerning the identities of five NIOSH employees referred to in an affidavit prepared by the representative in conjunction with a pending court case, and in conjunction with representational duties performed on behalf of the Union. The complaint also alleged that on the same dates the Respondent, through Bierbaum and Kay violated Section 7116(a)(1) by threatening to discipline the Union representative for failing to reveal the identities of the five NIOSH employees referred to in the affidavit.

Counsel representing the Respondent contends that Respondent's representatives were conducting a legitimate inquiry to help establish evidence of discriminatory practices, and further that under the circumstances presented herein the conduct outlined was not violative of Section 7116(a)(1).

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including exhibits, and other relevant evidence adduced at the hearing, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

General Background Information

The record reveals that the Respondent's activities in Cincinnati are operated and supervised by the Centers for Disease Control, Department of Health and Human Services (CDC), through a facility in Atlanta, Georgia known as Headquarters, National Institute for Occupational Safety and Health. The Union is the exclusive representative of a unit of Respondent's employees consisting of certain professional and non-professional General Schedule and Wage Grade employees.[1] Philip J. Bierbaum has served as the Deputy Director of Respondent's Division of Surveillance, Hazard Evaluations and Field Studies (DSHEFS) since 1976. F. Sutton Kay has been employed as Operation Management Officer for DSHEFS, under Bierbaum, since 1977 or 1978.

The Union official referred to in the complaint was identified as Jan Handke, an epidemiologist in DSHEFS. Handke served as President of the Union for a one year period ending on May 7, 1984, when the position was taken over by James P. Agee, Handke's successor (Tr. 17, 22-23). During the preceding year (1982-1983), Handke served a term as the Union's

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[1] The Union represents about 300 bargaining unit members out of a total of approximately 500 to 600 employees engaged on behalf of the Respondent in Cincinnati.

Vice-President, and during the year 1981-1982 she served as the Union's Steward for DSHEFS (Tr. 22). Since October 10, 1982, Handke has served as a Union representative on the Respondent's Equal Employment Opportunity (EEO) Committee. The Committee was established under the terms of the collective bargaining agreement governing the labor relations of the Respondent and the Union (Jt. Exh. No. 1 at 9; Tr. 18-19). The EEO Committee meets quarterly for the purpose of assisting the Respondent to develop and implement a more effective EEO program (Jt. Exh. No. 1 at 10). The Committee deals generally with affirmative action policy, and discusses individual problems at times (Tr. 133). Handke was also selected to serve as the Union's EEO Fair Practices Coordinator. The selection was made at a Union meeting in June of 1984 by James P. Agee, the current Union President (Tr. 17).

Handke's identification with the Union was further established by the fact that during the period that she served as President of the Union, her office was enlarged to provide additional space for the Union as required by the collective bargaining agreement (Tr. 23-24). Union files were maintained at her office work location in space provided by the Respondent, and Union business was conducted at her work location.

Handke's Association with Union Representational Duties on Behalf of James E. Peguese

James E. Peguese was employed as an industrial hygienist in DSHEFS from approximately 1981 until May of 1984 (Tr. 24-25). He filed two grievances, both of which were handled by the Union (Tr. 152). The first was filed in March of 1984 to protest an unsatisfactory performance rating (Tr. 27, 116).[2] The grievance interposed objection to the rating and also alleged a failure to follow relevant provisions of the collective bargaining agreement in the preparation of Peguese's performance rating (Tr. 118). Peguese's second grievance related to Respondent's denial of a within-grade pay increase (Tr. 27-28). It was not pursued to arbitration because it was felt that the arbitrator's decision relating to the first grievance would dispose of issues posed in the second (Tr. 28).

As President of the Union Handke discussed Peguese's grievances with Union stewards assigned to handle them, and met with Peguese and stewards on at least three occasions to discuss them (Tr. 29-31). She was involved in decisions made at each step of the grievance procedure (Tr. 30-31).

In the latter part of March 1984, after the initiation of the Peguese grievances, Peguese was served with a letter of proposed separation (Tr. 31). Peguese retained Lee Thompson, a Columbus, Ohio attorney to represent him in connection with this proposed adverse action (Tr. 37-38, 134). The removal action, like the two earlier grievances involved the issue of poor performance (Tr. 118-119, 153).

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[2] This grievance eventually went to arbitration and was pending decision at the time of hearing.

In addition to Peguese's use of the adverse action procedure to oppose Respondent's proposed letter of separation, Peguese also initiated an EEO complaint in an attempt to defeat Respondent's efforts to remove him (Tr. 33-34, 153). The complaint, based upon a charge of racial discrimination, alleged that Bierbaum and Kay were the officials responsible for the discriminatory conduct designed to effect his removal (Tr. 72, 118, 150-151).

On March 30, 1984, Peguese designated the Union to represent him during the informal stage of his EEO complaint, and Jan Handke was designated to serve as his Union representative (G.C. Exh. No. 2, Tr. 33-34). Handke accompanied Peguese to a meeting with the EEO Counselor assigned to the case, and her name appears on the "Designation of Representative" form as well as other documents filed in connection with the informal stages of the EEO proceeding (Tr. 34-35). As a result of this Union representational activity, Handke was very familiar with the issues raised in the Peguese EEO complaint (Tr. 151-152).

Circumstances Surrounding Preparation of Affidavit for Filing in James E. Peguese v. United States, et al, Case No. C-1-84-896, United States District Court, Southern District of Ohio

Following the issuance of the EEO Counselor's report in the latter part of April 1984, Peguese retained his attorney Lee Thompson to replace Handke as the representative of record for the formal stage of the EEO proceeding (Tr. 33-34, 38). At about the same time Thompson filed an action in the United States District Court for the Southern District of Ohio to enjoin the adverse action proceeding brought to remove Peguese (Tr. 41-42). At this point Thompson was acting as Peguese's representative in defense of the removal action, as attorney of record in the EEO proceeding, and as Peguese's attorney in the District Court action. However, the Union continued to represent Peguese in connection with grievances filed under the negotiated grievance procedure.

Peguese advised Handke of Thompson's interest in Handke's preparation of an affidavit relating to knowledge gained by Handke through her representation of Peguese during the informal stage of the EEO proceeding (Tr. 42). Upon the basis of knowledge gained as a Union official Handke agreed to express her view that Peguese had been subjected to racial discrimination (Tr. 151). On May 5, 1984, just prior to the expiration of her term as Union President, Handke wrote Thompson to confirm that she would prepare an affidavit as a witness in the District Court proceeding, but noted that she would need a list of questions Thompson wished to have answered in the affidavit (G.C. Exh. No. 3).

Thompson's questions were delivered to Handke on May 7, 1984, and the affidavit was prepared by Handke on May 7 and 8, 1984. She utilized Union grievance files located in her office to verify some of the dates incorporated into her responses (Tr. 45-46).

The affidavit, included in the record as G.C. Exh. No. 4, reflects questions and answers relating to Handke's Union membership; Union offices held during 1983 and 1984;[3] responsibilities and duties assumed as Union Vice-President, and President; Handke's personal knowledge regarding Respondent's proposals to remove white and black employees in 1983 and 1984; and whether Handke thought the Peguese removal action involved unfair treatment.

Question (7) of the affidavit requests Handke to state her "personal knowledge regarding management at NIOSH-Cincinnati Operations proposing to remove white and black employees in 1983 and 1984." Handke's affidavit reflected the following language relative to this inquiry:

> In June 1983 Mr. Jon Ruse, head of the Personnel Office at NIOSH-Cincinnati Operations gave the only black clerk-typist in his office a letter stating she would be fired. The date of implementation was about two days before she would have completed her one-year probationary period as a permanent employee and have the right to appeal to the Merit System Protection Board. She refused to resign so that she would have the right to file a formal EEO complaint and clear her name. As a result of pressure on management at NIOSH-Cincinnati Operations by concerned employees, she was then immediately rehired by another supervisor as a temporary employee. Since then she has informed me she received two "exceeded" ratings on her annual performance evaluation in January, 1984.

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[3] The affidavit indicates that she served as President during the period "May 1983 - April 1984"; however, it appeared from the record that Handke's successor was the President Elect until he assumed office on May 7, 1984, and that Handke's term of office did not technically terminate until May 7, 1984 (Tr. 17, 22-23).

> In July 1984[4] a white clerk-typist in the Division of Surveillance, Hazard Evaluations and Field Studies (DSHEFS) discussed with me a letter she received proposing that she be fired. This firing was reversed by officials in Atlanta and she was allowed to transfer to another Division.
>
> Around December 1983 a white health technician in DSHEFS received a letter proposing that he be fired. This firing was reversed by officials in Atlanta and he was given a 30-day suspension.
>
> In March 1984 a black industrial hygienist in DSHEFS received a letter proposing that he be fired. This action is currently being appealed to officials in Atlanta.
>
> In April 1984 my immediate supervisor informed me he was going to fired [sic] a black clerk-typist. I argued strongly that this was unfair and discriminatory since she was being treated differently from a white male doctor in the same Section who was asked to resign by the Director of DSHEFS. (This white male doctor subsequently transferred to a different supervisor.) My immediate supervisor then reversed his decision and the clerk-typist was laid off.

The affidavit reflects that Handke refused to name the individuals referred to in Question (7). She responded that she could not reveal the names because of "confidentiality." (G.C. Exh. No. 4 at Question (8)). Her testimony at the hearing established that she did not intend to conceal the identity of the individuals referred to from "NIOSH management," and that she included sufficient detail for management to identify the employees involved (Tr. 71, 109-110). To this end she supplied relevant dates, and identifying data relating to employee job titles, race, sex, and office location, together with descriptive phrases about surrounding circumstances (Tr. 109-110). However, she did not wish to disclose the names of employees publicly in the affidavit because she wanted to protect the reputations of the employees who had in the past been subjected to proposed removals, and because she had been advised by the Union's District Office to consider the names confidential until the District Judge ordered her to reveal the names (Tr. 108-109). Her testimony established that these matters involved Union grievances which were considered confidential by the Union (Tr. 110).

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[4] Handke's testimony established that the date used in the affidavit was a typographical error, and that "July 1983" was intended (Tr. 58).

The record revealed the following relative to the Union's representational interest in the episodes outlined in the Handke affidavit:

The June 1983 Episode[5] - This episode involved Florence Darks, an employee in Respondent's Personnel Office. She was not a member of the bargaining unit. Handke became aware of the matter as a result of employees reporting to her as the Union President, and then as a result of Darks asking the Union to represent her in connection with an EEO complaint arising out of management efforts to terminate her employment. Handke was designated as her representative (G.C. Exh. No. 5, Tr. 47-48). Thereafter Handke represented her as a Union representative during the informal stage of her EEO complaint, and as an individual during the formal stage of the EEO proceeding (Tr. 50-51). The matter was of special concern to the Union and was the subject of Union Executive Committee discussion on more than one occasion (Tr. 52-53, 55). The informal stage of the EEO proceeding lasted many months (Tr. 54), and involved a number of Union sponsored initiatives (Tr. 56).

The July 1983 Episode - This matter involved Linda Smith, a bargaining unit employee in DSHEFS. Smith requested the Union to represent her when management threatened to terminate her employment (Tr. 58-60). Smith sought out Handke personally; and Handke and another Union official served as designated Union representatives (G.C. Exh. No. 6, Tr. 62, 127-128). Although Smith did not file a formal grievance, the Union represented her interests in the matter through informal contacts with management (Tr. 126-127, 131). The matter was resolved by classifying Smith as a handicapped person with a learning deficiency. She was demoted and retained as an employee (Tr. 63).

The December 1983 Episode - This segment of the affidavit involved Dorris Hale a bargaining unit employee in DSHEFS. Handke became aware of the case when Hale received a letter indicating that management planned to terminate Hale's employment. Hale contacted the Union and requested representation, and a Union representative handled Hale's administrative appeal (Tr. 64-65). Handke had conversations with Hale, and discussed strategy with the designated Union representative (Tr. 66-67). As a Union representative Handke also had conversations with Bierbaum, Kay and other management officials concerning the Hale matter (Tr. 67-68).

The March 1984 Episode - This paragraph of the affidavit refers to the previously outlined efforts to terminate the employment of James E. Peguese because of poor performance.

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[5] For convenience the five episodes mentioned by Handke in reply to Question (7), are referred to by dates used in the Handke affidavit.

The April 1984 Episode - This element of the affidavit refers to a matter involving one Kim Gordon, a black clerk-typist who was not a member of the bargaining unit. Handke became personally aware of the plan to terminate Gordon, and in a personal capacity, intervened on Gordon's behalf with management officials (Tr. 69-70).

Handke Interrogated by Bierbaum and Kay Following Filing of Handke Affidavit in United States District Court Action

On May 9, 1984, Lee Thompson, acting as Peguese's attorney, filed the Handke affidavit in the United States District Court proceeding brought to obtain a temporary restraining order in the Peguese adverse action proceeding (Tr. 72). The affidavit was submitted to the District Court as the statement of a witness testifying on behalf of Peguese to establish an evidentiary basis for a temporary restraining order.

The filing of the affidavit came to the attention of Kay, who then phoned Everett L. Martin, Chief of Labor and Employee Relations for CDC in Atlanta (Tr. 160). Martin and Kay decided that it would be necessary to interrogate Handke to obtain the exact identity of individuals that Handke referred to in factual situations outlined in her affidavit. According to Kay and Martin it was further determined that Kay should undertake this assignment so that the names could be turned over to the appropriate people at CDC for the purpose of initiating further investigation to determine whether discriminatory actions had in fact occurred (Tr. 161, 172-173, 186).6/ However, as will be described in more detail herein, Respondent's representatives were then completely aware of the identity of individuals referred to in the affidavit. One purpose of the interrogation was made clear. The interrogation was proposed as part of Respondent's efforts to prepare a defense for use in the District Court action (R. Exh. No. 2 at 11).

Kay summoned Handke to his office on June 19, 1984. She attended the meeting with C. K. Wang, Vice President of the Union, who acted as here reprentative (Tr. 73). At the meeting Kay and Bierbaum advised Handke that the allegations were serious, and that disclosure of the identity of the individuals to Kay and Bierbaum was necessary to permit NIOSH to initiate an investigation into discriminatory practices to see if they existed, and to provide a basis for appropriate action (Tr. 105, 112, 162). Kay's testimony indicated that he and Bierbaum were the individuals conducting the investigation (Tr. 166). They asked her if she had prepared

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6/ Martin's testimony established that neither Handke nor Peguese were suspected of any criminal activity or wrongdoing in connection with the information presented in the affidavit (Tr. 203-204).

the affidavit, whether or not she had signed it, and then requested her to identify the individuals referred to in the document (Tr. 75-76, 163). The record as a whole indicates the first two questions were unnecessary inasmuch as Kay and Bierbaum knew that she had prepared the affidavit before Kay scheduled the interview. It was also clearly established that Kay and Bierbaum, and/or other NIOSH officials knew the identity of the individuals referred to in the document. This fact was admitted during the interview (Tr. 77, 79, 143, 149, 173-175, 178-179, 181).

Handke acknowledged that the affidavit was hers but refused to name the individuals because of possible civil liability related to her disclosure under the circumstances; because she did not know the legal basis for Kay and Bierbaum insisting upon disclosure, and lastly, because the affidavit had been filed in connection with the then pending Federal court case (Tr. 164). Bierbaum and Kay strongly disagreed with her refusal and conveyed to Handke, erroneous information to the effect that the court case had been settled (Tr. 77-78, 164). On behalf of Handke, Wang informed Kay and Bierbaum that the Federal case was still pending and that there were appropriate court procedures for interrogating witnesses (Tr. 76-77). Kay and Bierbaum insisted that she answer and threatened her with discipline for failing to reveal the names (Tr. 78). Handke repeatedly stated that she would be willing to provide the names "in the proper legal format." (Tr. 78-79). Kay and Bierbaum became uncertain about the status and the effect of the Federal case and decided to terminate the interrogation at this point (Tr. 166).

Following the meeting Handke wrote directly to the Director of DSHEFS to express concern about Division policy concerning such interviews, and to inquire whether he thought the meeting appropriate (Tr. 80, 83). Her Union representative sent a similar letter to Kay and Bierbaum. He noted objections to the questioning because of the pending court case, and mentioned the need to follow appropriate civil procedure in such cases (Tr. 83-84).

As a followup Kay contacted Everett Martin in Atlanta concerning the interview. Martin stated that he would communicate with the Office of the United States Attorney as they were handling Respondent's defense in the District Court proceeding (Tr. 168). Martin called Kay back to advise that Kay and Bierbaum should postpone any further questioning (Tr. 168, 187). However, on July 13, 1984, Martin phoned Kay to advise that he (Martin) had again discussed the matter with the United States Attorney's Office and that an Assistant United States Attorney had advised that they could resume their interview of Handke (Tr. 169, 187-188).

On July 16, 1984 Kay and Bierbaum again summoned Handke to a meeting for the purpose of continuing the interrogation (Tr. 80-81). Bierbaum conducted most of the interrogation on this occasion (Tr. 169). C. K. Wang again represented Handke. In response to an inquiry from Wang concerning a failure to reply to Handke's and Wang's letters concerning the propriety of the June 19th meeting, Bierbaum stated that the letters were not worthy of a response (Tr. 83-84). Bierbaum stated that the United States Attorney's Office had advised that the questions previously posed would have to be answered, and repeated the three questions asked on June 19th even though Handke had previously stated that she had prepared and signed the affidavit, and even though they knew the identity of the individuals referred to therein (Tr. 86-87, 169-170). He and Kay repeatedly demanded answers, and at 3:20 P.M. threatened her with discipline based upon insubordination if she did not respond by 3:30 P.M. (Tr. 87-88, 89). Again Handke stated that she would cooperate in an appropriate legal setting (Tr. 89). At 3:30 P.M. Bierbaum declared that the meeting was over (Tr. 89).

Wang again addressed letters to NIOSH on behalf of Handke after this meeting, and Bierbaum had verbal conversations with Wang about the matter (Tr. 182). Bierbaum indicated that there would be no response to his letters, because the Respondent's position had been stated (Tr. 182-183).

On August 7, 1984, Handke was served with a notice that NIOSH intended to suspend her for a period of six months for her refusal to identify the individuals referred to in the affidavit (G.C. Exh. No. 7). The notice stated that Handke's refusal to answer questions by management representatives, "cannot be tolerated." On August 12, 1984, Handke wrote to a representative of the Respondent and provided the information demanded (G.C. Exh. No. 9).

As a result of the proposal to suspend, Handke wrote to United States District Court Judge S. Arthur Spiegel, who was handling the District Court proceeding, and requested a protective order to prevent further interrogation by Kay and Bierbaum, and to effect a withdrawal of the proposed six-month suspension (Tr. 96). The Charging Party also sought to intervene in the proceeding to protect from harassment, Union members who had filed affidavits in the District Court proceeding, as well as others who might be called as witnesses (R. Exh. No. 2, at 2). Judge Spiegel issued a show cause order requiring that NIOSH establish why such an order should not be granted (Tr. 96-97, G.C. Exh. No. 10).

At a scheduled hearing before Judge Spiegel on October 12, 1984, it was argued that Handke and Wang had been subjected to harassment and interrogations outside of the regular procedures of the court, that NIOSH had sought to circumvent discovery procedure, and had conspired to deter witnesses from testifying fully and truthfully in violation of 42 U.S.C. § 985. It was argued that threats of discipline and suspension were improper under the circumstances presented, and could materially affect the testimony of the witnesses in the District Court proceeding. It was argued that Handke had not refused to answer in an appropriate forum; and that since Kay and Bierbaum were officials alleged to have been guilty of discriminatory practices in the District Court action, and in the Handke affidavit, serious questions were posed concerning the legitimacy and real intent of their interrogations.

As a result of argument presented to District Court Judge Spiegel during the October 12th hearing, the need for a protective order was recognized by the District Court (R. Exh. No. 2 at 11-13, 16, 19-20). However, the protective order became unnecessary by reason of NIOSH assurances that the proposed six-month suspension would be revoked, that all reference to insubordination in relation to the Peguese case would be deleted from Handke's personnel file, that Mrs. Handke would be deposed by the Government in accordance with the Federal Rules of Civil Procedure; and lastly that no alleged discriminating official would be permitted to conduct any hearing, investigation, or interrogation of Ms. Handke in regard to the NIOSH investigation of Peguese's charges of discrimination, or in regard to the allegations made in the Handke affidavit submitted to the District Court. An order providing a basis for the resolution of the matter along the foregoing lines was entered by Judge Spiegel on October 19, 1984 (G.C. Exh. No. 11).

Discussion and Conclusions

Counsel representing the General Counsel contends that the Respondent, through the conduct of Bierbaum and Kay on June 19th and July 16th, violated Section 7116(a)(1) of the Statute by interfering with, restraining or coercing Handke in the exercise of rights accorded to her under Section 7102 of the Statute.

Section 7116(a)(1) provides in pertinent part:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . .

Section 7102(1) of the Statute provides:

> "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right --
>
> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the

> labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities . . .

A determination of whether a statement violates Section 7116(a)(1) must take into consideration all of the circumstances surrounding the making of the statement. Internal Revenue Service, Mid-Atlantic Service Center, 4 A/SLMR 519, A/SLMR No. 421 (1974); U.S. Customs Service, Region IV, Miami, Florida, 1 FLRA No. 108 (1979), 1 FLRA 942; Veterans Administration Medical Center, Shreveport, Louisiana, 3 FLRA No. 65 (1980), 3 FLRA 429.

That standard by which one may determine interference, restraint or coercion, is not the subjective perceptions of the employee, nor is it the intent of the employer. Rather the test is whether, under the circumstances of the case, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement. The effect of the employer's statements must be judged in light of circumstances in which words, innocent in and of themselves, may be understood as threats. Federal Mediation and Conciliation Service, 9 FLRA No. 31 (1982), 9 FLRA 199; Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA No. 64 (1983), 11 FLRA 290.

The circumstances presented in this case indicate that the affidavit was prepared by Handke while acting as a representative of the Union. The questions posed and answered in the affidavit reflect that it was executed by Handke in a representational capacity in an effort to remedy discriminatory practices affecting bargaining unit members, particularly James Peguese. Handke's representational activity dominates the picture presented by the evidence. At the time the affidavit was planned she was concluding her term as president of the Union. She was a Union representative on the Respondent's EEO Committee. Her work location was the focal point of Union activity, and in 1981-1982, she had served as a Union steward.

The Union acted as Peguese's representative in connection with two grievances which arose out of personnel actions relating to an unsatisfactory performance rating, and denial of a within-grade pay increase. These grievances had not been resolved as of the date of the alleged unfair labor practice herein, and were then being handled by the Union. As the Union president, Handke played an important role in the formulation of Union decisions relating to the processing of these grievances.

The Respondent's action to remove Peguese in the latter part of March 1984, was the culmination of Respondent's efforts against Peguese. Like the grievances, the removal action turned upon allegations of poor performance. Although, Peguese retained private counsel to represent him in the removal action, he resorted to the Union to help him through the filing of an EEO complaint alleging that Bierbaum and Kay had discriminated against him in connection with the removal action. Handke was Peguese's designated Union representative during the informal stage of the EEO proceeding.

Although Peguese retained a private attorney to represent him during the formal stage of the EEO proceeding, Handke was called upon to assist Peguese's attorney in his handling of Peguese's effort to resist removal. These efforts finally assumed the form of an injunction proceeding initiated by Peguese in the United States District Court. Handke was specifically asked to provide, in affidavit form, information of value which she had gathered through her handling of the informal stage of the EEO proceeding as a Union official. In effect she was assisting Peguese's attorney in the transition required as a result of Peguese's change in designated representatives, and she was at the same time stating, in an appropriate forum, the official position of the Union regarding Respondent's efforts to remove Peguese.

In addition to the Union's deep interest and involvement in Peguese's grievances, Peguese's EEO complaint, and court proceedings, the Union and/or Handke had vital representational interests in other episodes of alleged discrimination referred to by Handke in her affidavit. Specifically, this interest stemmed from the designation of Handke and/or others as Union representatives assigned to assist other alleged discriminatees referred to in the affidavit.

There was no legitimate basis for the Bierbaum and Kay interrogations. It was acknowledged that Respondent's representatives were aware of the identity of the individuals referred to in the affidavit. This circumstance gives rise to considerable inquiry, as do repetitive efforts to establish Handke's authorship of the affidavit filed in the District Court proceeding. Even though she acknowledged her authorship and her signature during the June 19, 1984 meeting, she was again subjected to interrogation concerning these elements on July 16, 1984.

A number of reasons may be cited to establish the absence of any legitimate basis for conducting the interrogations described, or for using threats of discipline for refusal to respond to questions. Perhaps the most glaring and noticeable is the fact that Handke was either a witness, or a prospective witness in a pending District Court proceeding. The Bierbaum and Kay confrontations with Handke were extra-judicial in nature and outside the purview of discovery procedures prescribed in the Federal Rules of Civil Procedure. This element was clearly recognized by United States District Court Judge Spiegel (G.C. Exh. No. 10, R. Exh. No. 2, G.C. Exh. 11).

Discriminatory practices in the Federal Government are prohibited by 42 U.S.C.A. § 2000e-16(a). Section 2000e-16(b) of Title 42 grants authority to the Equal Employment Opportunity Commission (EEOC) to enforce the policy of nondiscrimination in the Federal Government; and instructs the EEOC to issue rules and regulations necessary to carry out its responsibilities under Section 2000e-16. The EEOC has issued regulations requiring Federal agencies to establish programs for equal opportunity in employment. 29 C.F.R. § 1613.201 et seq. Section 1613.203(k) of Title 29 C.F.R. requires agencies to "[P]rovide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex or national origin." The EEOC mandates specific procedures and requires agencies to attempt to resolve complaints of discrimination on an informal basis according to established EEOC guidelines before a formal complaint of discrimination can be filed. 29 C.F.R. § 1613.204(d)(4), § 1613.213, and § 1613.214.

The interrogations utilized by Respondent's representatives in this case contravened established EEOC procedures, and were not authorized by law. Even assuming a legitimate intent to develop evidence of the discriminatory practices alluded to in Handke's affidavit, Respondent's representatives should have referred the matter to appropriate investigatory officials and should have avoided the Bierbaum-Kay confrontations with Handke.[7]

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[7] Although it would be inappropriate within the context of this case to determine the applicability of federal criminal statutes, it is noted that the interrogations and threats might be considered as possible violations of 18 U.S.C. § 1512. Among other things this Section prohibits tampering with a witness in a United States District Court proceeding.

Furthermore, under the provisions of Section 2302(b)(8)(A)(i) of Title 5, United Stated Code, it is a "prohibited personnel practice" to take disciplinary action against any employee as reprisal for disclosing information which an employee reasonably believes evidences a violation of any law, rule or regulation.

It is also noted that this policy is reflected in the collective bargaining agreement governing the labor relations of the parties (Jt. Exh. No. 1, at 11).

It is also well-settled that an agency may not conduct fact-gathering sessions without limitation when preparing for third party proceedings. In Internal Revenue Service and Brookhaven Service Center, 9 FLRA No. 132 (1982), 9 FLRA 930 the Authority held:

> . . . . Thus, while management may ascertain facts in preparing its case for third-party proceedings without the presence of the exclusive representative, the unit employees have the right under section 7102 of the Statute to 'form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal[.]' Accordingly, where management exercises its right to interview unit employees in preparation for third-party proceedings, but does not take necessary precautions to preserve employees' protected rights, and instead acts in a manner which 'interferes with, restrains, or coerces' the employees, it violates section 7116(a)(1) of the Statute. To protect employees' rights under section 7102 while management attempts to ascertain necessary facts, the Authority concludes that (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights. In this manner, the necessary balance between the rights of management and the rights of employees and their exclusive representatives will best be preserved.

This rule may appropriately be applied to the facts of this case. The record disclosed that the interrogations and threats did in part relate to Respondent's preparations for the District Court proceeding. Evidence introduced by the Respondent reflects that they arose in part out of Respondent's effort to prepare a defense concerning evidence introduced through a Union official in the District Court case (R. Exh. No. 2 at 11). The Union's involvement, interest, and participation in the litigation initiated on behalf of Peguese was obvious. Respondent was under an obligation to comply fully with the carefully established guidelines in Internal Revenue Service and Brookhaven Service Center. It is clear that the Respondent failed to do so.

On the basis of the foregoing it is concluded that interrogations and threats would necessarily have had a chilling effect on Handke's continued participation in Union activity. The conduct conveyed to Handke, and other bargaining unit members, the clear message that discipline and/or harassment would follow as a direct result of the pursuit of legitimate Union interests. It operated to interfere with, restrain, and coerce her and other bargaining unit members in the exercise of the statutory right to engage in Union activity. Accordingly, it is concluded that the Respondent violated Section 7116(a)(1) by subjecting Handke to interrogation and threats as alleged in the complaint.

Having found that the Respondent violated Section 7116(a)(1) of the Statute, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, shall;

1. Cease and desist from:

    (a) Interfering with, restraining or coercing Jan Handke, or any other employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute, by conducting interrogations concerning protected union activity, and by threatening disciplinary action for failing to disclose details of information relating to such protected union activity.[8]

    (b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

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[8] Counsel representing the Respondent seeks a cease and desist order and an appropriate posting, together with any further relief deemed just and proper. In light of the District Court Order providing for the revocation of Handke's suspension, and for deletion of all relevant references to insubordination in Handke's personnel file, it is determined that a cease and desist order, together with a posting would best effectuate the purposes and policies of the Statute.

(a) Post at its facilities at the National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, Division of Surveillance, Hazard Evaluation, and Field Studies, National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.

(b) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: May 23, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce Jan Handke, or any other employee, in the exercise of rights assured by the Federal Service Labor-Management Relations Statute, by conducting interrogations concerning protected Union activity, and by threatening disciplinary action for failing to disclose details of information related to such protected Union activity.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Agency or Activity)

Dated: ______________________ By: ______________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

22 FLRA No. 102

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NAVAL AIR STATION,
WHITING FIELD

Activity

and

Case No. O-AR-562

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION NO. 1954

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator James E. Fulford filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned the Activity's determination to contract out certain maintenance and firefighting functions. After the contract had been awarded but before performance had begun, the Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982) was enacted and signed into law prohibiting the contracting out of firefighting functions at any military installation or facility. Consequently, the contract was modified to delete firefighting functions. The Activity determined that a new cost comparison study was not required because the modification was still within the scope of the initial contract. The grievance alleged that the Activity's action was not in accordance with applicable law as required by the parties' collective bargaining agreement. Specifically, the Union alleged that the procurement action, as modified, was not in accordance with section 502 of Public Law No. 96-432, which pertinently requires that no commercial or industrial type function of the Department of Defense

(DOD) may be converted to performance by a private contractor unless the Secretary of Defense provides Congress with a detailed cost comparison which demonstrates that performance by the contractor will result in cost savings to the Government. The Union argued that under that provision the Activity was required to conduct a new cost comparison before the maintenance functions could be contracted out. The Arbitrator agreed with the Union's position, finding that the Activity was required to recertify the modified contract to Congress or at least to conduct a new study to prove that contracting out the maintenance functions would be more cost effective then in-house performance. The Arbitrator therefore sustained the grievance and, as his award, directed the Activity to terminate the procurement action and to reinstate the employees involved with appropriate backpay.

III. EXCEPTIONS

A. Contentions

In its exceptions the Agency contends that the award is contrary to management's right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out. The Agency also contends that the direction to reinstate affected employees with backpay is contrary to the Back Pay Act.

B. Analysis and Conclusions

In Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986), the Authority addressed for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work. In sum, the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action and are authorized to sustain grievances challenging a decision to contract out only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. The Authority advised that these provisions of law or regulation must be sufficiently specific to permit the arbitrator to adjudicate whether there has been compliance with such provisions.

In this case we conclude that the Arbitrator was not authorized either to sustain the grievance or to cancel the procurement action. In accordance with our decision in Blytheville Air Force Base, the Arbitrator's direction that the Activity cancel the procurement action is clearly deficient. In addition, we find that under Blytheville Air Force Base the Arbitrator was not authorized to sustain the grievance. As noted, the Union essentially claimed in its grievance that under Pub. L. No. 96-342, in order to have contracted out the maintenance functions, alone, the Activity was required to conduct a new cost comparison after it modified the procurement contract to delete firefighting functions. At arbitration the Activity had argued that although the provisions of that law require a cost comparison and a certification to Congress before a contract is awarded, there is nothing in the law requiring another cost comparison and a recertification when the contract is modified prior to its effective date. In rejecting the Activity's argument, the Arbitrator reasoned that if there were no obligation imposed to recertify after a contract has been substantially modified, the provisions of Pub. L. No. 96-342 could be entirely negated. Thus, the Arbitrator decided to impose such an obligation based on his "feel[ing] that Congress intended that substantially modified contracts would be recertified or that at least a new study would prove that in this case, contracting would be more cost effective than in-house performance."

We decided in Blytheville Air Force Base, slip op. at 6, that an arbitrator can sustain a challenge to a procurement action only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. In this case we find that the Arbitrator was not authorized to sustain the grievance on the basis of an obligation that the Arbitrator felt Congress intended in Pub. L. No. 96-342, but did not specifically provide. Therefore, the Arbitrator's award sustaining the grievance and directing the Activity to terminate the procurement action is contrary to section 7106(a)(2)(B) of the Statute. In view of this conclusion, the Arbitrator's direction to reinstate the affected employees with backpay is likewise deficient.

IV. DECISION

Accordingly, for the above reasons, the Arbitrator's award is set aside.*/

Issued, Washington, D.C., July 31, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary that the Authority address contentions of the Agency in its other exceptions to the award.

22 FLRA No. 103

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION HOSPITAL
BATH, NEW YORK

Activity

and

Case No. 0-AR-1065

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 491

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Judith A. La Manna filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

For the appraisal period of 1984-85, the grievant received an overall performance rating of minimally satisfactory. He filed a grievance that was ultimately submitted to arbitration claiming that his performance appraisal was procedurally improper. Noting that the Activity conceded that the grievant had been improperly evaluated in violation of the collective bargaining agreement, the Arbitrator stated the issue to be one of remedy. As the remedy for the violation, the Arbitrator directed that the Activity reevaluate properly the grievant's performance for the disputed appraisal period and issue to the grievant a performance rating for the period of fully satisfactory or higher.

III. EXCEPTION

As its exception the Agency contends that the award is contrary to section 7106(a) of the Statute. The Agency agrees that under the decisions of the Authority, the Arbitrator appropriately found that the grievant had not been properly rated and appropriately directed that management reevaluate properly the grievant's performance under the established elements and standards. However, the Agency maintains that by additionally ordering that the grievant's rating be no less than fully satisfactory, the award to that extent is contrary to management's rights under section 7106(a)(2)(A) and (B) of the Statute.

IV. ANALYSIS AND CONCLUSIONS

As noted by the Agency, the Authority in a number of recent decisions has discussed in detail the role of an arbitrator in resolving disputes pertaining to performance appraisal matters. General Services Administration, Region 10 and American Federation of Government Employees, Council 236, 22 FLRA No. 8 (1986); Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760, 21 FLRA No. 86 (1986); Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148, 21 FLRA No. 15 (1986); Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO, 20 FLRA No. 39 (1985). As acknowledged by the Agency, the Authority in these decisions found that an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his or her performance appraisal by management's application of the established performance standards. An arbitrator may sustain the grievance on finding that management applied the standards in violation of law, regulation, or an appropriate provision of the parties' collective bargaining agreement. The Authority also has stated that in sustaining the grievance, an arbitrator as a permissible remedy may direct that the grievant's work product be properly evaluated by management. The Authority, however, has cautioned in these decisions that the arbitrator may not substitute his or her own judgment for that of management as to what that employee's evaluation and rating should be.

In this case we find that by directing the Activity to rate the grievant's performance no lower than fully satisfactory, the Arbitrator improperly substituted her judgment for that of management as to what the grievant's performance evaluation and rating should be. Although the Arbitrator properly ordered the grievant reevaluated in accordance with the established performance elements and standards in order to remedy management's violation of the collective bargaining agreement, the Arbitrator's restriction of the rating on reevaluation to fully satisfactory or higher is deficient as contrary to section 7106(a)(2)(A) and (B) of the Statute.

V. DECISION

Accordingly, the Arbitrator's award is modified to strike any order or direction as to what the grievant's performance rating for the disputed appraisal period should be after reevaluation by management.

Issued, Washington, D.C., July 31, 1986.

Jerry L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

22 FLRA No. 104

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES AIR FORCE, SEVENTH
COMBAT SUPPORT GROUP, CARSWELL
AIR FORCE BASE, TEXAS

Activity/Petitioner

and

Case No. 6-CU-60001

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1364

Labor Organization

ORDER DISMISSING APPLICATION FOR REVIEW

On June 10, 1986, Mr. Willie L. Coberly, an employee, filed what may be considered to be an application for review pursuant to Section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petition for Clarification of Unit in the above-entitled case. For the reasons set forth below, it has been determined that the application for review must be dismissed.

Under Section 2422.17 of the Authority's Rules and Regulations, only a party can file an application for review of a Regional Director's Decision and Order in a representation proceeding.[1]

Section 2421.11 of the Authority's Rules and Regulations, in pertinent part, define a party as ". . . [A]ny person: (1) Filing a charge, petition or request; (2) named in a charge, complaint, petition, or request; (3) whose intervention in a proceeding has been permitted or directed by the Authority. . . ."

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[1] Section 2422.17 of the Authority's Rules and Regulations provides, in pertinent part, "A Regional Director's Decision and Order shall be final: provided however, That a party may file an application for review of the Regional Director's Decision and Order. . . ." [emphasis added]

In this case, the Activity filed the clarification of unit (CU) petition.[2] Mr. Coberly was not the subject of the petition. He was not the representative of the Union in the proceeding nor was he granted intervention status by the Authority. Therefore, Mr. Coberly is not a party to the case within the meaning of Section 2421.11 of the Authority's Rules and Regulations and has no standing to file an application for review under Section 2422.17 of the Authority's Rules and Regulations.

Accordingly, as employee, Willie L. Coberly, has no standing to file an application for review of the Regional Director's Decision and Order in the instant case, and apart from other considerations, the application for review is hereby dismissed.

For the Authority.

Issued, Washington, D.C., July 31, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

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[2] Under section 2422.1(d) of the Authority Rules and Regulations, a petition for clarification of unit may be filed only by an activity or agency or by a labor organization which is currently recognized by the activity or agency as exclusive representative.

22 FLRA No. 105

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. O-NG-1083

DEPARTMENT OF TREASURY,
FINANCIAL MANAGEMENT SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The petition for review in this case is before the Authority because of an appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of the following Union proposal submitted while the parties were bargaining over ground rules in preparation for contract negotiations.

Union Proposal

> All employee negotiators will receive travel and per diem reimbursement for negotiations from the employer.

II. Positions of the Parties

The Agency contends that the proposal is not within the duty to bargain for the following reasons:[1]

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[1] The Agency incorporated in the present case its Statement of Position in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 21 FLRA No. 19 (1986). Thus, the positions and arguments presented here are identical.

1. It does not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;
2. it is inconsistent with Federal law or Government-wide regulation;
3. the demand for travel and per diem to employee/negotiators is not limited to those employee/negotiators who are receiving official time.

The Agency maintains that the crux of the issue is the negotiability of reimbursement for travel and per diem for employee negotiators. As explained by the Union, the proposal would only provide travel and per diem to employee negotiators on official time.

III. Analysis and Conclusion

The Authority held in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986) that payment by an agency of travel expenses and per diem allowances incurred by employees using official time in the conduct of labor-management relations concerns a condition of employment which is within the agency's administrative discretion, and is not inconsistent with law or Government-wide regulation. Furthermore, the negotiability of travel and per diem is based on consideration of whether the travel involved is in the primary interest of the Government so as to constitute official business without consideration to 7131 official time. In this regard, the Agency has not cited any legal or regulatory provision, nor is any apparent, which would absolutely prohibit it from exercising through negotiations the discretion which it possesses to determine whether, and under what circumstances, travel attendant to labor-management relations activities is sufficiently within the interest of the United States so as to constitute official business. Also, the Union acknowledges that provisions of the Travel Expense Act and the Federal Travel Regulations apply. Thus, the Authority finds the proposal is within the duty to bargain.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union's Proposal).[2]

Issued, Washington, D.C. July 31, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In deciding that the Union's proposal is within the Agency's duty to bargain, we make no judgment as to the merits of the proposal.

22 FLRA No. 106

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1923

Union

and

Case No. O-NG-1216

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF THE SECRETARY
OFFICE OF THE GENERAL COUNSEL
BALTIMORE, MARYLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following provision of a negotiated agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute:1/

1/ The Agency head originally disapproved three provisions of the agreement and the Union's appeal encompassed all three disapprovals. Thereafter, the Agency withdrew its disapproval of one provision (Article 3, Section 6B) and the parties agreed upon alternative language for another disapproved provision (Article 19, Section 1A). Accordingly, the dispute with regard to two of the originally disapproved provisions has been resolved and those matters are no longer before the Authority for decision.

Article 13, Section 3

> The decision by the employer to contract out work presently being performed by bargaining unit employees will be made in accordance with OMB Circular A-76 (unless application of the Circular is prohibited or not required by the Circular).

II. Positions of the Parties

The Agency argues that the disputed provision conflicts with section 7106(a)(2)(B) of the Statute which reserves exclusively to management the right to contract out, and subjecting management's contracting out determination to review by arbitrators would result in arbitrators rather than Federal agencies making substantive contracting out decisions. At the very least, it is argued, the arbitral review process would delay the Agency's exercise of its right to contract out. Finally, the Agency argues that the provision is inconsistent with the exclusive appeal procedures contained in OMB Circular A-76, which should be viewed as a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute.

In its response, the Union asserts that the disputed provision constitutes a negotiable procedure for management to follow in the event a decision is made to contract out, and cites Authority decisions to support its contention.

III. Analysis

The Agency's arguments in this case are essentially the same as those rejected by the Authority in finding a similar proposal negotiable in American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (Union Proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 54 U.S.L.W. 4408 (U.S. April 29, 1986) (per curiam). In the EEOC case, the Authority held that a proposal which required management to comply with applicable laws and regulations, and specifically OMB Circular A-76, in exercising its right to make contracting out determinations was not inconsistent with section 7106(a)(2)(B) of the Statute because the proposal would only contractually recognize external limitations on management's right. The proposal would not itself establish any particular substantive limitation on management in the exercise of that right. The D.C. Circuit expressly agreed. EEOC v. FLRA, 744 F.2d at 848-849.

As for the Agency's further assertion that any contractual provisions which would subject management's contracting-out decisions to any type of grievance or arbitration review are nonnegotiable, the Authority in EEOC concluded that such contention also could not be sustained. The Authority noted that the Statute and its relevant legislative history requires the grievance procedures negotiated under section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining. The Authority also noted that the disputed proposal in EEOC would not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure because, even in the absence of such a contractual provision, disputes involving conditions of employment arising from the application of OMB Circular A-76 would be covered by the negotiated grievance procedure. The D.C. Circuit agreed, rejecting the Agency's contrary arguments as follows:

> The [Statute] expansively defines the subjects covered under the statutory grievance procedure. Grievances include complaints concerning "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" as well as complaints "concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9). Only five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism. An allegation that the EEOC failed to comply with the OMB Circular, or with any other law or rule governing contracting-out, plainly falls within this expansive definition.
>
> . . . .
>
> A grievance alleging noncompliance with the Circular, . . . does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it

> provides a procedure for enforcing the [Statute's] requirement that contracting-out decisions be made in accordance with applicable laws. Any substantive limitation on management's authority stems from the externally established criteria contained in the Circular. . . . We therefore find that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause. (footnotes omitted.)

EEOC v. FLRA, 774 F.2d at 849-851.[2]

We also reject the Agency's argument that the disputed provision would delay the exercise of management's right to contract out. Nothing in the provision would prevent management from reaching the decision to contract out or from implementing that decision. In any event, as noted by the D.C. Circuit in EEOC v. FLRA, 774 F.2d at 850 n.19:

> Of course, any review of an agency decision, whether conducted by the courts or through a contractual grievance mechanism, may cause some delay. This court has previously recognized that a proposal that may result in delay, including delay created by the arbitral process, need not infringe management's reserved authority, and may thus be negotiable. See Department of Defense v. FLRA, 659 F.2d at 1153-58.

Finally, we reject the Agency's assertion that the provision is nonnegotiable because it conflicts with the exclusive appeal procedures contained in OMB Circular A-76. This argument was rejected by the Authority in EEOC, 10 FLRA at 4, and by the D.C. Circuit on review, 744 F.2d at 851.

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[2] We respectfully adhere to the view that this position is correct, although we note that the U.S. Court of Appeals for the Ninth Circuit rejected this approach in Defense Language Institute, Presidio of Monterey, California v. FLRA, 767 F.2d 1398 (9th Cir. 1985), denying enforcement of National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of Monterey, California, 14 FLRA 761 (1984).

That reasoning applies equally here. The provision in question does not create any new right of appeal; the right to file grievances concerning contracting-out decisions is created by the Statute. Nothing in OMB Circular A-76 restricts the statutory right to file such grievances.

In concluding that the disputed provision is within the duty to bargain, we emphasize that in reviewing management's contracting-out actions for conformity with applicable laws and regulations, an arbitrator may not substitute his or her judgment for that of the agency. Rather, as the Authority recently stated in a related case, Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72, slip op. at 6-7 (1986):

> In sum, arbitrators are not authorized to cancel a procurement action and are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. These provisions must be sufficiently specific to permit the arbitrator to adjudicate whether there has been compliance with such provisions. When presented with such a grievance, an arbitrator on finding a failure to comply may sustain the grievance. In sustaining the grievance, the arbitrator as a remedy may properly order a reconstruction of the procurement action when the arbitrator finds that an agency's noncompliance materially affected the final procurement decision and harmed unit employees. An agency in taking the action required by such an award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accordance with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination. For example, an agency could determine that immediate cancellation is warranted, or an agency

could determine that cancellation is not warranted, but that an improperly granted contract should not be renewed. Additionally, an agency may use its discretion to fashion other remedies appropriate to the circumstances.

Having found that the disputed provision is within the duty to bargain but that its inclusion in the parties' agreement does not add to the scope of their contractual grievance procedure because such matters already are covered unless the parties specifically exclude them during negotiations, we believe that the parties would be well advised to concentrate their energies on more meaningful matters.

IV. Conclusion

For the reasons stated above, the disputed provision is not inconsistent with management's rights under section 7106 of the Statute to make determinations with respect to contracting out or with applicable law and regulations.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of the provision which was bargained on and agreed to by the parties at the local level.

Issued, Washington, D.C., July 31, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ARMAMENT RESEARCH
AND DEVELOPMENT CENTER

Activity

Case No. 0-AR-1159

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1437

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Gladys Gershenfeld filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., July 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1199

Union

and

Case No. 0-AR-1179

DEPARTMENT OF THE AIR FORCE
554th COMBAT SUPPORT GROUP (TAC)
NELLIS AIR FORCE BASE
LAS VEGAS, NEVADA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator George H. Hildebrand filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 31, 1986

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3286

Union

and

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, REGION VII

Activity

Case No. 0-AR-1144

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator J. C. Fogelberg filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., July 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case No. 386

Federal Labor Relations Authority

Washington, D.C. 20424

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 5 (August 11, 1986)

American Federation of Government Employees, AFL-CIO, Local 3320 and United States Department of Housing and Urban Development, Region VI and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office, Case No. 6-CO-40016

23 FLRA No. 6 (August 11, 1986)

U.S. Government Printing Office and Columbia Typographical Union No. 101, International Typographical Union, AFL-CIO, Case No. 3-CA-30465

23 FLRA No. 9 (August 12, 1986)

Internal Revenue Service and Internal Revenue Service Brooklyn District and National Treasury Employees Union and National Treasury Employees Union, Chapter 53, Case No. 2-CA-50241

NEGOTIABILITY CASES

23 FLRA No. 1 (August 5, 1986)

National Federation of Federal Employees, Local 1450 and U.S. Department of Housing and Urban Development, Case No. 0-NG-1171

23 FLRA No. 2 (August 6, 1986)

American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 1741 and Department of Justice, Federal Prison System, Federal Corrections Institution, Milan, Michigan, Case No. 0-NG-1179

Y3.F31/21-3:

23 FLRA No. 3 (August 6, 1986)

National Joint Council of Food Inspection Locals, AFGE, AFL-CIO and Food Safety and Inspection Service, U.S. Department of Agriculture, Case No. 0-NG-1061

23 FLRA No. 7 (August 11, 1986)

American Federation of State, County and Municipal Employees, Local 2027 and ACTION, Case No. 0-NG-1243

23 FLRA No. 8 (August 11, 1986)

American Federation of Government Employees, AFL-CIO, Local 2022 and U.S. Army, Headquarters 101st Airborne Division and Fort Campbell, Case No. 0-NG-1205

ARBITRATION CASE

23 FLRA No. 4 (August 11, 1986)

American Federation of Government Employees, Local 1509, Sioux Falls, South Dakota Veterans Hospital and U.S. Veterans Administration Hospital, Sioux Falls, South Dakota (Conway, Arbitrator), Case No. 0-AR-1052

23 FLRA No. 1

NFFE, Local 1450 and HUD,
Case No. 0-NG-1171 (Decided
August 5, 1986)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions for Review
    Proposal Inconsistent With
    Government-Wide Regulation
      FPM, Chapt. 335, subchapt. 1-4, Requirement 4
  Management Rights
    Make Selections [7106(a)(2)(C)(ii)]
      Fill Vacancies with RIFed Employees
      Who Meet Minimum X-118 Standards

STATUTE

7105(a)(2)(E)
7106(a)(2)(C)(ii)
7106(b)(3)
7114(c)

DIGEST NOTES

A proposal which requires an agency to fill vacancies in a RIF situation only with affected employees who meet minimum "X-118 standards" is nonnegotiable. The Authority held that the provision violates the agency's right to choose among candidates from any appropriate source pursuant to § 7106(a)(2)(C)(ii). Furthermore, the provision is inconsistent with Federal Personnel Manual, Chapter 335, subchapter 1-4, Requirement 4, because it would prevent the agency from making selections from any appropriate source in filling vacant positions.

A proposal which requires an agency to fill vacancies in a RIF situation only with affected employees who meet minimum "X-118 standards" is not an appropriate arrangement, within the meaning of § 7106(b)(3) because it excessively interferes with management's right to fill positions. The provision would effectively preclude the agency from determining the requisite qualifications for vacant positions, that is, any qualifications beyond the minimum requirements of X-118 standards. Such a total abrogation of management's right to act in this respect excessively interferes with management's rights.

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23 FLRA No. 2

Federal Labor Relations Authority

AFGE, Council of Prison Locals, Local 1741 and DOJ, Federal Prison System, Federal Corrections Institution, Milan, Mich., Case No. 0-NG-1179 (Decided August 6, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability Procedure Timeliness Agency's Disapproval Served on Proper Union Official	7105(a)(2)(E) 7114(c)(4) 7117(c)(2)

DIGEST NOTES

The Authority dismissed the union's petition for review as untimely filed because it failed to comply with §§ 2424.3 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The Authority found that the agency head's disapproval of the local agreement provisions was properly served on the Union's Regional Vice President by certified mail and that there was no basis for the union's assertion that the agency was required to serve notice on the National President instead of the Union's Regional Vice President.

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23 FLRA No. 3

Federal Labor Relations Authority

National Joint Council of Food Inspection Locals, AFGE and Food Safety and Inspection Service, Dep't of Agriculture, Case No. 0-NG-1061 (Decided August 6, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Negotiability
  Conditions of Employment
    Travel and Per Diem Expenses
      Union Representatives
  Travel and Per Diem
5 U.S.C. § 5701 et seq. [Travel Expense Act]
41 CFR, Part 101-7 [Federal Travel Regulations]
46 Comp. Gen. 21 (1966)

DIGEST NOTES

Under the Travel Expense Act, 5 U.S.C. § 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, agencies have the discretion to make determinations that travel in the context of union activity is sufficiently within the interest of the Government to constitute official business. Upon this determination, otherwise proper travel and per diem expenses may be paid from agency funds. Nothing in those authorities requires that that necessary determination be only made by management on a case by case basis. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986) Therefore, union proposals providing for the payment of travel and per diem relate to conditions of employment and are negotiable within the meaning of the Statute. The agency made no argument that the travel flowing from the activities and circumstances set forth in the provisions could not meet the required standard nor do the provisions suggest that they would foreclose case by case determinations as to the appropriateness of specific travel and per diem expenses which are proper under law and governing regulations.

Union proposals providing for the payment of travel and per diem relate to conditions of employment and are negotiable within the meaning of the Statute. The agency's argument that the proposal conflicts with its regulation is rejected inasmuch as, the Authority has consistently found that the agency has failed to establish a compelling need for the regulation.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

22 FLRA No. 1

National Joint Council of
Food Inspection Locals,
AFGE and Food Safety and
Inspection Service, Dep't
of Agriculture, Case No.
0-NG-1061 (Decided August
5, 1986)

Federal
Labor Relations
Authority

SUBJECT MATTER INDEX ENTRIES

STATUTE

Negotiability
 Conditions of Employment
  Travel and Per Diem Expenses
   Union Representatives
 Travel and Per Diem
5 U.S.C. § 5701 et seq. (Travel Expense Act)
41 CFR, Part 101-7 (Federal Travel Regulations)
46 Comp. Gen. 21 (1966)

DIGEST NOTES

Under the Travel Expense Act, 5 U.S.C. § 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, agencies have the discretion to make determinations that travel in connection with union activity is sufficiently within the interests of the Government to constitute official business. Upon this determination, otherwise proper travel and per diem expenses are to be paid from agency funds. Nothing in those authorities requires that these necessary determinations be only made by management on a case by case basis. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 7 (1986) petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1218 (D.C. Cir. March 27, 1986). Therefore, union proposals providing for the payment of travel and per diem relate to conditions of employment and are negotiable within the meaning of the Statute. The agency made no argument that the travel flowing from the activities and circumstances set forth in the provisions could not meet the required standard nor do the provisions suggest that they would foreclose case by case determinations as to the appropriateness of specific travel and per diem expenses which are proper under law and governing regulations.

Union proposals providing for the payment of travel and per diem relate to conditions of employment and are negotiable within the meaning of the Statute. The agency's argument that the proposal conflicts with its regulation is rejected inasmuch as the Authority has consistently found that the agency has failed to establish a compelling need for the regulation.

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Federal Labor Relations Authority

23 FLRA No. 4

AFGE, Local 1509, Sioux Falls South Dakota Veterans Hospital and Veterans Administration Hospital, Sioux Falls, S.D. (Conway, Arbitrator), Case No. 0-AR-1052 (Decided August 11, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Assign Work
    - Performance Appraisal Review
  - Award Set Aside
  - Exceptions Asserted in Appeal
    - Award Contrary § 7106(a)(2)(B)
  - Performance Appraisal System
    - Performance Appraisal Review

STATUTE

DIGEST NOTES

A grievance was filed when the grievant's overall annual performance rating by his immediate supervisor was lowered from "outstanding" to "highly satisfactory" by the reviewing official. The issue at arbitration was whether the reviewing official's action violated the provisions of the collective bargaining agreement. The arbitrator determined that the reduction of the rating by the reviewing official was inconsistent with the agreement because under the agreement it was not appropriate for someone who does not have daily knowledge of any employee's performance to reduce the employee's performance rating by the employee's immediate supervisor. He also found that under the agreement the reduction was not timely and properly communicated to the grievant. The arbitrator sustained the grievance and ordered that the grievant's "outstanding" rating be reinstated and that the grievant be considered for a monetary award.

In its exception to the arbitrator's award the agency contended that the award was contrary to § 7106(a)(2)(B) of the Statute because it interfered with management's right to assign performance appraisal review duties to the reviewing official and substituted the arbitrator's judgment for that of the agency as to who has the authority to review and change performance appraisals. The Authority held that the arbitrator interpreted the parties' agreement to preclude the reviewing official, an individual not in the bargaining unit, from carrying out the assigned duty of reviewing performance appraisals and so as to deprive him of the discretion to change appraisals inherent in that duty. An arbitrator may not interpret or enforce a provision of a collective bargaining agreement so as to improperly deny the authority of an agency to exercise its rights under § 7106(a) or result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights. The award was set aside because it improperly interfered with management's right to assign work.

23 FLRA No. 5

Federal Labor Relations Authority

AFGE, Local 3320 and HUD, Region VI and Region VI San Antonio Area Office, Case No. 6-CO-40016 (Decided August 11, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Procedure
    Election of Remedies
      Authority's Reconsideration of Exceptions
      Did Not Nullify Prior Grievance Election
      ULP Barred by Activity's Grievance
  Union Violations
    Refusal to Comply with
    Arbitrator's Award

STATUTE

7116(b)(8) and (d)
7118(a)(4)(A)
7122

DIGEST NOTES

The Authority determined, consistent with the Judge's ruling, that an unfair labor practice proceeding was barred by § 7116(d) of the Statute. The Authority found that its reopening of the union's exceptions to an arbitrator's award for consideration of the exception's merits did not nullify the activity's prior grievance election. The activity was aware of the union's intention to appeal a previous Authority order in this case and knew that the union had filed a request for reconsideration with the Authority when it requested a panel of arbitrators to enforce the subject arbitration award. The activity's election to pursue enforcement of the arbitration award through the parties' negotiated grievance procedure barred it from pursuing the same matter under the unfair labor practice procedures of the Statute. The activity's pursuit of the grievance was not voided by the Authority's later decision to consider the union's exceptions on the merits.

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Federal Labor Relations Authority

23 FLRA No. 6

Government Printing Office
and Columbia Typographical
Union No. 101, International
Typographical Union, Case
No. 3-CA-30465 (Decided
August 11, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
Agency Violations
Refusal to Negotiate
Bypass
Informal Settlement of EEO Complaint with Employee
Discrimination
Settlement of Complaint Under EEOC Regulations
Agency Does Commit ULP By Complying With EEOC Regs
Rights of Victim Outweigh Rights of Bargaining Unit
Union's Right to Notice
Change in Conditions of Employment
42 U.S.C. § 2000e-16(b) (1976) [Civil Rights Act of 1964]
29 CFR §§ 1613.213(a), 1613.214(b) and 1613.271

STATUTE

7114(a)(2)(A)
7116(a)(1) and (5)
7118
7121(d)

DIGEST NOTES

An agency did not bypass the union, in violation of § 7116(a)(1) and (5), by meeting directly with a bargaining unit employee and negotiating an informal adjustment of her EEO complaint. Any employee is entitled to elect to pursue a complaint of discrimination pursuant to and under the regulations of the EEOC as provided by law. These regulations provide for an informal adjustment process. Nowhere in those regulations is there any provision for the exclusive representative's presence, unless the exclusive representative is the complainant's designated representative. An unfair labor practice cannot be found based solely upon an agency's conduct in resolving an EEO complaint pursuant to the regulations of the EEOC. The bargaining unit employee had elected to pursue her complaint of discrimination as an appeal under the regulatory process of the EEOC, and the union had no statutory rights or obligations to represent her in that process.

Normally, a union does not have right to participate in the informal adjustment of an EEO complaint where a bargaining unit employee has elected to pursue the complaint of discrimination as

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an appeal under the regulatory process of the EEOC, and the exclusive representative had no statutory rights or obligations to represent her in that process. It may, however, have a role if the settlement gives rise to an impact on the bargaining unit. The resolution of such complaints could potentially affect all bargaining unit employees in important ways, since a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for other employees. Accordingly, if the adjustment of an EEO complaint results in a change of unit employees' conditions of employment, the agency would have an obligation under the Statute to give prompt notice of that change to the union and provide it with an opportunity to bargain to the extent required by the Statute. Since Congress has determined that the rights of identifiable victims of discrimination must take priority over the interests of the bargaining unit, an exclusive representative's right to bargain upon receiving notice of an EEO complaint settlement cannot conflict with or overturn the substance of such settlements.

The Authority dismissed the Judge's finding that the agency failed to provide the union with notice of the agency's settlement of a EEO Complaint with a unit employee. The complaint neither alleged nor did the parties litigate at the hearing, whether the agency failed to provide notice to the union of the informal adjustment of the EEO complaint constituted an unfair labor practice charge. The clear basis of both the ULP charge and the complaint was that the agency violated the Statute by meeting directly with a bargaining unit employee and reaching a settlement with that employee with respect to her EEO complaint of discrimination. Since the allegation that the agency failed to provide notice and an opportunity to bargain was not encompassed by the complaint and thus not before the Judge, the violation must be dismissed.

23 FLRA No. 7

Federal
Labor Relations
Authority

AFSCME, Local 2027 and
ACTION, Case No. 0-NG-1243
(Decided August 11, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Managements Rights
    - Assign Employees
      - Rotation of Details - Less than 31 Days
    - Assign Work
      - Rotation of Details - Less than 31 Days
  - Subjects of Bargaining
    - Mandatory - Procedures
      - Rotation of Details - Less than 31 Days

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7106(b)(2)

DIGEST NOTES

A proposal which requires the agency, under normal circumstances, to rotate details of less that 31 days constitutes a negotiable procedure for the selection of employees to perform work on details, that is, selection by rotation among employees management has determined to be qualified to perform the work involved. The Authority has held that when two or more employees have been determined by management to be equally qualified and capable of performing work, the selection of any one of those employees to perform the work is consistent with management's exercise of its discretion under § 7106(a). A proposed procedure by which employees previously judged by management to be equally qualified will be selected to perform the work does not directly interfere with § 7106(a)(2)(A) or (B), but, rather, is a negotiable procedure under § 7106(b)(2). Under the proposal, management would fully retain the discretion to determine the qualifications necessary to perform any detail work and the qualifications of any employees to be detailed. Management would also retain the discretion to determine not to rotate details in other than normal circumstances.

23 FLRA No. 8

Federal Labor Relations Authority

AFGE, Local 2022 and U.S. Army, HQ 101st Airborne Division and Fort Campbell, Case No. 0-NG-1205 (Decided August 11, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Conditions of Employment
    Factors Considered In Determining
    Posting of Union Greeting/Notice
      Does Not Pertain to Bargaining Unit Employees
      Does Not Affect Working Conditions

STATUTE

7103(a)(12) and (14)
7105(a)(2)(E)
7106
7114
7117

DIGEST NOTES

A union proposal which provides for the hanging of union greetings/notices at the entrances of the agency facility is nonnegotiable because it concerns a matter which is not a condition of employment of bargaining unit employees. The Authority will consider two basic factors in deciding whether a proposal involves a condition of employment of bargaining unit employees: (1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. Applying the above factors, the Authority concluded that the union proposal does not pertain to unit employees or affect their working conditions inasmuch as, it would merely welcome all people entering the specified gates and advise them of the union's existence. The union did not show how hanging the proposed sign on agency property would facilitate communication or in any other way directly affect the working conditions of bargaining unit employees.

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23 FLRA No. 9

IRS and IRS, Brooklyn District and NTEU and NTEU, Chapter 53, Case No. 2-CA-50241 (Decided August 12, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7114(b)(2)
Agency Violations	7116(a)(1) and (5)
Refusal to Bargain in Good Faith	7118

Unfair Labor Practice
  Agency Violations
    Refusal to Bargain in Good Faith
      Representative Not Authorized to Execute Agreement
    Refusal to Negotiate
      Failure to Execute Agreement
        No Violation - Union Notified of Representatives' Lack of Authority
  Procedure
    Credibility of Witness
      Pre-Hearing Access to Documents
        Casts Doubt on Witness Credibility
        Violates Policy In Authority's Rules and Regulations
5 CFR § 2423.7(d)

DIGEST NOTES

The Authority adopted the Judge's conclusions and held that the activity did not violate § 7116(a)(1) and (5) when it failed and refused to execute and implement a memorandum of understanding reached by representatives of the parties at a negotiating session. The Authority concluded, as found by the Judge, that no final agreement had been reached between the parties requiring execution and implementation, because the agency representatives made clear to the union's representatives at the outset of the session that they did not have the authority to bind the agency and that they consistently maintained this position.

The Authority found that the Judge was correct in finding that the agency violated § 7116(a)(1) and (5) by refusing to bargain in good faith when it sent representatives to a negotiating session who were not fully authorized to conclude an agreement as required by § 7114(b)(2). The Authority concluded that the Judge's finding of the above violation, as well as the Judge's resolution of the issue of whether the agency was provided with adequate notice at the hearing that it was being charged with such misconduct, were supported by the record despite the fact that the charge was not specifically stated in the formal complaint. The union's opening and closing statements included that contention and the General Counsel supported that position as an alternative to the allegation that the agency violated § 7116(a)(1) and (5) by failing to execute the agreement.

The Authority held, consistent with the Judge's finding, that the General Counsel violated the policy set forth in section 2423.7(d) of the Authority's Rules and Regulations, by showing one of it witnesses, prior to the hearing, a document obtained from the agency in the course of its investigation. The Authority further concluded that the Judge acted appropriately in deciding that the actions cast doubt on the credibility of that witness' testimony, as well as the testimony of other union witnesses with whom the affected witness was likely to have discussed the matter, rather than striking and disregarding their entire testimony.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1450

Union

and Case No. 0-NG-1171

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one provision of a negotiated agreement which was disapproved by the Agency head pursuant to section 7114(c) of the Statute.1/

II. Provision

Section 26: Performance Appraisals

Annual performance appraisals will be frozen at the time of the general RIF Notice.

1/ The Agency withdrew its allegation that the duty to bargain did not extend to a second provision concerning criteria to be used when taking an adverse action based on unacceptable performance. Hence, that provision will not be considered herein.

> This provision does not determine the date on which the Employer will freeze other personnel actions. In addition, Employer agrees to fill vacancies, for which affected Employees meet minimum X-118 standards, only with affected employees after issuance of the general RIF notice to maximize the number of positions available to affected employees.

A. Positions of the Parties

The Agency argues that the underlined portion of this provision would interfere with its right, under section 7106(a)(2)(C)(ii) of the Statute, to fill positions from any appropriate source.

The Union did not file a response in this case.

B. Analysis

The disputed portion of this provision, by its terms, would require the Agency to fill vacancies in a RIF situation only with affected employees who meet minimum X-118 standards. In this regard, the provision herein is to the same effect as a provision in *National Treasury Employees Union and Department of the Treasury, U.S. Customs Service*, 9 FLRA 983 (1982), *remanded as to other matters sub nom. Department of the Treasury, U.S. Customs Service v. Federal Labor Relations Authority*, No. 82-2225 (D.C. Cir. Jan. 19, 1984), *vacated by FLRA as to other matters*, May 3, 1984, which provided in Article 12, sections 12A and B that for a 3-month period following a RIF affected employees be placed in vacant positions for which they qualify. In that decision, the Authority held that the provision violated the Agency's right to choose among candidates from "any appropriate source" pursuant to section 7106(a)(2)(C)(ii) of the Statute. Hence, for the reasons cited in *U.S. Customs Service*, the provision here in dispute must also be found to be outside the duty to bargain.

While the Union does not argue that the disputed provision is an appropriate arrangement under section

7106(b)(3) of the Statute,2/ the Authority notes that the provision is similar to union proposal 2 in National Association of Government Employees, Local R14-87 and Department of the Army, Kansas Army National Guard, 21 FLRA No. 105 (1986), which the Authority found to be an excessive interference with management's right to fill positions and, thus, not an appropriate arrangement under section 7106(b)(3). As indicated in Kansas Army National Guard, management's right to make selections for vacant positions includes the right to decide to fill or not fill a position and the right to determine the qualifications necessary to perform the work of the position. Management therefore retains the right in filling a position to determine whether any qualifications, in addition to basic qualification requirements such as those set forth in the X-118 standards, are necessary to accomplish the work of a position.

In this case, the provision in dispute would effectively preclude the Agency from determining the requisite qualifications for vacant positions, that is, any qualifications beyond the minimum requirements of the X-118 standards. Such a total abrogation of management's right to act in this respect excessively interferes with management's right to fill positions and, therefore, is not an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. See American Federation of Government Employees, Local 1799 and Department of the Army, Aberdeen Proving Ground, Maryland, 22 FLRA No. 62, slip op. at 6 (1986). Furthermore, the provision is inconsistent with a Government-wide regulation, Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual, because it would prevent the Agency from making selections from any appropriate source in filling vacant positions. See American Federation of Government Employees, AFL-CIO, Local 2677 and Department of Health and Human Services, Office of Community Services, 21 FLRA No. 22 (1986).

2/ The Authority has determined that proposals which concern "arrangements" for employees adversely affected by the exercise of management rights are negotiable unless the arrangement excessively interferes with the exercise of those rights. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

C. Conclusion

Therefore, for the above reasons, the Authority finds that the provision in dispute is not within the duty to bargain.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., August 5, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL OF
PRISONS LOCALS, LOCAL 1741

Union

and

Case No. 0-NG-1179

DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEM,
FEDERAL CORRECTIONS
INSTITUTION,
MILAN, MICHIGAN

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

From the record before the Authority, it appears that the local parties forwarded a supplemental collective bargaining agreement to the designee of the Agency head for review and approval pursuant to section 7114(c)(4) of the Statute. Article 9, Section d of the parties' National Controlling Agreement set forth the procedures for review of such local supplemental agreements.*/ The designee of the Agency head disapproved a number of provisions of the local agreement and served a copy of that disapproval on the Regional Vice President of the Union on August 27, 1985, by certified mail. The Union filed its petition for review with the Authority on September 19, 1985. In its statement of position, the Agency contends that the Union's petition was untimely filed. In response, the Union asserts that under the Controlling National Agreement the Agency's disapproval should have been served on the National President of the Union rather than the Regional Vice President. The Union further asserts that its appeal was timely filed from the date a local Union official obtained a copy of the disapproval.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, section 2429.22 of the Authority's Regulations provides for five days to be added to the prescribed filing period when the allegation is served on the Union by mail. Moreover, it is now well-established that an agency head's disapproval of a locally negotiated collective bargaining agreement constitutes an allegation of nonnegotiability for purposes of appeal to the Authority. American Federation of Government Employees, Local 2142, AFL-CIO and Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas, 15 FLRA 98 (1984).

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*/ Article 9, Section d provides, in part:

> Section d. Once an agreement has been reached at the local level, it shall be reduced to writing and signed by the local parties within fifteen (15) calendar days from the conclusion of the negotiations. A copy of the signed, proposed agreement shall be forwarded to the Labor-Management Relations Section by local management and another copy shall be forwarded by the local Union to its Regional Vice President. These parties at the national level shall have thirty days, from the date that the proposed agreement was signed, to independently review the agreement and determine if the proposed agreement complies with the provisions of this Agreement and applicable laws and regulations.
>
> The parties at the national level will independently notify their counterparts at the local level of the results of their reviews before the expiration of the thirty day time limit. The reviewing parties at the national level will serve on each other copies of their reviews as they are sent to the local level. At the end of the thirty-day review period, the local supplemental agreement will go into effect except for those provisions which have been found by either party to be in conflict with this Agreement, or applicable laws and regulations. Such conflicting provisions shall be stricken. [Emphasis added.]

In this case, it is undisputed that the Agency's disapproval of the local agreement provisions was served on the Union's Regional Vice President by certified mail on August 27, 1985. Moreover, based on the clear language of Article 9, Section d of the National Controlling Agreement, the Regional Vice President was the Union official the Agency was required to serve and not the National President as the Union asserts. There is no reference to the National President in the pertinent agreement provision and the Union fails to establish any basis for its assertion. Therefore, under sections 2424.3 and 2429.22 of the Authority's Rules and Regulations, any appeal from the Agency's allegation of nonnegotiability had to be filed with the Authority no later than September 16, 1985, in order to be considered timely. Since the Union's petition for review was not filed until September 19, 1985, it is untimely and must be denied on that basis.

Accordingly, and apart from other considerations, the Union's petition for review is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 6, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

23 FLRA No. 3

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL JOINT COUNCIL
OF FOOD INSPECTION LOCALS,
AFGE, AFL-CIO

Union

and Case No. 0-NG-1061

FOOD SAFETY AND INSPECTION
SERVICE, U.S. DEPARTMENT
OF AGRICULTURE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability of six provisions on travel and per diem.[1] The Agency head disapproved the provisions in reviewing a negotiated agreement under section 7114(c) of the Statute. The disapproval was limited to those aspects of the provisions which would allow payment of travel and per diem expenses for employee representatives. The disputed provisions follow:

[Provision 1]

ARTICLE V---UNION REPRESENTATIVES, GENERAL PROVISIONS
AND EXPENSES

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[1] The petition originally included four additional provisions on other subjects. The Union has since withdrawn its petition as to those four provisions.

Section A--Representatives:

The Chairman of the Council, the Presidents of the Regional Councils, the Presidents of affiliated Locals and designated plant representative or their designees are recognized as Union representatives at their respective organizational levels within the Service. . . . Similarly, the Local President(s) will designate to the appropriate area office one (1) plant representative for each plant having an assigned supervisor who will be expected to deal with the Service supervisor of that plant on day-to-day matters covered by this Agreement or applicable regional agreements. There will be no restriction upon the Local President with respect to whom he/she appoints as a plant representative. However, if a Local President appoints an individual who is located over twenty-five (25) miles from the plant to which he/she was appointed to serve as a plant representative, the entitlement to official time and expense shall be restricted to that which he/she would normally have received had he/she been located within the twenty-five (25) mile radius.

[Provision 2]

Section C--Official Expenses:

Per diem and travel expenses at official rates shall be paid Union representatives to attend meetings, and official proceedings, and to present grievances pursuant to paragraphs 1(a), (b), and (c) of Section B.

However, per diem and travel expenses not to exceed $150 shall be paid representatives to attend an oral conference pursuant to paragraph 1(c) of Section B.

[Provision 3]

ARTICLE XIII -- HEALTH AND SAFETY

Section J--Duty Time:

Each Union representative serving on a Health and Safety Committee shall be afforded official time to engage in such tasks. If such tasks involve travel, official travel allowances will be paid.

[Provision 4]

ARTICLE XXX -- DISCIPLINARY ACTION

Section D--Procedures:

Disciplinary actions shall be initiated and processed in accordance with applicable regulations. Grievances over disciplinary action decisions shall be processed in accordance with the provisions of Article XXXII, and of Article XXXIII if arbitration is invoked. It is further agreed by the Parties that:

. . . .

If the employee is not represented by the Union, the Union shall have the right to have an observer present at the oral conference, subject to a contrary determination by an oral conference officer when the employee objects on the grounds of privacy.

The Union observer shall be on official time and expenses for attendance at the meeting up to twelve (12) hours and $150. The Union shall be notified sufficiently in advance of the oral conference to permit attendance.

[Provision 5]

ARTICLE XXXII -- GRIEVANCE PROCEDURE

Section E--Role of the Union:

The Union shall be recognized as the representative of the aggrieved employee(s) unless such employee(s) wishes to personally handle the grievance and so informs the official to whom the grievance is being presented. No employee representative other than the Union will be recognized under these procedures.

If any employee presents a grievance on his/her own behalf, the Union shall have the right to have a representative present during the grievance proceeding on official time and expense.

[Provision 6]

ARTICLE XXXIII -- ARBITRATION

Section B--Arbitration Hearing:

1. The arbitration hearing will be held on Service premises or premises furnished by the Service during the regular day-shift hours of the basic workweek. The grievant(s), his/her Union representative and up to four (4) witnesses shall be allowed official time and expenses for the proceedings. All other witnesses deemed necessary by the arbitrator will be allowed official time for the proceedings.

II. Positions of the Parties

The Agency states that although the negotiated agreement was executed after the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), the disapproved language was agreed to prior to that decision. It asserts that the disputed portions of the provisions are not within the duty to bargain for the following reasons:

a. They do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute because payment of travel expenses is specifically provided for by law;

b. they are inconsistent with Federal law and Government-wide regulation; and

c. they conflict with an Agency regulation for which a compelling need exists.

The Union asserts that the provisions represent negotiation of a condition of employment about which the Agency has discretion, that is, whether to allow travel and per diem for travel occurring in the context of union representational activities. It contends that the Agency has not established a compelling need for Personnel Letter 711-10, the agency regulation which is claimed to bar negotiations.

III. Analysis

A. The Provisions Relate to Conditions of Employment

The Agency makes essentially the same "conditions of employment" argument as that made by the agency in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986) petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986). The Authority rejected that argument in Customs Service and we reject it here for the same reasons as set forth in that case.

B. The Provisions Are Not Inconsistent with Federal Law or Government-Wide Rules or Regulations

Under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, as interpreted by the Comptroller General,[2] agencies possess discretion to make determinations that travel in the context of union activity is sufficiently within the interest of the Government to constitute official business. Upon this determination, otherwise proper travel and per diem expenses may be paid from agency funds. Contrary to the Agency's argument, nothing in these authorities requires that this necessary determination be made only by management and only on a case by case basis. Customs Service, 21 FLRA No. 2. The Agency here makes no argument that travel flowing from the particular types of activities and circumstances set forth in the provisions could not meet this required standard.[3] Additionally,

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2/ 46 Comp. Gen. 21 (1966).

3/ Of course, if such a question should arise, the parties have access to their negotiated grievance procedure as a means of resolving the issue.

nothing in the provisions themselves or the parties' arguments suggests that these provisions would foreclose case by case determinations as to the appropriateness of specific travel and expenses which are proper under law and governing regulations. Given these circumstances, and for the reasons expressed in Customs Service, we reject the Agency's assertion that the provisions are inconsistent with law and Government-wide regulations.

C. The Provisions Do Not Conflict with an Agency Regulation for Which a Compelling Need Exists

The Agency argues, without further explanation, that these provisions conflict with Personnel Letter 711-10--an Agency regulation which meets the criteria for compelling need under section 2424.11(c) of the Authority's Rules and Regulations. The Agency has made a similar argument in various other negotiability appeals before us. We have consistently found that the Agency failed to establish a compelling need for that regulation. American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986), petition for review filed sub nom. Department of Agriculture, Federal Grain Inspection Service v. FLRA No. 86-1295 (D.C. Cir. May 21, 1986); American Federation of Government Employees, Council of Meat Grading Locals, AFL-CIO and Department of Agriculture, Agricultural Marketing Service, Meat Grading and Certification Branch, 22 FLRA No. 38 (1986), and National Association of Agricultural Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, 22 FLRA No. 45 (1986). There is no basis here for concluding differently.

IV. Conclusion

Based on the foregoing analysis, the Authority finds that the provisions concern conditions of employment and are not inconsistent with law or Government-wide regulation. The provisions are not barred from negotiations because they are inconsistent with an Agency regulation for which a compelling need exists. Therefore, they are within the duty to bargain.[4]

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[4] In finding that these provisions are within the duty to bargain, we make no judgment as to their merits.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of Provisions 1 through 6 which were bargained on and agreed to by the parties at the local level.

Issued, Washington, D.C., August 6, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON. D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1509, SIOUX FALLS
SOUTH DAKOTA VETERANS HOSPITAL

Union

and Case No. 0-AR-1052

U.S. VETERANS ADMINISTRATION HOSPITAL
SIOUX FALLS, SOUTH DAKOTA

Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Martin E. Conway filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed when the grievant's overall annual performance rating by his immediate supervisor was lowered from "outstanding" to "highly satisfactory" by the reviewing official. The grievance was submitted to arbitration on the issue of whether the reviewing official's action violated provisions of the collective bargaining agreement. The Arbitrator determined that the reduction of the rating by the reviewing official was inconsistent with the agreement. Primarily, he ruled that under the agreement it is not appropriate for someone who does not have daily knowledge of an employee's performance to reduce the employee's performance rating by the employee's immediate supervisor. He also found under the agreement that the reduction of the grievant's rating was not timely and properly communicated to him. Accordingly the Arbitrator sustained the grievance and ordered that the grievant's "outstanding" rating be reinstated and that the grievant be considered for a monetary award.

III. EXCEPTIONS

In its exceptions the Agency contends that the award is contrary to law and regulation. In particular, the Agency contends that the award is contrary to section 7106(a)(2)(B) of the Statute because it interferes with management's right to assign performance appraisal review duties to the reviewing official and substitutes the Arbitrator's judgment for that of the Agency as to who has the authority to review and change performance appraisals.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency. In Department of Health and Human Services, Social Security Administration, Kansas City, Missouri and National Treasury Employees Union, 17 FLRA 561 (1985), the arbitrator had interpreted the parties' collective bargaining agreement so as to preclude the performance appraisal reviewing official, an individual not in the bargaining unit, from lowering the performance appraisals of the grievants. In finding the award deficient, the Authority noted that bargaining proposals which prescribe duties to be performed by particular nonbargaining-unit personnel in the agency improperly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute. We also stated that an arbitrator's award may not interpret or enforce a provision of a collective bargaining agreement so as to improperly deny the authority of an agency to exercise its rights under section 7106(a) of the Statute or result in the substitution of the arbitrator's judgment for that of the agency in the exercise of those rights. Accordingly, the Authority ruled that the award was contrary to management's right under section 7106(a)(2)(B) to assign performance appraisal review duties to the reviewing official because it eliminated the discretion inherent in that right and because the arbitrator substituted his judgment for that of the agency in the exercise of the right. 17 FLRA at 562.

In this case, similar to SSA, Kansas City, we find that the Arbitrator has interpreted the parties' agreement to preclude the reviewing official, an individual not in the bargaining unit, from carrying out the assigned duty of reviewing performance appraisals and so as to deprive him of the discretion to change appraisals inherent in that duty. Thus, for the reasons set forth in greater detail in SSA, Kansas City, we conclude that the award improperly interferes with management's right to assign work and is deficient as contrary to section 7106(a)(2)(B) of the Statute.

V. DECISION

Accordingly, the Arbitrator's award is set aside.*/

Issued, Washington, D.C., August 11, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary to address the other contentions of the Agency in its exceptions to the award.

23 FLRA No. 5

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3320

Respondent

and

Case No. 6-CO-40016

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, REGION VI AND
UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, REGION VI
SAN ANTONIO AREA OFFICE

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent (AFGE) filed an opposition to the General Counsel's exceptions. The complaint alleged that AFGE violated section 7116(b)(8) of the Federal Service Labor-Management Relations Statute (the Statute) by its refusal to comply with an Arbitrator's award. The refusal of AFGE to comply with the Arbitrator's award is conceded. The issue before the Authority is whether this proceeding is barred by section 7116(d) and/or section 7118(a)(4)(A) of the Statute.

II. Facts

A grievance over the posting by AFGE of alleged objectionable material on its Union bulletin board was filed by the Charging Party (the Activity) and the matter was eventually submitted to arbitration. On March 28, 1983, Arbitrator Raymond L. Britton issued his decision and award on the matter. He sustained the grievance and ordered AFGE "to remove the objectionable material from the Union bulletin board and to post a retraction and apology for a period of time equal to the posting of the letters which are the subject of this grievance."

On April 27, 1983, AFGE filed exceptions to the Arbitrator's award with the Authority. It did not request a stay of the award. On May 6, 1983, the Authority issued an Order dismissing the exceptions as untimely filed. U.S. Department of Housing and Urban Development, Region VI, San Antonio Area, 12 FLRA 39 (1983). On May 11, 1983, the Activity requested AFGE to comply with the award and by letter dated May 16, 1983, AFGE responded, stating that it was appealing the Authority's Order.

By letter dated May 17, 1983, the Activity reminded AFGE that it was in violation of the parties' negotiated agreement, and in non-compliance with section 7122 of the Statute, by not complying with the arbitration award. The Activity's letter stated that AFGE should consider the letter an official grievance for the noted violation. On July 14, 1983, the Activity requested a panel of arbitrators from the Dallas, Texas office of the American Arbitration Association (AAA). In its letter to the AAA, the Activity stated that it was requesting the panel of arbitrators "so that one may be selected to hear a grievance concerning a violation of our national labor agreement." It stated further that the grievance concerned the Union's refusal to comply with Arbitrator Britton's March 28, 1983 Award. The Activity took no further action on the grievance.

AFGE filed a request for reconsideration of the Authority's May 6, 1983 Order. On August 3, 1983, the Authority granted the request and ordered that the case be reopened for consideration on the merits. On March 6, 1984, the Authority issued its decision denying AFGE's exceptions, on the basis that AFGE failed to establish that the Arbitrator's award was deficient on any of the grounds set forth in the Statute. Thereafter, AFGE again refused the Activity's request that AGFE comply with the arbitration award. On July 19, 1984, the Activity filed the charge in this proceeding alleging that AFGE violated the Statute by its failure and refusal to comply with Arbitrator Britton's March 28, 1983 award.

III. Administrative Law Judge's Decision

The Judge found that under Authority precedent, where there is a single issue, involving the same parties, section 7116(d) of the Statute allows an election of remedies; that the election is complete upon either the filing of a grievance or upon the filing of an unfair labor practice charge; and that, once the election is made, the aggrieved party may not thereafter elect to proceed under the other procedure. In support of this finding, the Judge cited several Authority decisions, including Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 13 FLRA 631 (1984); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA 855 (1985); and Federal Bureau of Prisons, 18 FLRA 314 (1985).

The Judge rejected the General Counsel's argument that the May 17, 1983 grievance was not a bar to this proceeding. He found that the Activity made its election to pursue the grievance procedure with full knowledge that AFGE was appealing the Authority's Order finding that AFGE's exceptions were untimely. He found further that the Authority's rescission of its Order did not resolve the underlying dispute of non-compliance alleged in the grievance and did not render the grievance moot. The Judge found that if the Activity had proceeded with the grievance to arbitration, the arbitrator could have ruled on the effect on the grievance proceeding of the Authority's decision to entertain AFGE's exceptions on the merits. Accordingly, he concluded that section 7116(d) precluded the proceeding in this case. He thus found it unneccessary also to resolve whether this proceeding was precluded by section 7118(a)(4)(A) of the Statute.

IV. Positions of the Parties

The General Counsel asserts in its exceptions that the Judge's interpretation of section 7116(d) of the Statute was in error. It argues that the Authority's rescission of its May 6, 1983 Order in 12 FLRA 39 returned the parties to the positions they were in prior to that Order, and rendered the Activity's May 17, 1983 grievance a nullity. Thus, it argues, the grievance did not bar this unfair labor practice proceeding.

AFGE asserts in its opposition to the General Counsel's exceptions that the Judge was correct. That is, the Authority's reconsideration of its dismissal of exceptions had no practical or legal effect upon the election of the grievance procedure by the Activity. It argues that there is no dispute that the Activity chose to raise the enforcement issue in a grievance, and that the Activity's choice barred it from filing an unfair labor practice charge. Therefore, it asserts that the General Counsel's exceptions are without merit and the complaint should be dismissed.

V. Analysis

In agreement with the Judge and based on his rationale, except as noted below,[1] we find that the Authority's reopening of AFGE's exceptions to Arbitrator Britton's award for consideration of the exceptions' merits did not nullify the Activity's prior grievance election. It is undisputed that the Activity was aware of the Union's intention to appeal the Authority's May 6, 1983 Order when it chose to file a grievance on May 17, 1983, and that the Activity knew that the Union had filed a request for reconsideration with the Authority when it requested a panel of arbitrators from the AAA in July 1983. Further, as the Judge found, the Activity's pursuit of the grievance was not voided by the Authority's later decision to consider AFGE's exceptions on the merits, since an arbitrator could have proceeded to decide all issues concerning the Activity's grievance under the terms of the parties' agreement. Thus, the Authority finds that the Activity's election, on May 17, 1983, to pursue enforcement of Arbitrator Britton's March 28, 1983 award through the parties' negotiated grievance procedure barred it under section 7116(d) of the Statute from pursuing the same matter under the unfair labor practice procedures of the Statute.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the General Counsel's exceptions, the Respondent's opposition to the exceptions, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended dismissal of the complaint. We therefore conclude that this proceeding is barred by section 7116(d) of the Statute and shall dismiss the complaint.[2]

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[1] We find it unnecessary to pass upon and specifically do not adopt the Judge's discussion at page 9 of his Decision concerning the effect of the Union's failure to request a stay of Arbitrator Britton's award under section 2429.8 of the Authority's Rules and Regulations.

[2] Based on this conclusion, the Authority finds it unnecessary to pass upon whether the unfair labor practice charge in this case would have been timely under section 7118(a)(4)(A) of the Statute, and we do not adopt the Judge's comments on the matter.

ORDER

IT IS ORDERED that the complaint in Case No. 6-CO-40016 be, and it hereby is, dismissed.

Issued, Washington, D.C., August 11, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[23 FLRA No. 5]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, AFL-CIO, LOCAL 3320 .

Respondent .

and . Case No. 6-CO-40016

UNITED STATES DEPARTMENT OF .
HOUSING AND URBAN DEVELOPMENT, .
REGION VI, AND UNITED STATES .
DEPARTMENT OF HOUSING AND URBAN .
DEVELOPMENT, REGION VI, SAN .
ANTONIO AREA OFFICE .

Charging Party .

. . . .

Steven M. Angel, Esquire
For the Respondent

Susan E. Jelen, Esquire
For the General Counsel

Before: William B. Devaney
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns the refusal of Respondent, American Federation of Government Employees, AFL-CIO, Local 3320 (hereinafter also referred to as "Local 3320"), to comply with an Arbitration Award.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(b)(8) will be referred to, simple, as "§ 16(b)(8)."

The consistent and adament refusal of Local 3320 to comply with the arbitration award is both conceded and firmly established by the record. The sole issue is whether this proceeding is barred by: a) § 16(d); and/or b) § 18(a)(4)(A). For reasons more fully set forth hereinafter, I conclude that this proceeding is barred by § 16(d) of the Statute. In view of my conclusion that this proceeding is barred by the Charging Party's prior election of the grievance procedure, it is unnecessary to reach, and I specifically do not decide, the further issue as to whether the charge was untimely within the meaning of § 18(a)(4)(A) of the Statute.

This matter was initiated by a charge filed on July 19, 1984 (G.C. Exh. 1(a)) which alleged violations of §§ 16(b)(5) and (8) of the Statute as the result of Local 3320's refusal to comply with the Arbitrator's Decision of March 28, 1983. A first Amended charge was filed on January 11, 1985 (G.C. Exh. 1(d)), which alleged violation of § 16(b)(5) only. The Complaint and Notice of Hearing issued on January 18, 1985 (G.C. Exh. 1(g) and set the Hearing for February 13, 1985. Subsequently, initially at the request of Local 3320 the hearing was rescheduled for April 9, 1985 (G.C. Exh. 1(h)); at the request of the General Counsel the hearing was rescheduled for May 21, 1985 (G.C. Exh. 1 (q)); and further at the request of General Counsel on May 21, 1985, was indefinitely postponed (G.C. Exh. 1(t)). By Order dated October 25, 1985, this matter was rescheduled for hearing on December 5, 1985, and pursuant thereto a hearing was duly held on December 5, 1985, in San Antonio, Texas, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which each party waived. At the conclusion of the hearing January 6, 1986, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of the General Counsel to which Respondent did not object, to January 13, 1986. General Counsel and Respondent each timely mailed an excellent brief, received on, or before, January 14, 1986, which have been carefully considered. Upon the entire record, I make the following findings and conclusions:

Findings and Conclusions

1. The United States Department of Housing and Urban Development (HUD) and the American Federation of Government Employees, AFL-CIO (AFGE) are parties to a collective bargaining agreement which covers both professional and non-professional employees. The current collective bargaining agreement was effective November 7, 1983 (G.C. Exh. 3). The previous

collective bargaining agreement was effective from November 10, 1979, until replaced by the current agreement (G.C. Exh. 2). Local 3320 is the local representative for AFGE at HUD's San Antonio Area Office.

2. On May 25, 1982, the Activity filed a grievance against Local 3320 alleging that Local 3320 had violated section 8.01(2) of the parties' collective bargaining agreement (G.C. Exh. 2) by the posting of certain letters. The grievance was processed through the parties' negotiated grievance procedure; an arbitration hearing was held on December 1, 1982; and, on March 28, 1983, Arbitrator Raymond L. Britton issued his decision and award, AAA Case No. 7130020082 (G.C. Exh. 5). The Arbitrator sustained the grievance and ordered Local 3320:

> ". . . to remove the objectionable material from the Union bulletin board and to post a retraction and apology for a period of time equal to the posting of the letters which are the subject of this grievance." (G.C. Exh. 5, p. 18).

On April 27, 1983, Local 3320 filed exceptions to the decision of the arbitrator with the Authority (G.C. Exh. 6). Local 3320 did not request a stay of the arbitration award. On May 6, 1983, the Authority issued an Order dismissing the exceptions as untimely filed. 12 FLRA No. 10, 12 FLRA 39 (1983) (G.C. Exh. 8).

3. On May 11, 1983, the Activity requested that Local 3320 comply with the arbitration award (G.C. Exh. 9) and by letter dated May 16, 1983, Local 3320 responded that it was, "appealing 12 FLRA No. 10" (G.C. Exh. 10).

4. By letter dated May 17, 1983, the Activity reminded Local 3320 that it was, ". . . in violation of Article 23, Section 23.09 Award, and in addition, in non-compliance with 5 USC Section 7122 by not complying with the Arbitrator's Award . . . ." (G.C. Exh. 11). The Activity's letter of May 17, 1983, further stated:

> "This is to inform you that this should be considered by you an official grievance for the above noted violation." (G.C. Exh. 11).

By letter dated July 14, 1983, to the Assistant Regional Director, American Arbitration Association, Dallas, Texas, the agency requested a panel of arbitrators, ". . . so that one may be selected to hear a grievance concerning a violation of our national labor agreement . . . ." (G.C. Exh. 12). The Activity further stated,

> "The grievance concerns a violation of the HUD-AFGE labor agreement, Article 23, Section 23.09. Management contends that the union violated the contract by its refusal to comply with Arbitrator Britton's Award of March 28, 1983, AAA Case No. 71 30 0200 82 . . . ." (G.C. Exh. 12).

The Activity's grievance was never withdrawn, although the activity took no action to select an arbitrator from the panel submitted by the American Arbitration Association (see, G.C. Exh. 21).

5. Local 3320 having filed a request for reconsideration of the Authority's Order of May 6, 1983, the Authority by Order dated August 3, 1983, rescinded its Order of May 6, 1983, and ordered the ". . . case reopended for consideration on the merits." (G.C. Exh. 13).

6. On March 6, 1984, the Authority issued its decision denying Local 3320's exceptions (G.C. Exh. 15). By letter dated March 16, 1984, the Activity again requested that Local 3320 comply with the arbitration award (G.C. Exh. 16); by memorandum dated March 23, 1984, Local 3320 responded and stated, ". . . we are going to court on FLRA decision . . . Also . . . the time frame for you to appeal my non-compliance has expired. Instead of following the proper appeal procedures to the FLRA, this office chose to ask for a second arbitrator, and in doing so allowed the time frame to run out. Therefore, your (sic) out of luck." (G.C. Exh. 17). By letter dated July 2, 1984, the Activity again requested that Local 3320 comply with the arbitration award (G.C. Exh. 18); and by memorandum dated July 10, 1984, Local 3320 refused to comply with the award (G.C. Exh. 19).

7. On July 19, 1984, the Activity filed a charge (G.C. Exh. 1(a)) and on January 11, 1985, a first Amended charge (G.C. Exh. 1(d)), each of which alleged that Local 3320 violated the Statute by its failure and refusal to comply with the Arbitrator's decision of March 28, 1983.

I. § 16(d)

Section 16(d) of the Statute provides, in relevant part, as follows:

> ". . . issues which can be raised under a grievance procedure may, in the discretion

> of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." (5 U.S.C. § 7116(d)).

Where there is a single issue, here the failure and refusal to comply with an arbitration award, involving the same parties, it has consistently been held that § 16(d) requires an election of remedies; that the election is complete upon either the filing of a grievance or upon the filing of an unfair labor practice charge; and that once the election is made, the aggrieved party may not thereafter elect to proceed under the other procedure. In Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California, 13 FLRA No. 105, 13 FLRA 631 (1984), the Authority dismissed the complaint because the issue, which was the subject matter of the complaint, had, prior to the filing of the charge been the subject matter of a grievance, i.e., the Respondent's failure to disclose a crediting plan, notwithstanding that the grievance had not been pursued through all steps of the grievance procedure. In Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA No. 100, 18 FLRA 831 (1985), the Authority held, in part, that, ". . . section 16(d) . . . does not bar this unfair labor practice proceeding, based on the finding by the Judge that the charge . . . was filed . . . prior to the filing of the grievance." 18 FLRA at 832). See, also, Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 17, 19 FLRA 169, 170-171 (1985). In Headquarters, Space Division, Los Angeles Air Force Station, California, 17 FLRA No. 131, 17 FLRA 969 (1985) the Authority denied exceptions to an award of the arbitrator which had held portions of the grievance were precluded by an earlier-filed unfair labor practice charge, notwithstanding that the unfair labor practice charge had been withdrawn. In Federal Bureau of Prisons, 18 FLRA No. 40, 18 FLRA 314 (1985), the Authority set aside an arbitration award because of a prior filed unfair labor practice charge, notwithstanding that the Authority's Regional Director had refused to issue a complaint and the appeal from that decision had been denied by the Authority's General Counsel. The Authority stated, in part, as follows:

> "In sum, there was an election in the discretion of the aggrieved party to raise the issue in this case under the unfair labor practice procedures. The Authority has recognized that the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party . . .

> Thus, the matter raised by the filing of the grievance could not be relitigated under the grievance procedure and consequently the grievance was precluded by the Statute from consideration by the Arbitrator. For these reasons, the award is deficient as contrary to section 7116(d) and is set aside (footnote omitted)" (18 FLRA at 316).

To like effect, see also, Department of Defense Dependents Schools, Pacific Region, 17 FLRA No. 135, 17 FLRA 1001 (1985). In Department of Air Force, Griffiss Air Force Base, Rome, New York, 12 FLRA No. 50, 12 FLRA 198 (1983), a portion of a consolidated complaint (Case No. 1-CA-588) was dismissed, pursuant to § 16(d), because of a prior filed grievance (12 FLRA at 200, n. 5; ALJ decision 12 FLRA at 208). (Reversed and remanded on other grounds, American Federation of Government Employees, AFL-CIO, Local 2612 v. Federal Labor Relations Authority, 739 F. 2d 87 (D.C. Cir. 1984)). In Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA No. 101, 18 FLRA 855 (1985), the Authority dismissed the complaint, pursuant to § 16(d), because the subject matter of the complaint had been raised by a previously filed grievance.

General Counsel states, in part, as follows:

> ". . . On May 17, 1983, the Activity filed a grievance over the Union's refusal to comply with the arbitration award. The General Counsel admits that the May 17, 1983 grievance was filed by the same aggrieved party and involved the same basic issue, the Union's refusal to comply with the arbitration award, as the unfair labor practice charge filed in this case on July 19, 1984. Under normal circumstances, the grievance would bar the processing of the subsequent unfair labor practice." (General Counsel's Brief at p. 9).

However, General Counsel argues that the prior filed grievance in this case is not a bar because, ". . . the intervening event of the Authority's August 3, 1983 recision of its earlier May 6, 1983 . . . mooted the May 17, 1983 grievance." (General Counsel's Brief, p. 9). General Counsel further argues that, "The Activity considered the grievance a nullity since the Authority had rescinded its previous ruling that the exceptions were untimely. The 1983 grievance was premature as the arbitration award was not considered final and binding until the Authority issued its decision on May 6, 1984 . . . ." (General Counsel's Brief, p. 9).

I do not agree that the May 17, 1983, grievance is not a bar to this proceeding; nor do I agree that Authority's August 3, 1983, recision of its May 6, 1983, decision that Local 3320's exceptions were untimely rendered the grievance moot. First, the aggrieved party, the Activity, in its discretion, made an election to raise the issue, of Local 3320's failure and refusal to comply with the arbitration award of March 28, 1983, through the grievance procedure. The Activity made this election with full knowledge (G.C. Exh. 10) that Local 3320 was "appealing 12 FLRA No. 10." As the Authority has consistently held,

> ". . . the clear purpose and effect of section 7116(d) is to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party . . . ." Federal Bureau of Prisons, supra, 18 FLRA at 316.

Second, the arbitrator, in his award of March 28, 1983, had resolved all aspects of the dispute being arbitrated; Local 3320 had failed and refused to comply with that award; and the Activity's grievance was based on the premise that Local 3320 was, ". . . in violation of Article 23, Section 23.09 Award . . . by not complying with the Arbitrator's Award . . . ." (G.C. Exh. 11). In its letter requesting a panel of arbitrators, the Activity further stated, "The grievance concerns a violation of the HUD-AFGE labor agreement, Article 23, Section 23.09. Management contends that the Union violated the contract by its refusal to comply with Arbitrator Britton's Award of March 28, 1983 . . . ." (G.C. Exh. 12). At the time of the Activity's election of the grievance procedure to resolve the dispute, Local 3320's exceptions on May 6, 1983, had been dismissed as untimely (G.C. Exh. 8); but the Authority's subsequent decision, on August 3, 1983, rescinding that order, i.e., its determination that Local 3320's exceptions had, in fact, been timely filed, and ordering the ". . . case reopened for consideration on the merits." (G.C. Exh. 13) did not resolve the dispute. Local 3320 had not complied with the Arbitration Award of March 28, 1983, and, because the underlying dispute had not been resolved, the Activity's grievance was not rendered moot. Local 74, United Brotherhood of Carpenters & Joiners of America, AFL v. National Labor Relations Board, 341 U.S. 707 (1951). Indeed, on March 6, 1984, the Authority denied Local 3320's exceptions (G.C. Exh. 15). The Authority's decision, after the Activity's election of the grievance procedure, to entertain Local 3320's exceptions did not render the arbitration case a non-justiciable controversy, Hicklin v. Coney, 290 U.S. 169 (1933). Quite to the contrary, Article 23, Section 23.09 of the parties' Agreement provided that:

> "The arbitrator's award shall be binding on the Parties. Either party may file exceptions to the award with the Federal Labor Relations Authority." (G.C. Exh. 2).

Article 23, Section 23.05 of the parties' Agreement provided,

> "The arbitrator shall have the authority to make all grievability and/or arbitrability determinations. Questions of arbitrability shall be submitted to the arbitrator in writing and be decided prior to any hearing, unless otherwise mutually agreed upon." (G.C. Exh. 2).

Pursuant to Article 23, Section 23.05 and 23.09, of the parties' Agreement, the arbitrator plainly was given full authority to determine all questions of grievability and/or arbitrability. Presumably, Local 3320 would have raised, as an affirmative defense, the fact that its exceptions to the Award of March 28, 1983, were pending before the Authority, and, if the exceptions had not been decided at the time the matter was submitted to the arbitrator, the arbitrator would have had to make a decision; but, clearly, the Authority's decision of August 3, 1983, to entertain Local 3320's exceptions, did not render the dispute submitted to arbitration moot. The arbitrator might have concluded that, pursuant to the language of Article 23, Section 23.09, pendancy of exceptions was immaterial to arbitration of the issue of Local 3320's violation of the contract by virtue of its non-compliance with the Award of March 28, 1983. Compare, American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority, 777 F. 2d 751 (D.C. Cir. 1985); or the arbitrator might have proceeded to arbitration on the issue of Local 3320's breach of contract but deferred any award pending disposition of Local 3320's exceptions; or the arbitrator might have proceeded to arbitration on the issue of Local 3320's breach of contract in failing to comply with the Award of March 28, 1983, because Local 3320 had not requested a stay of the Award of March 28, 1983 (discussed further hereinafter); or the arbitrator might have deferred arbitration pending disposition of Local 3320's exceptions; or the arbitrator may have taken other action. The significance is not what action the arbitrator might have taken, but, rather, that the Agreement of the parties lodged plenary power in the arbitrator to decide any question of grievability and/or arbitrability and that the arbitrator had a wide range of options in determining the effect, if any, of the Authority's decision to entertain Local 3320's exceptions.

Third, Local 3320 had not requested a stay of the Arbitrator's Award of March 28, 1983, and the Regulations of the Authority specifically provide, in part, that:

> ". . . the filing of an exception shall not itself operate as a stay of the award involved in the proceedings." (5 C.F.R. § 2429.8(a)).

Consequently the Authority's August 3, 1983 determination to entertain Local 3320's exceptions did not stay the Award of March 28, 1983, and without regard to whether the exceptions were ultimately sustained or denied (and they were, in fact, denied on March 6, 1984, G.C. Exh. 15), in the absence of a stay, the parties must comply with the Award of March 28, 1983, even though the Award was subject to review by the Authority. American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority, supra. Stated otherwise, the arbitrator could have proceeded to arbitration on the issue of Local's violation of the Agreement by virtue of Local 3320's failure to comply with the Award of March 28, 1983, because the Award had not been stayed and Local 3320 was then required to comply with the Award. Obviously, the Authority's determination on August 3, 1983, to entertain Local 3320's exceptions did not preclude the arbitrator from granting effective relief to the aggrieved party, the Activity, and, therefore, the arbitration was not rendered moot. Newport News Shipbuilding and Dry Dock Co. v. Schauffler, et al., 305 U.S. 54 (1938); United States v. Rock Royal Co-op, Inc. et al., 307 U.S. 533 (1939); National Labor Relations Board v. C.E. Atkins and Co., 331 U.S. 398 (1947); American Federation of Government Employees, AFL-CIO, Local 3090 v. Federal Labor Relations Authority, supra.

Of course, the controlling consideration under § 16(d) is the election of remedies. It is conceded that the Activity elected the grievance procedure on May 17, 1983. Having made that election, it is immaterial whether that remedy was wise or whether that remedy was pursued. For reasons set forth above, the Activity's grievance was not rendered moot by the Authority's subsequent determination to entertain Local 3320's exceptions.

II. § 18(a)(4)(A).

In view of my conclusion that this proceeding must be dismissed pursuant to § 16(d) of the Statute, it is unnecessary to reach the further question as to whether this proceeding is, or is not, precluded by § 18(a)(4)(A). Although I specifically do not decide whether the time for filing an unfair labor practice, pursuant to § 18(a)(4)(A), began to run either from the date of the arbitration award, here March 28, 1983, to which no stay was requested, or from the initial refusal to comply with that award, here, May 16, 1983, either date having been substantially more than six months prior to the date the charge was filed on July 19, 1984, attention is directed to: a) Section 2429.8(a) of the Authority's Regulations, which provides that the filing of an exception to an arbitration award ". . . shall not operate as a stay of the award . . . ."; and b) the decision of the United States Court of Appeals for the District of Columbia Circuit, *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, 777 F. 2d 751 (D.C. Cir. 1985), which held that the dismissal of an unfair labor practice complaint, initiated while exceptions to the arbitrator's decision were pending before the Authority but as to which no stay had been requested, was improper.

Conclusion

Having found that this proceeding is barred by § 16(d) of the Statute, 5 U.S.C. § 7116(d), it is recommended that the Authority adopted the following;

ORDER

The Complaint in Case No. 6-CO-40016 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 17, 1986
Washington, D.C.

23 FLRA No. 6

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. GOVERNMENT PRINTING OFFICE

Respondent

and

Case No. 3-CA-30465

COLUMBIA TYPOGRAPHICAL UNION NO. 101
INTERNATIONAL TYPOGRAPHICAL UNION,
AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondent. The complaint alleged that the U.S. Government Printing Office violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when on March 23, 1983, it bypassed the Columbia Typographical Union No. 101, International Typographical Union, AFL-CIO, the exclusive representative of certain of its employees, by negotiating directly with a bargaining unit employee an informal adjustment of her Equal Employment Opportunity complaint.

II. Background

The facts are set out in detail by the Judge and are not in dispute. In sum, a bargaining unit employee applied for the position of Head Deskman-in-Charge and was determined to be one of five best qualified candidates. This position, while included in the bargaining unit, is a bridge position for consideration with respect to supervisory positions. Upon her nonselection for the position, the employee filed an Equal Employment Opportunity (EEO) complaint alleging that she was not selected because of her race and sex. The employee did not choose the Union to represent her in her EEO complaint. On March 23, 1983, the employee entered into an informal adjustment of her EEO complaint with the Respondent which provided that she would be promoted to the next available vacancy of a Head Deskman-in-Charge position. Within a few days the Union learned of the settlement and requested a copy. The Respondent provided the Union with a copy of the settlement on April 1, 1983.

III. Judge's Decision

The Judge concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by negotiating directly with a bargaining unit employee an informal adjustment of her EEO complaint based on the fact that "the meeting and 'negotiations' . . . concerned an EEO complaint, pursuant to statutory procedures of the Equal Employment Opportunity Commission (EEOC) . . . ." In response to the General Counsel's contention that the meeting with the employee constituted the adjustment of a grievance, the Judge relied on the Authority's holding in Bureau of Government Financial Operations, Headquarters, 15 FLRA 423, 429 (1984), rev'd sub nom. National Treasury Employees Union v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985), "that a grievance within the meaning of section 7114(a)(2)(A) does not encompass a statutory appeal . . . ."

Although the bypass alleged in the complaint was related specifically to the direct dealings between the bargaining unit employee and the Respondent in settlement of the EEO complaint, the Judge concluded further "that 'bypass' is sufficiently broad as to include all aspects of the Respondent's duty to bargain with the Union . . . ." In the Judge's view, where a change in conditions of employment results from the resolution of an EEO complaint, an agency is obligated to provide notice to the exclusive representative not later than immediately after its resolution. As he viewed the informal adjustment of the bargaining unit employee's EEO complaint to have resulted in a change in conditions of employment which was more than minor and isolated in character, the Judge found that the Respondent's failure to provide immediate notice to the exclusive representative of that change in conditions of employment, even though the Respondent provided the Union with a copy of the settlement upon the Union's request not more than a week later, constituted a violation of section 7116(a)(1) and (5) of the Statute.

IV. Positions of the Parties

The General Counsel took the position before the Judge that where the resolution of a unit employee's EEO complaint has a substantive impact on the bargaining unit, the exclusive representative has the right to receive notice and attend the meeting at which the resolution was reached. Before the Judge, the Respondent argued essentially that no provision of the Statute establishes a right for the exclusive representative to be a party in the resolution of complaints filed as statutory appeals under the regulations of the EEOC.

In its exceptions, the Respondent contended that the violation found by the Judge was improper because it was neither alleged in the complaint nor litigated at the hearing. Specifically, the Respondent asserted that neither the language of the complaint nor the supporting arguments made by the General Counsel ever raised the issue that the Respondent bypassed the Union solely by its failure to afford the Union an opportunity to negotiate concerning the impact and implementation of the EEO settlement agreement. In the Respondent's view, the sole issue alleged, litigated and briefed by both parties was whether the Respondent bypassed the Union by dealing directly with the EEO complainant.

The Respondent also excepted to the Judge's finding of a violation on its merits, contending essentially that the General Counsel never established that any existing condition of employment was changed or that the settlement resulted in any foreseeable impact on bargaining unit employees. Additionally, the Respondent argued that the Union never requested bargaining after it had received a copy of the settlement.1/

1/ The Respondent also excepted to the Judge's statement that in some circumstances the provisions of the EEOC with respect to confidentiality, specifically the identity of the aggrieved person, might have to yield to the right of the exclusive representative to notice of a change in conditions of employment resulting from the resolution of an EEO complaint of discrimination. Since no issue is raised in this case concerning the disclosure of an EEO complainant's identity, the Authority finds it unnecessary to address the Respondent's exception to the Judge's statement. Nevertheless, the Authority would give little weight to this exception as it is predicated on the pre-complaint confidentiality requirements of the EEOC Regulations, 29 CFR § 1613.213(a), while the facts of this case concern the post-complaint settlement efforts of the parties involved and different confidentiality requirements, 29 CFR § 1613.217.

V. Analysis

A. The Judge's Conclusion that the Complaint was Sufficiently Broad to Encompass All Aspects of Respondent's Duty to Bargain in Good Faith.

The Judge concluded that the complaint was sufficiently broad to include all aspects of the Respondent's duty to bargain with the Union. The Authority disagrees. The complaint neither alleged, nor did the parties litigate at the hearing, whether the Respondent's failure to provide notice to the Union of the informal adjustment of the EEO complaint constituted an unfair labor practice. The clear basis for both the unfair labor practice charge and the complaint, as indicated in the positions taken by the General Counsel at the hearing and in the brief to the Judge, was that the Respondent violated the Statute by meeting directly with a bargaining unit employee and reaching a settlement with that employee with respect to her EEO complaint of discrimination, which the General Counsel characterized as the resolution of her grievance without the presence of the exclusive representative. Therefore, as the allegation that the Respondent failed to provide the Union with notice of the settlement and an opportunity to bargain was not encompassed by the complaint and thus was not before the Judge, the Authority concludes that the violation found by the Judge in this regard must be dismissed.

B. The Judge's Conclusion that Negotiating Directly with a Bargaining Unit Employee over the Informal Adjustment of an EEO Complaint did not Constitute a Bypass.

The Authority concludes, in agreement with the Judge, that the Respondent, by meeting directly with a bargaining unit employee and negotiating an informal adjustment of her EEO complaint, did not bypass the exclusive representative in violation of section 7116(a)(1) and (5) of the Statute. Thus, any employee is entitled to elect to pursue a complaint of discrimination pursuant to and under the regulations of the EEOC as provided by law.[2] These regulations provide for an informal adjustment process.[3/] The regulations of the EEOC also provide that at any stage in the presentation of an EEO complaint, "the complainant shall have the right to be accompanied, represented and advised by a representative of his own choosing."[4/] Nowhere in those regulations is there any provision for the exclusive representative's presence, unless the exclusive representative is the complainant's designated representative. The U.S. Court of Appeals for the District of Columbia Circuit recognized the rights of the employee victim of discrimination when it observed:

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[2] 29 CFR § Part 1613 was promulgated by the EEOC pursuant to an express grant of authority contained in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b)(1976). *See also* section 7121(d) of the Statute.

> . . . Congress has explicitly decided that a conflict between the identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. . . . Similarly, a direct conflict between the rights of an exclusive representative . . . and the rights of an employee victim of discrimination should also presumably be resolved in favor of the latter. (citation omitted; emphasis in original).

National Treasury Employees Union v. FLRA, 774 F.2d 1181, 1189 n. 12 (D.C. Cir. 1985).[5/]

[3/] 29 CFR § 1613.217 provides that "The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file." The same EEOC regulation requires the agency to furnish the investigative file promptly to "the complainant and the complainant's representative . . . ."

[4/] 29 CFR § 1613.214(b).

[5/] For examples of similar conflicts in the private sector resolved in favor of the victim of discrimination over the exclusive representative, see Alexander v. Gardner-Denver Co. 415 U.S. 36, 50-51 (1973), which held that the individual's right to equal employment opportunities may not be waived in a collective bargaining agreement; International Union of Electrical, Radio and Machine Workers v. NLRB, 648 F.2d 18, 26-27 (D.C. Cir. 1980), involving an individual EEO complainant's paramount right to the privacy and confidentiality of his or her EEO complaint over an exclusive representative's demand for a copy of the complaint and the employee's identity; and

(Continued)

Therefore, an unfair labor practice cannot be found based solely upon an agency's conduct in resolving an EEO complaint pursuant to the regulations of the EEOC. Moreover, as the theory of bypass is premised on a finding that agency management has dealt unlawfully with unit employees concerning a matter over which the exclusive representative has both the right and obligation to represent the employees,6/ no violation can be found in these circumstances. The bargaining unit employee had elected to pursue her complaint of discrimination as an appeal under the regulatory process of the EEOC, and the exclusive representative had no *statutory* rights or obligations to represent her in *that* process.

Furthermore, the Authority agrees with the Judge, as a statement of general principle, that while a union has no right to participate in the informal adjustment of an EEO complaint where a bargaining unit employee has elected to pursue the complaint of discrimination under the EEOC regulatory process,7/ it may have a role if the settlement gives rise to an impact on the bargaining unit. As the D.C. Circuit recognized in a different context with reference to rights under section 7114 of the Statute in *National Treasury Employees Union v. FLRA*, 774 F.2d at 1188, the resolution of such complaints could potentially affect all bargaining unit employees in important ways, since a benefit or opportunity granted to one employee can mean the loss of the same benefit or opportunity for other employees. Accordingly, if the adjustment of an EEO complaint results in a change of unit employees' conditions of employment, the agency would have an obligation under the Statute to give prompt notice of that change to the exclusive representative of the unit employees and provide it with an opportunity to bargain to the extent required by

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(Continued)

Airline Stewards and Stewardesses Association, Local 550, TWU, et al. v. American Airlines, Inc., 490 F.2d 636, 642 (7th Cir. 1973), concerning the right of individual class members in an EEO case to exclude themselves from class actions brought by their exclusive representative.

6/ *See* *Internal Revenue Service (District, Region, Office Units)*, 19 FLRA No. 48 (1985), *petition for review filed sub nom. National Treasury Employees Union v. FLRA*, No. 85-1597 (D.C. Cir. Sept. 20, 1985).

7/ Of course, the union may be selected as the employee's *personal* representative.

the Statute.[8] Of course, since Congress has determined that the rights of identifiable victims of discrimination must take priority over the interests of the bargaining unit (744 F.2d at n. 12), an exclusive representative's right to bargain upon receiving notice of an EEO complaint settlement cannot conflict with or overturn the substance of such settlements. Since there is no issue in this case concerning the exclusive representative's lack of notice and an opportunity to bargain over the EEO complaint settlement, it is unnecessary for the Authority to address Respondent's exceptions on these grounds.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order only to the extent consistent with the above. We therefore conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by meeting directly with a bargaining unit employee and negotiating the settlement of her EEO complaint. We conclude further that the Judge's finding of a violation based on the Respondent's failure to provide the Union with notice of a change in conditions of employment must be reversed as that allegation was not encompassed by the complaint before the Authority. Accordingly, the complaint shall be dismissed in its entirety.

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[8] Such prompt notice would also appear to satisfy a union's need to understand the agency's application of policies affecting members of the bargaining unit and to fulfill its role as the exclusive representative. Thus, as noted by the United States Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, Local 1345 v. FLRA, No. 85-1378 (D.C. Cir. 1986), "In order to fulfill this obligation [to represent bargaining unit employees], it is axiomatic that [the union] must be able to inform employees of the procedures to which they are entitled and to communicate its willingness to enforce compliance with the bargaining agreement." (footnote omitted) slip op. at 8. The Court also noted that since the union represents all the members of the bargaining unit and policies established in particular personnel actions may affect employees beyond those immediately involved, management must provide information that is relevant to the union's need to understand new policies or the application of old policies that may affect members of the bargaining unit. Slip op. at 8.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-30465 be, and it hereby is, dismissed.

Issued, Washington, D.C. August 11, 1986

J. Calhoun

Jerry L. Calhoun Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

U.S. GOVERNMENT PRINTING OFFICE :
Respondent :
and : Case No. 3-CA-30465
COLUMBIA TYPOGRAPHICAL UNION NO. 101, :
INTERNATIONAL TYPOGRAPHICAL UNION, :
AFL-CIO :
Charging Party :

. . . .

Neal H. Fine, Esquire
For the Respondent

Mr. William J. Boarman
For the Charging Party

Ana de la Torre, Esquire
Bruce D. Rosenstein, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judges

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether the Government Printing Office (hereinafter also referred to as GPO or Respondent) violated § 16(a)(5), and derivatively § 16(a)(1), of the Statute by informally adjusting an EEO

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)."

Complaint of a bargaining unit employee without affording the exclusive representative notice of the change of conditions of employment which resulted therefrom and opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby. This case was initiated by a charge filed on April 26, 1983 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; the Complaint and Notice of Hearing issued on December 28, 1983 (G.C. Exh. 1(c)); the Complaint alleged violations only of §§ 16(a)(5) and (1) and set the hearing for February 14, 1984, pursuant to which a hearing was duly held on February 14, 1984, in Washington, D.C., before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to present oral arguement. At the close of the hearing, March 14, 1984, was fixed as the date for mailing post hearing briefs which time was subsequently extended, upon timely motion of Respondent, with which the other parties concurred, for good cause shown, to April 16, 1984. Respondent and General Counsel each filed an excellent brief on April 16, 1984, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

The facts are not disputed and briefly are as follows:

1. The Columbia Typographical Union No. 101 (hereinafter referred to as the "Union") is the exclusive bargaining representative for a unit of GPO's employees, including Video Keyboard Operators assigned to the Electronic Photocomposition Division. GPO and the Union are parties to a collective bargaining agreement (Jt. Exh. 1(a)) and are also party to a second but separate agreement negotiated between GPO and the Joint Council of Unions of which the Union is a part (Jt. Exh. 1(b)).

2. Ms. Sylvan W. Curtis is assigned as a Video Keyboard Operator in the Electronic Photocomposition Division. In October, 1981, Ms. Curtis had bid for a posted vacancy of Assistant Group Chief (now Head Deskman-in-Charge) in the Video Keyboard Section; had been one of five best qualified candidates; but was not selected. On May 20, 1982, Ms. Curtis filed an equal employment opportunity (EEO) Complaint in which she alleged that she had not been selected for the position of Assistant Group Chief, now Head Deskman-in-Charge, because of her race and sex (Union Exh. 1).

3. Ms. Curtis selected as her personal representative Mr. Jerry Nash, an employee of GPO but neither a representative of the Union nor an official of the Union.

4. In accordance with the applicable EEO regulations, GPO Instruction 650.1c (Jt. Exh. 2) and 29 C.F.R. Part 1613 (Jt. Exh. 3), Ms. Curtis' complaint was investigated and processed under GPO's EEO procedures.

5. The Union was not given notice of Ms. Curtis' EEO Complaint.

6. On March 23, 1983, Ms. Curtis entered into an informal adjustment[2] agreement of her complaint (G.C. Exh. 4). The settlement agreement was signed by the Complainant, Ms. Curtis; by her representative, Mr. Jerry Nash; by Respondent's EEO Complaint Officer, Ms. Hazel Devers; and by Respondent's representative, Mr. Thomas O. Magnetti. The Union was not given notice of the settlement which, in part, provided that Ms. Curtis would be promoted to the next available vacancy of a Head Deskman-in-Charge position on any of the three shifts in the Video Keyboard Section (G.C. Exh. 4, Par. 2).

7. During the latter part of March, 1983, shortly after its execution, the Union learned of the settlement and by letter dated March 28, 1983 (G.C. Exh. 2) requested a copy of the "decision" which GPO furnished by letter dated April 1, 1983 (G.C. Exh. 3).

8. The Union did not, after notice of the settlement, request negotiations concerning the implementation or impact of the settlement agreement (Tr. 23). As of the date of the hearing, Ms. Curtis had not been promoted to the position of Head Deskman-in-Charge as there has been no further vacancy in the Video Keyboard Section.

Conclusions

The Complaint alleges, in relevant part, that:

> "On or about March 23, 1983, Respondent negotiated directly with an employee an Informal Adjustment Agreement to resolve the employee's complaint of discrimination." (G.C. Exh. 1(g), Par. 6).
>
> "The employee referred to in Paragraph 6 above occupies a position within the . . . unit . . . ." (id., Par. 7)
>
> "Respondent engaged in the conduct described in paragraph 6 above without acquiring the actual consent of the Union or an express waiver of its right under the Statute to exclusively represent bargaining unit employees." (id., Par. 8)

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[2] Under the EEO regulations there is an informal complaint procedure (Jt. Exh. 2) or precomplaint procedure (Jt. Exh. 3) and if the allegation of discrimination is not resolved at this stage, a complaint must be submitted in writing. Once a complaint is filed, there is further provision for informal adjustment of the complaint (Jt. Exh. 2, Par. 6 h; Jt. Exh. 3, § 1613.217). Here, there was no adjustment at the informal or precomplaint stage; a complaint was filed in writing (Union Exh. 1); and the complaint was settled pursuant to the informal adjustment procedures.

> "By the acts and conduct described in paragraph 6 above, Respondent bypassed the Union and thereby failed or refused to negotiate in good faith with the Union." (id., Par. 9)
>
> "By the acts and conduct alleged above, Respondent has engaged in . . . unfair labor practices in violation of section 7116(a)(1) and (5). (id., Par. 10).

Although this case does not involve any allegation that the meeting of March 23, 1983, was a formal discussion concerning, inter alia, a "grievance", as set forth in § 14(a)(2)(A) and defind in § 3(a)(9) of the Statute[3], General Counsel, both at the hearing (see, for example, Tr. 72, 75) and by brief (see, for example, General Counsel Brief pp. 11, 12, 13), relied heavily on Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA No. 54, 7 FLRA 371 (1981), set aside, 706 F.2d 1019 (9th Cir. 1983), which was premised on § 14(a)(2)(A) and the definition of § 3(a)(9) of the Statute. Indeed, General Counsel asserts that,

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[3] § 3(a)(9) "'grievance' means any complaint —

"(A) by any employee concerning any matter relating to the employment of the employee;

"(B) by any labor organization concerning any matter relating to the employment of any employee; or

"(C) by any employee, labor organization, or agency concerning —

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;" (5 U.S.C. § 7103(a)(9)).

§ 14(a)(2) "An exclusive representative . . . shall be given the opportunity to be represented at —

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment;" (5 U.S.C. § 7114(a)(2)(A)).

". . . since the forum in the instant case remains within the jurisdiction of the Authority, the Internal Revenue Service case, supra, remains binding precedent." (General Counsel's Brief, p. 13; see, also, Tr. 72). After the hearing and after briefs were submitted, the Authority, on August 1, 1984, in Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87, 15 FLRA 423 (1984), reversed its analysis as set forth in Internal Revenue Service, supra, and held in relevant part (Member Haughton concurring in part and dissending in part) as follows:

> ". . . the United States Court of Appeals for the Ninth Circuit reversed a decision of the Authority in which the Authority held that a meeting to discuss an Equal Employment Opportunity (EEO) complaint concerned a 'grievance' within the meaning of section 7114(a) since an EEO complaint fell within the broad definition of section 7103(a)(9) of the Statute (footnote omitted). In its decision, the Court, noting that the EEO complaint was filed pursuant to statutory procedures of the Equal Employment Opportunity Commission (EEOC), decided that the EEO claim of discrimination did not constitute a 'grievance' within the meaning of section 7114(a)(2)(A). In this regard, the Court stated, '. . . the EEOC procedures involved in this case are not controlled by 5 U.S.C. § 7114(a)(2)(A) because they are separate and distinct from the grievance process to which 5 U.S.C. §§ 7103 and 7114 are directed.' Thus, the Authority finds, based on the distinctions in the Statute and its legislative history noted above, and the Court decision in the IRS, Fresno, case, supra, that a grievance within the meaning of section 7114(a)(2)(a) does not encompass a statutory appeal (footnote omitted). In the instant case, the meeting was held solely in connection with a statutory appeal — namely, an MSPB appeal. Accordingly, the Authority concludes that the meeting did not concern a 'grievance' within the meaning of section 7114(a)(2)(A) of the Statute." (15 FLRA at 429-430).

In this case, as the meeting and "negotiations" of March 23, 1983, concerned an EEO complaint, pursuant to statutory procedures of the Equal Employment Opportunity Commission (EEOC), GPO did not violate §§ 16(a)(5) or (1) of the Statute by its failure to give the Union notice of the meeting, by its failure to provide the Union with an opportunity to be represented at the meeting, or by negotiating directly with an employee an informal adjustment of her EEO complaint. Nevertheless, Respondent GPO was not free to implement any change in established conditions of employment, albeit that here the change resulted from an agreement resolving an EEO complaint of discrimination, without giving the Union notice of the change and an opportunity to negotiate concerning appropriate arrangements for those employees adversely affected as a result of Respondent GPO's action. Stated otherwise, an agency is free to meet with an employee and/or his or her designated representative to resolve, or to attempt to resolve, pursuant to statutory procedures of the

EEOC, an EEO complaint of discrimination without notice to the exclusive bargaining representative; but if the agency by its resolution of the EEO complaint[4] takes action which changes any established condition of employment of other bargaining unit employees, it must give the exclusive bargaining representative notice of the change of established condition(s) of employment and an opportunity to negotiate concerning appropriate arrangements for those employees adversely affected by its action. It is the agency's change of conditions of employment which requires notice to the exclusive bargaining representative and an agency may not change an established condition of employment, even though it lawfully may agree to do so pursuant to statutory procedures of the EEOC to resolve an EEO Complaint of discrimination, without notice of the change to the exclusive bargaining representative and affording the exclusive bargaining representative an opporunity to negotiate concerning the impact and implementation of said change, any more than an agency may not change an established condition of employment pursuant to a reserved management right without notice to the exclusive bargaining representative and opportunity to negotiate concerning the impact and implementation of the exercise of such management right. U.S. Government Printing Office, 13 FLRA No. 39, 13 FLRA 203 (1983); Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 15 FLRA No. 187 (1984). Notice of change of an established condition of employment by the resolution of an EEO complaint of discrimination does not necessarily require that the agency reveal the identity of the aggrieved person (see, Jt. Exh. 2, p. 9, Par. 5 c); but to the extent that it does, or may, then the provisions of EEOC with respect to confidentiality must yield to the right of the exclusive bargaining representative to notice of any change of a condition of employment and its right, pursuant to the Statute, to negotiate concerning impact and implementation of such change.

The position of Head Deskman-in-Charge is within the bargaining unit represented by the Union and GPO's agreement to promote Ms. Curtis to the next available vacancy foreseeably results in impact upon the remaining bargaining unit members, as between 200 and 250 unit employees will be rendered ineligible to apply for the next vacancy of Head Deskman-in-Charge which, without posting, will automatically be awarded to Ms. Curtis. Promotion to the Head Deskman-in-Charge position is one of the few opportunities open to journeymen unit employees to move into better paying positions and ultimately to supervisory positions (Tr. 18-20). As General Counsel notes, "The fact that these positions are scarce is evidenced in that Ms. Curtis following almost twelve months after entering into the settlement agreement, still remains in the same position she held when she first applied for the head deskman-in-charge position in 1981 (Tr. 18, Un. Exh. No. 1)" (General Counsel's Brief, p. 4). Ms. Devers, Respondent's EEO Complaint Officer, testified that EEOC had given her verbal guidance that,

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[4] It is immaterial whether such resolution occurs during the "Informal Complaint Procedure" or during the "Formal Complaint Procedure."

> ". . . unless the settlement of the complaint is going to have an impact on the bargaining unit employee, then the union has no right to be present at meetings with the complainant if they are not the designated representative.
>
> . . . .
>
> "If the settlement of that complaint is going to result in a change of working conditions, employment, the terms of their employment, if it's going to affect more than one person than the individual who we're dealing with who filed the complaint, then there is no right, the union has no right to be there." (Tr. 46).

For reasons set forth above, the right of the Union to be present at meetings with an EEO Complainant is properly governed by EEO procedures (in passing, however, the record plainly shows that EEOC and Respondent recognize that confidentiality is not absolute vis-a-vis the exclusive bargaining representative). Here, we are concerned not with Respondent's right to resolve an EEO complaint of discrimination without the presence of the Union, but, rather, with the separate and distinct right of the Union to notice of any change of conditions of employment affecting other bargaining unit employees that results from such resolution. Ms. Devers' testimony also fully supports, and by direct inference concedes, General Counsel's assertion that resolution of an EEO complaint of discrimination which affects other bargaining unit employees results in an impact which is more than de minimis. cf. Department of Health and Human Services, Social Security Administration, Chicago Region, 15 FLRA No. 174 (1984). I conclude that Respondent's agreement to promote Ms. Curtis to the next available vacancy of a Head Deskman-in-Charge position changed an existing condition of employment and that the change resulted in an impact upon unit employees which was more than de minimis for the reason that, although only a single future vacancy was thus encumbered, the removal of a promotion opportunity from the established posting and bidding procedures impacted on the rights of all other bargaining unit employees.

Here, Respondent changed an existing condition of employment on March 23, 1983, when it agreed to promote Ms. Curtis to the next available vacancy of a Head Deskman-in-Charge position and Respondent, at that point, failed to give the Union notice of the change of a condition of employment. As Respondent lawfully resolved the complaint of discrimination pursuant to statutory procedures of EEOC, unlike the situation when an agency exercises a reserved management right pursuant to § 6 of the Statute where the agency is obligated to provide adequate prior notice to the exclusive representative, Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, supra, I conclude that where the change in condition of employment results from the resolution of an EEO complaint, the agency is obligated to provide notice to the exclusive representative not later than immediately after its resolution of an EEO complaint which results in a change of conditions of employment. This Respondent failed to do; however, sometime thereafter the Union learned of the settlement by overhearing a conversation among unit employees on the shop floor (Tr. 13-14), and the Union requested a copy of the settlement agreement on March 28, 1983, which Respondent furnished on April 1, 1983. Respondent violated its obligation when it failed to provide the Union notice of the change of a condition of employment resulting from its resolution of the EEO complaint immediately after entering into the settlement agreement and its violation is neither obviated nor absolved by the fact that the Union subsequently learned of the settlement by "shop talk" or by the fact that the agreement remained executory. But is the violation found encompassed by the Complaint? The Charge (G.C. Exh. 1(a)) alleged, inter alia, that Respondent violated the Statute, ". . . by bypassing . . . [the Union] by agreeing to promote Sylvan W. Curtis . . . in a manner inconsistent with . . .[the Union's] contract and with the Federal Merit Promotion Policy", which, in my opinion, encompassed the violation found, i.e., the failure to give the Union notice of a change of a condition of employment and an opportunity to negotiate concerning appropriate arrangements for those employees adversely affected. The Complaint, however, in quite different language alleges that, by negotiating directly with an employee an Informal Adjustment Agreement to resolve the employee's complaint of discrimination, ". . . Respondent bypassed the Union and thereby failed or refused to negotiate in good faith with the Union" (G.C. Exh. 1(c), Par. 9); and, as the Complaint proceeded on the theory that direct negotiation with an employee of a settlement of an EEO complaint of discrimination violated the statute, that by such conduct ". . . without acquiring the actual consent of the Union or an express waiver of the right under the Statute to exclusively represent bargaining unit employees" (G.C. Exh. 1(c), Par. 8), Respondent violated §§ 16(a)(1) and (5) of the Statute. Whether the violation found is encompassed by the allegations of the Complaint turns, therefore, on the allegation that by negotiating the Adjustment Agreement Respondent bypassed the Union and thereby failed or refused to negotiate with the Union. If construed strictly, one could conclude that the violation found was not encompassed by any allegation of the Complaint since the Complaint was premised on the theory that, because an EEO complaint was a "grievance" within the meaning of § 3(a)(9) of the Statute, the exclusion of the Union from the negotiation of the Adjustment Agreement violated the Statute. Although the bypass alleged by the Complaint was of the negotiation of the Adjustment Agreement, I conclude that "bypass" is sufficiently broad as to include all aspects of Respondent's duty to bargain with the Union and specifically that it encompassed Respondent's duty to give notice to the Union of any change of conditions of employment resulting from the resolution of the EEO complaint and an opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby. Accordingly, I find that Respondent violated §§ 16(a)(1) and (5) of the Statute by its failure to give the Union notice of the change in conditions of employment on March 23, 1983, which resulted from its resolution of Ms. Curtis' EEO complaint, and affording the Union an opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby.

As Respondent violated §§ 16(a)(1) and (5) when it failed to give the Union notice of the change in conditions of employment at, or immediately after, its action which resulted in said change, the fact that the Union did not request negotiations after it learned of the Adjustment Agreement is not determinative with respect to whether a violation occurred. Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, A/SLMR No. 1142, 8 A/SLMR 1188 (1978); Internal Revenue Service (IRS) and Brooklyn District Office, IRS, 2 FLRA No. 76, 2 FLRA 586 (1980); United States Department of Justice, Immigration and Naturalization Service, Southern Region, El Paso, Texas, 11 FLRA No. 27, 11 FLRA 90 (1983); Bureau of Land Management, Richfield District Office, Richfield, Utah, 12 FLRA No. 133, 12 FLRA 686 (1983); U.S. Government Printing Office, 13 FLRA No. 39, 13 FLRA 203 (1983); Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 15 FLRA No. 187 (1984).

Respondent's agreement to promote Ms. Curtis to the next available vacancy remains executory, i.e., no vacancy has occurred and Ms. Curtis has, therefore, not been offered promotion to Head Deskman-in-Charge. Under the circumstances, General Counsel's request for an order requiring present negotiations, upon request of the Union, concerning appropriate arrangements for bargaining unit employees adversely affected by the change in conditions of employment resulting from Respondent's resolution of Ms. Curtis' EEO Complaint is appropriate and will be granted. Present negotiations will effectuate the purposes and policies of the Statute by assuring the Union's statutory rights and will provide a meaningful remedy for the violation found to have been committed. Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, supra.

Accordingly, having found that Respondent violated §§ 16(a)(1) and (5) of the Statute, 5 U.S.C. §§ 7116(a)(1) and (5), it is recommended that the Authority adopt the following:

ORDER

Pursuant to Section 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulation, 5 C.F.R. § 2423.29, the Authority hereby orders that the U.S. Government Printing Office shall:

1. Cease and desist from:

(a) Failing and refusing to give the Columbia Typographical Union No. 101, International Typographical Union, AFL-CIO, the exclusive representative of its employees (hereinafter referred to as the "Union"), notice of any change of conditions of employment as the result of the settlement or adjustment, pursuant to the statutory procedures of the Equal Employment Opportunity Commission and/or Respondent's Equal Employment Opportunity Regulations, immediately upon resolution of any EEO complaint of discrimination which results in any change of conditions of employment of any other bargaining unit employee and affording the Union the opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, we will negotiate with the Union concerning appropriate arrangements for employees who have been, or may be, adversely affected by the change in conditions of employment which resulted from the settlement, pursuant to statutory provisions, of the Equal Employment Opportunity complaint of Ms. Sylvan W. Curtis whereby Respondent agreed to promote Ms. Curtis to the next available vacancy of a Head Deskman-in-Charge position on any of the three shifts in the Video Keyboard Section.

(b) Post at all of its facilities wherein there are bargaining unit employees represented by the Union copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Public Printer, or his designee, and shall be posted and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director of Region III, Federal Labor Relations Authority, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 27, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give the Columbia Typographical Union No. 101, International Typographical Union, AFL-CIO, (hereinafter referred to as the "Union") notice of any change of conditions of employment as the result of the settlement or adjustment, pursuant to statutory procedure of the Equal Employment Opportunity Commission and/or Government Printing Office Equal Opportunity Regulations, immediately upon resolution of any EEO complaint of discrimination which results in any change of conditions of employment of any other bargaining unit employee and affording the Union the opportunity to negotiate concerning appropriate arrangements for bargaining unit employees adversely affected thereby.

WE WILL, upon request, negotiate with the Union concerning appropriate arrangements for employees who have been, or may be, adversely affected by the change in conditions of employment which resulted from the settlement, pursuant to statutory provisions, of the Equal Employment Opportunity complaint of Ms. Sylvan W. Curtis whereby the Government Printing Office agreed to promote Ms. Curtis to the next available vacancy of a Head Deskman-in-Charge position on any of the three shifts in the Video Keyboard Section.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: __________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111-18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number number is: (202) 653-8456.

23 FLRA No. 7

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,
LOCAL 2027

Union

and

Case No. O-NG-1243

ACTION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal.1/

II. Union Proposal

> Details for less than thirty-one (31) calendar days will normally be rotated among employees. Such details shall be documented with a memorandum to the detailed employee's OPF.

III. Positions of the Parties

The Agency contends that because the Union's proposal would require the Agency, under normal circumstances, to rotate details of less than 31 days, it would subject

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1/ In its appeal, the Union sought Authority review of a number of other proposals. However, in its response to the Agency's statement of position in the case, the Union withdrew its petition as to the other proposals. Accordingly, those proposals will not be considered by the Authority.

management's discretion concerning such details to review by the Union and third parties. The Agency argues that the proposal therefore would directly interfere with its right to assign employees under section 7106(a)(2)(A) of the Statute and its rights under section 7106(a)(2)(B) to assign work and to determine the personnel by which Agency operations will be conducted.

The Union maintains that its proposal does not interfere with management's rights and that the proposal is fully negotiable. In support of its position, the Union contends that the proposal does not mandate that details of less than 31 days must always be rotated and that the requirement of the proposal that details "normally" will be rotated acknowledges that deviations may be necessary for a variety of reasons. The Union further contends that the proposal does not limit management's discretion to establish the qualifications needed to perform work on details or limit management's judgment in determining whether a particular employee meets those qualifications.

IV. Analysis and Conclusions

The Union's proposal expressly provides that details for less than 31 calendar days normally will be rotated among employees. Under this proposal, as interpreted by the Union, employees would, in normal situations, be selected for details of the prescribed duration by rotation. Management would fully retain the discretion to determine the qualifications necessary to perform any detail work and the qualifications of any employees to be detailed. Management would also retain the discretion to determine not to rotate details in other than normal circumstances. The Authority finds that the Union's interpretation of the proposal is consistent with the plain language of the proposal.

The Authority has held that when two or more employees have been determined by management to be equally qualified and capable of performing work, the selection of any one of those employees to perform the work is consistent with management's exercise of its discretion under section 7106(a) of the Statute. In such circumstances, a proposed procedure by which employees previously judged by management to be equally qualified will be selected to perform the work does not directly interfere with section 7106(a)(2)(A) or (B) of the Statute but, rather, is a negotiable procedure under section 7106(b)(2). Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California, 9 FLRA 703, 706-07 (1982).

In this case, the Authority finds that the disputed proposal, as interpreted by the Union, constitutes a negotiable procedure for the selection of employees to perform work on details, that is, selection by rotation among employees management has determined to be qualified to perform the work involved. The Authority therefore concludes, contrary to the Agency's position, that the proposal is consistent with management's rights under section 7106(a)(2)(A) and (B) of the Statute and is within the Agency's duty to bargain.[2]

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the disputed proposal.

Issued, Washington, D.C., August 11, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding this provision to be within the duty to bargain, the Authority makes no judgment as to its merits.

23 FLRA No. 8

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2022

Union

and

Case No. 0-NG-1205

U.S. ARMY, HEADQUARTERS 101st
AIRBORNE DIVISION AND FORT
CAMPBELL

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of the following Union proposal:

> Section 13-6. The union is authorized to prepare, hang, and maintain signs at/near entrance to Gates 1, 3, 4, 6, and 10 of Fort Campbell, Kentucky. The signs will be restricted to three feet high and five feet wide. Words on signs will read as follows:
>
> WELCOME TO FORT CAMPBELL
> COURTESY OF
> AMERICAN FEDERATION OF
> GOVERNMENT EMPLOYEES
> LOCAL 2022

II. Positions of the Parties

The Agency contends that the proposal is nonnegotiable because it does not concern a matter affecting working conditions of bargaining unit employees, within the meaning of section 7103(a)(14) of the Statute. The Union argues that this proposal involves communication with its members through the use of Agency facilities which is a negotiable condition of employment.

III. Analysis and Conclusion

Under the statutory scheme established by sections 7103(a)(12), 7106, 7114 and 7117 a matter proposed for bargaining which is consistent with Federal law, including the Statute, Government-wide regulations or Agency regulations is outside the duty to bargain unless that matter directly affects the conditions of employment of bargaining unit employees.[1] In Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986), the Authority stated that it will consider two basic factors in deciding whether a proposal involves a condition of employment of bargaining unit employees:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

For the following reasons, we conclude that the proposal does not involve a condition of employment of bargaining unit employees.

Applying the first factor to the proposal we are not persuaded by the record that the proposal principally focuses upon or pertains to bargaining unit employees. See National Treasury Employees Union and Internal Revenue

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[1] Section 7103(a)(14) of the Statute defines "condition of employment" as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions . . . ."

Service, 7 FLRA 275, 284 (1981). Rather, the sign would merely welcome all people, employees and non-employees alike, entering the specified gates and advise them of the Union's existence.

Even assuming that the proposed signs pertain to bargaining unit employees, we cannot conclude, applying the second factor, that hanging the signs at or near the Agency's entrances would directly affect those employees' working conditions. The fact that the Agency provided this service to the Union in the past does not, standing alone, make this a condition of employment subject to the duty to bargain. Maritime Metal Trades Council and Panama Canal Commission, 17 FLRA 890, 892 (1985). Further, contrary to the Union's categorical assertion, the use of agency facilities by a Union is not necessarily a condition of employment within the meaning of section 7103(a)(14) of the Statute. The case the Union relies on to support this proposition, American Federation of Government Employees, AFL-CIO, Local 3748 and Department of Agriculture, Science and Education Administration, Personnel Division, Hyattsville, Maryland, 11 FLRA 122 (1983), is distinguishable. In Department of Agriculture, the Authority found negotiable a proposal which provided the Union access to the agency's Federal Telecommunication System during negotiations in order to facilitate the collective bargaining process. Unlike this case, that proposal was intertwined with the collective bargaining process and had a clear and direct affect on working conditions of bargaining unit employees. Here, to the contrary, it is not apparent that hanging the proposed sign on Agency property would facilitate communication or in any other way directly affect the working conditions of bargaining unit employees.

For the foregoing reasons, the Union's proposal in this case concerns a matter which is not a condition of employment of bargaining unit employees and is outside the Agency's obligation to bargain.[2]

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[2] In reaching this conclusion Chairman Calhoun wishes to emphasize his belief that disputes over proposals such as this one should and can best be resolved at the bargaining table. The issue here clearly should not be raised to the level of the Authority. Chairman Calhoun believes that resolution of this case and others which are similar require

(Continued)

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and hereby is, dismissed.

Issued, Washington, D.C., August 11, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

the resources of each Governmental entity, including the Authority, to be expended in a manner which is inconsistent with the requirement of an effective and efficient Government. This proposal clearly does not concern working conditions of unit employees and the dispute over it serves only to trivialize the labor-management relations process.

23 FLRA No. 9

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE
BROOKLYN DISTRICT

Respondent

and Case No. 2-CA-50241

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 53

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The General Counsel and the Charging Party (the Union) filed oppositions to the Respondent's exceptions. The complaint in this case alleged a violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by failing and refusing to execute and implement a memorandum of understanding (the agreement) reached by representatives of the parties at a negotiating session on February 14, 1985.

II. Background

The Union represents Internal Revenue Service (IRS) employees who work in the Brooklyn District. The parties had entered into a settlement agreement in October 1984, in which the Respondent agreed to negotiate concerning the impact and implementation of the relocation of Group 1117 employees whose post of duty was in Mineola, Long Island. After some effort, a negotiating session was set for February 14, 1985.

In prior negotiating sessions involving other matters, the Respondent took the position that its negotiators did not have final authority to bind the Respondent to an agreement and that such authority only resided with higher level management, the District Director. At the beginning of the February 14, 1985 session, there was a discussion concerning the extent to which the Respondent's representatives had the authority to bind the Respondent to any agreement which might be reached. The Union representatives who attended the negotiating session testified at the hearing that the Respondent's representatives left the room, apparently to make phone calls, and returned to announce that they now had full authority to bind the Respondent. The Judge, however, credited the Respondent's witnesses' testimony to the effect that they announced their lack of authority at the commencement of the meeting, that they never sought or announced a change in that position, and that they assumed that the Union's representatives acquiesced in that position in the interest of concluding an agreement subject to approval by the District Director.

In the course of the February 14, 1985 bargaining session, the parties reached agreement on all the outstanding issues presented by the move of Group 1117 employees. The Union left the session with the belief that it had a binding agreement. Subsequently, the District Director raised concerns about portions of the February 14, 1985 agreement and refused to execute the agreement. The Union refused to change the agreement reached at the bargaining table and filed the unfair labor practice charges that led to this complaint.

III. Judge's Decision

The Judge concluded that the General Counsel had not established, by a preponderance of the evidence, that a final agreement was reached at the bargaining session held on February 14, 1985. The Judge based that conclusion on her finding that the Respondent's representatives indicated at the beginning of the session that they did not have the authority to bind the agency and that they did not waver from that position. The Judge found that the Union's President at the time of the incident was aware of the Respondent's past failure to send fully authorized representatives to bargaining sessions. Therefore, the conclusions reached at that session were, in effect, only tentative pending the approval of higher level management officials. Under those circumstances, the Judge concluded that the Respondent did not act in violation of section 7116(a)(1) and (5) of the Statute, as alleged, when it failed to give final approval to, and implement, any agreement reached at the February 14, 1985 bargaining session.

The Judge also concluded that the Respondent failed to send representatives to the February 14, 1985 bargaining session who had the capability of binding the Respondent to an agreement, in violation of section 7116(a)(1) and (5) of the Statute. In so concluding, the Judge acknowledged the Respondent's contention that the complaint did not specifically charge it with the misconduct which is the basis of the violation. However, the Judge concluded that the allegation that the Respondent failed to send fully authorized representatives to the February 14, 1985 bargaining session was inherent in the complaint and that the matter was fully litigated at the hearing. In that regard, the Judge found that the testimony at the hearing presented by the Respondent demonstrated that its representatives made clear to the Union's representatives at the outset of the session that they did not have the authority to bind the Respondent and that they consistently maintained that position. The Respondent's defense was that the Union understood the position of management's representatives and agreed to continue with the negotiating session on the terms set by the Respondent. The Judge concluded that any Union acquiescence to the continuation of bargaining without fully empowered management representatives was not so clear and unambiguous as to constitute a waiver of its statutory right to bargain with agency representatives who were fully empowered to commit the Respondent to an agreement. The Judge recommended that the Respondent be ordered to continue the negotiations of February 14, 1985, with duly authorized representatives.

IV. Positions of the Parties

The Respondent excepts to the Judge's finding that it violated section 7116(a)(1) and (5) of the Statute by failing to send to the February 14, 1985 negotiations representatives who were fully empowered to represent the Respondent. The Respondent does not except to the substance of the Judge's finding, but rather to the Judge's conclusion that the complaint was sufficiently broad so as to encompass the activity she found to be violative and that the matter of whether or not there were fully empowered representatives was fully litigated at the hearing. The Respondent contends that the complaint was never amended to specifically allege that it violated the Statute by failing to provide fully empowered representatives.

The Respondent also excepted to the Judge's failure to strike and disregard the testimony of one of the witnesses for the General Counsel who had been shown, prior to the hearing, a document obtained by the General Counsel from the Respondent in the course of its investigation. The Judge found that it was a violation of 5 CFR § 2423.7(d) for the General Counsel's witness to have been shown the document in question, but she concluded that a sufficient remedy was for her to treat the matter as casting doubt on the credibility of the affected witness and the other Union witnesses with whom the affected witness was likely to have discussed the matter prior to the hearing. The Respondent contends that the Judge's action was insufficient as a remedy for such "egregious" conduct by the General Counsel.

Neither the General Counsel nor the Charging Party excepts to the Judge's decision. In their oppositions to the Respondent's exceptions, the General Counsel and the Charging Party essentially support the validity of the Judge's decision with respect to the matters to which the Respondent excepts.

V. Analysis

The Authority finds that the Judge's decision is correct and should be adopted. With respect to the question of whether the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to provide representatives who were fully empowered to commit the Respondent to any agreement reached with the Union at their February 14, 1985 negotiating session, the Judge found that the matter was fully litigated at the hearing. The Authority concludes that this finding by the Judge, as well as the Judge's resolution of the issue of whether the Respondent was provided with adequate notice at the hearing that it was being charged with such misconduct, are supported by the record. Thus, in its opening statement, the Charging Party stated:

> The Union's post-hearing brief will show that the Authority case law clearly holds that failure to authorize representative at the table to commit the party to a

> formal agreement or a final agreement. In the absence of mutual consent otherwise constitutes bad faith bargaining and violation of Sections (a)(1) and (5) of the Statute. (sic) (Transcript of Proceedings before the Judge, July 16, 1985, at 20.)

Further, the Charging Party's representative at the hearing repeated this contention in his closing argument, and the General Counsel supported this position as an alternative to the allegation that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to bargain in good faith by failing to execute the agreement reached on February 14, 1985.

The Judge found that the General Counsel, by showing one of its witnesses, prior to the hearing, a document obtained from the Respondent in the course of its investigation, violated the policy set forth in section 2423.7(d) of the Authority's Rules and Regulations. We conclude that the Judge, based on the reasoning set forth in her decision, acted appropriately in deciding that the actions cast doubt on the credibility of that witness' testimony, as well as the testimony of other Union witnesses with whom the affected witness was likely to have discussed the matter, rather than striking and disregarding their entire testimony as requested by the Respondent before the Judge and in its exceptions to the Judge's decision.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms these rulings. The Authority has considered the Judge's Decision, the Respondent's exceptions to the Judge's finding of a violation, the oppositions to the Respondent's exceptions submitted by the General Counsel and the Charging Party, and the entire record, and adopts the Judge's findings, conclusions, and recommended Order. We therefore conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain in good faith at the February 14, 1985 negotiating session with the Union by sending representatives who were not fully authorized to conclude an agreement as required by section 7114(b)(2) of the Statute. In agreement with the Judge, and noting that no exceptions were filed to this aspect of her conclusions, we also conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by failing to execute and implement the agreement reached between the parties on February 14, 1985 because, as found by the Judge, no final agreement requiring execution and implementation was reached at that time. Accordingly, those aspects of the complaint shall be dismissed.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Internal Revenue Service, Brooklyn District shall:

1. Cease and desist from:

(a) Failing to bargain in good faith by refusing and failing to designate an agency representative empowered to negotiate fully with the National Treasury Employees Union and enter into a final and binding agreement as to the impact and implementation of the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York, subject only to review pursuant to section 7114(c) of the Statute.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the National Treasury Employees Union for continued bargaining, designate an agency representative empowered to negotiate fully and enter into a final and binding agreement as to the impact and implementation of the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York, subject only to review pursuant to section 7114(c) of the Statute.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Director, Brooklyn District, Internal Revenue Service, or a designee, and shall be maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of section 7116(a)(1) and (5) of the Statute for failure to approve a binding agreement, shall be, and it hereby is, dismissed.

Issued, Washington, D.C., August 12, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

[23 FLRA No. 9]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to bargain in good faith by refusing and failing to designate an agency representative empowered to negotiate fully with the National Treasury Employees Union and enter into a final and binding agreement as to the impact and implementation of the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York, subject only to review pursuant to section 7114(c) of the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL, upon request by the National Treasury Employees Union for continued bargaining, designate an agency representative empowered to negotiate fully and enter into a final and binding agreement as to the impact and implementation of the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York, subject only to review pursuant to section 7114(c) of the Statute.

____
(Activity)

Dated:____________ By:____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, New York 10278, and whose telephone number is: (212) 264-4934.

[23 FLRA No. 9]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE,
BROOKLYN DISTRICT

Respondent

and

Case No. 2-CA-50241

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 53

Charging Party/Union

. . . .

Eileen P. Collins and
Robert F. Hermann,
For the Respondent

Michael J. Wolf,
For the Charging Party/Union

Cecile O'Connor and
E. A. Jones,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of an unfair labor practice filed by the Charging Party on April 8, 1985, the Regional Director of Region II of the Federal Labor Relations Authority (hereinafter, the Authority), investigated and, on May 31, filed the complaint initiating this proceeding.

In paragraph 8(a) of the complaint it is alleged that, on or about February 14, 1985, the Charging Party/Union and agents of Respondent "negotiated, reached agreement, and initialed off at the bargaining table on a written memorandum of understanding embodying the terms agreed to regarding the impact and implementation of the relocation at the Mineola post-of-duty." In paragraph 9 of the complaint it is alleged that "at all times thereafter, Respondent, by [its agent, District Director] John Jennings, failed and refused, and continues to fail and refuse, to execute and implement the memorandum of understanding . . . ." See General Counsel's Exhibit 9(c). It is then alleged, in paragraphs 10 and 11, that by the acts alleged in paragraph 9, Respondent violated Sections 7116(a)(1) and (5) of the Statute.[1] The unfair labor practice charge filed by the Charging Party/Union also alleges a violation of Sections 7116(a)(1) and (5) by the specific act of the activity refusing to execute and implement a negotiated agreement entered into on February 14. See General Counsel Exhibit 9(a).

Respondent denies that the alleged violations occurred.

A hearing was held on July 16 and 17, 1985, in New York City. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed by the General Counsel and the Charging Party on September 9 and by the Respondent on September 10. Based upon the record made in this proceeding and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

---

[1] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .

Findings of Fact [2]

1. At all times material herein, the Charging Party has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

2(a). At all times material herein, the Internal Revenue Service (IRS) has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute.

(b). At all times material herein, IRS, Brooklyn District has been, and is now, a constituent entity within IRS and an agent acting on its behalf.

3. At all times material herein, the following named persons occupied positions in the IRS Brooklyn District as set forth below, opposite their names:

John Jennings - District Director

Donald Mitgang - Assistant District Director

Harvey Silverman - Chief, Examination Division

Gail Peck - Chief, Labor Relations

4. At all times material herein, the individuals named above in paragraph 3, have been, and are now, supervisors and/or management officials as defined in Section 7103(a)(10) and (11), respectively, of the Statute and have been, and are now, agents of Respondent acting on its behalf.

5(a). At all times material herein, the National Treasury Employees Union (NTEU) has been, and is now, the certified exclusive representative of a consolidated nationwide unit of certain employees of IRS, including all professional and nonprofessional employees employed in the District, Region and National Offices of IRS, excluding all management officials, supervisors, confidential employees, federal employees engaged in personnel work in other than a purely clerical capacity, guards and other employees not relevant herein.

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[2] The following abbreviations will be used herein. "TR. I" refers to the transcript dated July 16. "TR. II" refers to the transcript dated July 17. "G.C. Exh." refers to the exhibits of the General Counsel and "R. Exh." to those of Respondent. "G.C. Br." refers to the brief of the General Counsel, "R. Br." to that of Respondent, and "C.P. Br." to that of the Charging Party/Union.

Corrections to the transcript are attached hereto and are made pursuant to 5 CFR 2423.19(r) and the unopposed motion of the General Counsel.

(b). At all times material herein, NTEU has delegated to its Chapter 53 authority to act as its representative for the purpose of collective bargaining for approximately 1200 of Respondent's employees, including those employed in the IRS, Brooklyn District, at Mineola, New York. Chapter 53's delegation has been recognized by Respondent. George Greenberg is President of Chapter 53.

6(a). On or about October 19, 1984 and October 26, 1984, the Charging Party and Respondent, respectively, entered into an informal settlement agreement which provided, in part, that IRS Brooklyn District would negotiate with NTEU over the impact and implementation of the relocation of bargaining unit employees in Group 1117 of IRS's Examination Division, Brooklyn District.

(b). On or about November 8, 1984, the agreement described above in paragraph 6(a) became, by its terms, effective. On December 11, 1984, NTEU made a demand to negotiate and submitted a set of proposals to Ms. Peck. No response was received and, on or about January 25, 1985, NTEU renewed its demand, resubmitted its proposals, and suggested specific bargaining dates. The afternoon of February 14, 1985, was finally set as the bargaining date at a labor-management meeting on February 1.

7(a). Prior to a February 14, 1985, bargaining session between Chapter 53 and Respondent over a relocation of Group 1117, these parties had had approximately five or six other negotiations. See TR. II. 99. Evidence was adduced as to three, in particular.

(b). One involved bargaining over the establishment of Revenue Agent Group 1103. Agreement was reached on this matter in November 1984. Mr. Mitgang signed for IRS and Mr. Greenberg for Chapter 53. Before the agreement was signed, David Krieg, Chief of Personnel and the supervisor of Ms. Peck, sent a "draft agreement" to Mr. Mitgang for his "OK" and, if "OK," it was to be sent out to NTEU "for review" (R. Exh. 10).

(c). Another involved bargaining over Taxpayer Delinquent Accounts (TDA). Negotiations began on this subject in or around July 1984. Final agreement was reached around July 1985. The delay was over an "outstanding issue" (TR. II. 206). Ms. Peck and Mr. Greenberg, as well as former Chapter 53 President, Peter Grimaldi, negotiated the TDA matter. Ms. Peck and Mr. Greenberg each kept bargaining notes. Ms. Peck's practice was to produce typed draft agreements from her bargaining notes and route a copy to the District Director for his approval. These drafts did not include items which the negotiators had put on "hold" or "impasse." There was no evidence that this practice was ever acquiesced in by, or communicated to NTEU. And it is not an express written rule, regulation or policy of the District. When Ms. Peck sent a copy of the TDA draft to Mr. Greenberg, it contained no changes made by the District Director. It was Ms. Peck's practice to forward a copy of her typed notes to Mr. Greenberg, who would check it for conformance with his bargaining notes. If there was a disparity, Mr. Greenberg could request further negotiations. Ms. Peck forwarded many such memoranda to Mr. Greenberg prior to reaching final agreement because the memoranda did not reflect items which the parties had agreed to hold or had come to impasse upon.

(d). Another involved bargaining over Employee Performance Folders (EPF). Ms. Peck, Mr. Greenberg and Mr. Grimaldi negotiated concerning EPF, with Ms. Peck and Mr. Greenberg each keeping bargaining notes. These sessions took place in July and September 1984. Mr. Greenberg noted "impasse" or "hold" next to items which reflected issues that were not agreed to during negotiations, as was his practice. After the negotiation session, a draft memorandum of agreement was transmitted to the District Director for his approval. Mr. Mitgang reviewed it for substance. On November 23, 1984, a copy of the "proposed" memorandum was sent by Ms. Peck to Mr. Greenberg for his acceptance, if agreeable to him (R. Exh. 4). On February 11, 1985, Mr. Greenberg wrote to Ms. Peck that:

> I have consistently told you that Chapter 53 wishes to negotiate the outstanding items before management broke off negotiations. We will not sign an agreement which you have unilaterally drawn up.

See R. Exh. 5 and see also TR. II. 213. Additional negotiations took place in February 1985. EPF negotiations were concluded in March 1985 and final agreement reached.

8. Mr. Mitgang has been Assistant District Director since September 1982. At one time, he participated in a negotiation over alternate work schedules ("AWS"), was the spokesperson, and had authority to bind the District at the bargaining table. The District Director signed the agreement at a later date.

9. Since the AWS negotiations, Mr. Mitgang has not participated at the bargaining table; and agency representatives at the table have had authority only to "discuss the proposals of NTEU and management and to arrive at a proposed tentative agreement for the director" (TR. II. 142 and see also 144). It has been the practice of Mr. Mitgang to review the draft memoranda of agreement reached at the table, discuss them with the District Director, and then discuss any problems detected with the management bargaining team. Prior to the agreement reached at the February 14 bargaining session, no changes in substance had ever been renegotiated, except for matters which had been declared as non-negotiable.3/

3/ Respondent's Chief of Labor Relations so testified and seemed certain. See TR. II. 208.

Mr. Mitgang testified that "changes" were made by him on "some" of the agreements reached at the bargaining table, but did not clarify whether they were of substance and seemed unclear on the point. See TR. II. 149.

10. On cross-examination, Mr. Mitgang conceded that, as a result of this hearing, he is "now aware" that the Statute requires management to send a team to the bargaining table which is fully authorized to enter into a binding agreement (TR. II. 196). He also conceded that the practice in issue in this case was inconsistent with management's obligation. See TR. II. 200.

11. Mr. Mitgang testified that "to [his] knowledge" the union was apprised of the fact that the agency bargaining team at the table had such limited authority (TR. II. 143) and that they were apprised of it through "various negotiations over the past period of time or two years or whatever it is" (TR. II. 144). Ms. Peck was also "confident" that the union knew of the tentative nature of agreements reached at the bargaining table and that they needed the approval of the Director (TR. II. 94). Mr. Mitgang admitted that there was no written policy on this limited authority; that no letter had been sent to George Greenberg, Chapter 53's President, about such authority; and that he had never personally notified Mr. Greenberg of it. See TR. II. 181 and 194 and also TR. II. 94-95. Peter Grimaldi, Chapter 53's President from June 1983 until September 1984, was unaware that the agency was sending unauthorized representatives to the bargaining table; but his experience was "limited in that area" because Chapter 53 and Respondent only "came to possibly one agreement" during his administration (TR. II. 218). At first, Mr. Greenberg indicated that he knew of the practice. See TR. I. 99-100 where he responded as follows to questions put by Counsel for the General Counsel at the hearing on July 16, 1985, about a meeting between Mr. Greenberg and Michael J. Wolf, Assistant Counsel of NTEU, just before the negotiation session in February 14, 1985, began:

> Q. What problems with management bargaining in the past did you express to Mr. Wolf during that meeting prior to the negotiation session?
>
> A. I expressed that I didn't understand why we could not -- in other words, in negotiations that I had with the Assistant Director, Donald Mitgang, he always went and made a big issue as to the fact that he was ready to sign agreements and commit the district, and was the union so ready to do. And I didn't know -- I didn't understand why in the interim period that wasn't happening with management, why we couldn't take the same position that I or someone on my team was authorized to sign, why wasn't management authorized. Why couldn't we have the same standard as the Assistant District Director of Brooklyn.
>
> And he [Mr. Wolf] seemed to feel that we could; and that that would be the thing that we would pursue.

See also TR. I. 97-98, where Mr. Greenberg testified that, at a February 1, 1985 labor-management meeting, the problem was discussed as to Mr. Jennings authorizing anyone from the management team, at negotiations, "to commit" (TR. I. 97-98).

When recalled as a rebuttal witness, on July 17, 1985, however, Mr. Greenberg responded as follows to questions put by Counsel for the General Counsel:

> Q. Mr. Greenberg, prior to the 1117 negotiations has any IRS representative ever told you at the negotiating table that they didn't have authority to commit the agency?
>
> A. No.
>
> Q. Have you ever been aware of any practice of the agency in sending negotiators to the table without authority to bargain prior to February 14, 1985?
>
> A. No.
>
> Q. So you've never agreed to that practice?
>
> A. No.

See TR. II, 204-205. Mr. Greenberg appeared to me to be candid and honest in the responding to the above-quoted questions put to him on July 16, and less so in responding to those put to him on July 17. Furthermore, Mr. Greenberg was not asked, on July 17, whether he was aware (as distinct from being told) of an agency practice of sending negotiators to the table without authority to commit and sign for the agency (as distinct from bargaining on its behalf). Thus his July 17 testimony is not necessarily in conflict with that given on July 16. Also, the Assistant Counsel for NTEU seemed aware that there was a "problem with [the District Director] authorizing people to negotiate for him" (TR. I. 97). Accordingly, I find that the current President of Chapter 53 was aware of the management practice of sending unauthorized representatives to the bargaining table, prior to the February 14, 1985, negotiations.

12(a). On February 14, 1985, bargaining teams from Chapter 53 and Respondent met to negotiate over the impact and implementation of a relocation of Group 1117 employees. Representing management were Gail Peck and Harvey Silverman. Ms. Peck has been Chief, Labor Relations, since 1982 and provides advice and guidance to managers, on labor matters. She also reviews union proposals and often participates in local negotiations with Chapter 53. Mr. Silverman has represented the Examination Division, as part of management's team, two to four times during the last two to three years. Representing Chapter 53 were Michael Wolf, Assistant Counsel for NTEU; George Greenberg, Chapter 53 President; and three Chapter 53 officers, Roslyn Haber, Gene Spitzer, and Peter Grimaldi. Prior to the meeting, Mr. Wolf and Mr. Greenberg agreed that Mr. Wolf would act as spokesperson and that unless the management team was "prepared to fully negotiate, to arrive at agreement," Chapter 53 would not negotiate until someone from Respondent was at the table "fully authorized" (TR. I. 35 and see also TR. II. 99-101). Nationwide, it is the practice of IRS and NTEU to send fully authorized representatives to the bargaining table. The contrary practice in the IRS Brooklyn District is an "anomaly" (TR. II. 87).

(b). As to what exactly transpired at the February 14 meeting, there is conflict. The two members of the management team testified, in agreement, that Ms. Peck was the "chief spokesman" for management and that she made it clear, at the outset of the meeting, and in response to a question put by Mr. Wolf, that her authority was limited and that final authority to sign rested with the Director. See the testimony of Ms. Peck at TR. II. 9, 100 and compare to that of Mr. Silverman at TR. II. 113-114, 122-123, 129, 131-133, who testified that Ms. Peck told Mr. Wolf that the agency's representatives lacked both the authority to sign and to commit the agency.

The union members of the team also testified; but their recollections of specifics varied in some important details. Mr. Wolf recalled that Mr. Silverman was the chief spokesman for the agency (TR. I. 34 and 82) and could not recall Ms. Peck making any statement, at the outset, about the limited authority of the management team (TR. I. 83). Mr. Greenberg and Ms. Haber affirmed that Ms. Peck made a statement, at the outset, that the management team could not commit to an agreement. See TR. I. 101, 147, and 184). This "so annoyed" Ms. Haber that she "wrote it down" (TR. I. 184). The other members of the union team could not recall the reply, if any, of Ms. Peck. See TR. I. 176 and 198). Generally, as to who from the management team was the chief spokesman, Mr. Greenberg affirmed that: "Basically, Mr. Silverman's response to [him] always is that he follows whatever he's told from Labor Relations is his standard response" (TR. I. 98).

Ms. Peck and Mr. Silverman impressed me as credible witnesses, and their testimony was basically consistent. While they had some difficulty in recollecting all the events of the three-hour meeting on February 14, their recollections seemed more firm and honest than those of the union witnesses. One problem with relying on the recollections of the witnesses from the union team as to what the management team said is that they were admittedly "quite a boisterous group" at the bargaining table (TR. I. 68) with "arguments going on" and "a lot of voices being heard" (TR. I. 193). Accordingly, I find that Ms. Peck, Chief of Labor Relations, was management's chief spokesman at the February 14 meeting and clearly stated at the outset, that the authority of the management team was limited, and it could not commit the agency.

(c). This announcement made the union team unhappy; and Mr. Wolf and Mr. Greenberg spoke out against it. See TR. I. 184-185 and TR. II. 123, 130 and 133. Mr. Wolf stated that such conduct constituted bad faith bargaining. Ms. Peck asked if they could not do business as usual. She did not explain what she meant by this statement. No one else recollected her making this statement.

(d). According to the witnesses from the union team, either Ms. Peck or Mr. Silverman, or both (the witnesses were in disagreement as to this) thereupon left the room and, upon their return, gave the impression that they had authority to bind the agency.

(e). Mr. Wolf recalled that both left the room and was "quite certain" that Mr. Silverman and not Ms. Peck made a phone call (TR. I. 37-38), to whom or about what he could not say (TR. I. 81); that upon their return to the room Mr. Silverman said something to the effect that: "I can bargain; let's go (TR. I. 38) or that "he was ready to bargain and that there was not a problem" (TR. I. 86) and that he had "verified his authority before coming to the table" (TR. I. 39) and "knew what his parameters were" and what he could agree to and what he couldn't agree to "and was prepared to come to an agreement" on everything, at least "if possible" (TR. I. 39).

(f). Mr. Greenberg testified that, upon returning to the room, Ms. Peck "announced that they spoke to Brooklyn and they now have the authority to commit the district to this agreement" (TR. I, 102 and see also TR. I. 121, 131 and 157).[4]

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[4] Mr. Greenberg was the only union witness to have been shown a note written by Ms. Peck, in which she summarized the beginning of the February 14 meeting and noted that she had stated that no member of the management team had authority to sign for the agency. See R. 11. The note was apparently turned over to the Authority by Ms. Peck as part of its investigation. Ms. O'Connor showed the note to Mr. Greenberg prior to his testimony, asked him if he were aware of it, and discussed that there would be a difference of opinion as to what happened, preliminary to the negotiations. See TR. I. 138 - 141. Respondent argues that revealing this note to Mr. Greenberg violated 5 CFR 2423.7(d) and diminishes his credibility as a witness, as knowledge of it allowed him to fashion his testimony so that it would not conflict with this potential documentary proof and testimony of Ms. Peck.

Upon reflection, I conclude that revealing the note to Mr. Greenberg was in violation of Authority policy, as stated in 5 CFR 2423.7(d):

> The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved by the full cooperation of all parties involved and the voluntary submission of all potentially relevant information from all potential sources during the course of the investigation.

(continued)

(g). Mr. Spitzer testified that both Ms. Peck and Mr. Silverman stepped outside the room to make a phone call and came back and said they "had the authority to negotiate" (TR. I. 172 and see also TR. I. 176). He then testified that he "guess[ed] that Ms. Peck said this, but could not "really remember" (TR. I. 172).

(h). Ms. Haber testified that both Ms. Peck and Mr. Silverman left the room and, upon their return, Ms. Peck said that "they were now authorized" (TR. I. 185).

(i). Mr. Grimaldi testified that Ms. Peck left the room to make a telephone call and he "assume[d] that it was to confirm the fact that she had the power to sign for management" (TR. I. 98-199). He at first testified that Mr. Silverman stayed in the room and later testified he was not sure of this. See TR. I. 199 and 207. He could not recall the exact words of Ms. Peck upon her return, but inferred that she had the power to sign for management because the meeting continued (TR. I. 199).

4/ (continued)

> To this end, it shall be the *policy of the Authority and the General Counsel to protect* the identity of individuals and *the substance of the statements and information they submit or which is obtained during the investigation as a manner of assuring the Authority's and the General Counsel's continuing ability to obtain all relevant information.* (Emphasis added).

Respondent urges that the "only appropriate remedy is to strike the testimony of the General Counsel's witnesses and dismiss the complaint" (R. Br. 13). In the particular circumstances of this case, I believe the better remedy is to treat this matter as casting doubt on the credibility of Mr. Greenberg, and to resolve any conflicts between his testimony and that of Respondent's witnesses in favor of the latter. Since, as President of Chapter 53, Mr. Greenberg may have discussed with the other union witnesses, particularly Mr. Wolf who acted as counsel for the Chapter in this proceeding, the information as to how Ms. Peck would be likely to testify, some doubt is also cast on the credibility of the account of the February 14 meeting given by all the union witnesses.

In a prior instance where the General Counsel revealed documentary evidence to a union witness, before the hearing, the Authority declined to dismiss the complaint and, instead, held that "this impropriety affects the weight to be accorded" to the testimony of the union witness. See footnote 2 to *Internal Revenue Service, Boston District Office, Boston, Massachusetts* and *Internal Revenue Service, Andover Service Center, Andover, Massachusetts*, 5 FLRA 700, at 701.

(j). Neither Ms. Peck nor Mr. Silverman could recall leaving the conference room to make phone calls while they were meeting with Chapter 53 on February 14. See TR. II. 78, 126 and 134. Ms. Peck did think that at a midway point, the parties broke to get a cup of coffee and to use the lounge. See TR. II. 97.

(k). Based upon the testimony of Ms. Peck and Mr. Silverman, both credible witnesses, that they did not leave the conference room on February 14 to confirm their authority, and that both knew they had only the authority to reach a tentative agreement, I find that no such phone calls were made and that they never receded from Ms. Peck's statement, at the outset, that they had only limited authority. I find the testimony of the witnesses from the union bargaining team to be conflicting and not as credible as that of Ms. Peck and Mr. Silverman. Ms. Peck and Mr. Silverman testified to the effect that they believed that the union team acquiesced in their proceeding with limited authority because it did not break off negotiations. See TR. II. 80, 115 and 130.

13. Give-and-take negotiations took place on February 14, 1985, until agreement at the table was reached on each item. At the suggestion of Mr. Wolf, the parties initialled off on each item as agreement was reached on it. The parties were pleased with this process. One improvement was the fact that it eliminated the need and practice of the parties to keep separate bargaining notes. The negotiations concluded with good feelings all round. The initialling-off process avoided the problem of the participants reaching some kind of accord on the language of a particular proposal and then, later, disagreeing on what was actually agreed to and in what context. See TR. II. 117 and 139. The management team by initialling, did not intend to bind the agency. But the process may have misled some of the union negotiators into believing that the substance of the agreement reached was final, as this process had never been used before in Chapter 53 negotiations. Mr. Wolf conceded that he, however, had "great concerns" about the District Director and the "finality of the agreement" reached at the table, despite Mr. Silverman's apparent elation and his generous words about the negotiators' product at the conclusion of the bargaining session on February 14 (TR. I. 67). When Mr. Wolf emphasized to the management bargaining team that the NTEU expected an immediate signature from the District Director, Mr. Silverman responded that he had no control over the District Director.

14. Contrary to Ms. Peck's expectations, the agreement reached at the table did not meet the approval of the Assistant District Director or the Director. Several substantive concerns were expressed by them which Ms. Peck was asked to communicate to Mr. Greenberg. Mr. Mitgang found "unacceptable" to management items six, seven and eight of the agreement forwarded to him by Ms. Peck following the February 14 negotiations and discussed them with the District Director (TR. II. 173).

(a). Item six provides that: "The Agency will provide reasonable isolation from distracting noise and mechanical equipment to each employee. Reasonable effort will be made to provide each employee with a window and blinds" (R. Exh. 1). Mr. Mitgang explained that there were approximately 13 employees who were relocated into a single office type setup with only so many windows, so that it was "impossible" to provide each employee with a window (TR. II. 174). He also objected that the employees were not put into any position where isolation from mechanical equipment or noise was of any concern.

(b). Item seven provides: "Lack of access by revenue agents to conference room facilities can be used as a defense to any performance based actions brought against a revenue agent" (R. Exh. 1). Mr. Mitgang's objection to this item was that the employees had only moved from one floor to another and "still had access to all the conference rooms that they had access to prior to the move and [he] felt that putting that in the agreement was totally irrelevant to the agreement or the move itself" (TR. II. 175). He also felt that management could not accept lack of conference room facilities as a defense to any performance-based action.

(c). Item eight provides that: "No employee will be required to work in an area which fails to comply with all applicable health and safety requirements. Health and safety conditions including those specified in 29 C.F.R. 1960 _et al._, will be monitored by a joint team of two persons, one appointed by the union and one appointed by the agency. Unhealthy or unsafe working conditions which are not rectified by the agency once brought to its attention can be grieved" (R. Exh. 1). He objected to this item because there is already a joint labor-management safety committee, so a second would be "a duplication of effort" (TR. II. 178). He also objected because 29 CFR 1960 already requires Respondent to provide safe working conditions.

15. Mr. Greenberg has refused to change the agreement reached at the table. See TR. II, 21. The agreement has not been signed.

16. It is a common practice, throughout IRS, for District Directors to perform the ministerial task of formally executing agreements which have been earlier reached at the bargaining table.

17. The National Office of Respondent reviews all agreements reached by NTEU and its District Directors for legality and negotiability .

Discussion and Conclusions

I. It has not been established, by a preponderance of the evidence,[5] that a final agreement was reached at the bargaining table on February 14, 1985.

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[5] This is the statutory burden of proof. See 5 U.S.C. §§ 7118(7) and (8).

The complaint alleges that Respondent violated Sections 7116(a)(1) and (5) of the Statute when its Brooklyn District Director failed and refused to execute and implement a memorandum of understanding reached on February 14, 1985, by management and union agents at the bargaining table. Establishing this violation requires proof that agreement was reached by the bargaining agents at the bargaining table. Based upon the most credible evidence of record, I have found that final agreement was not reached; and therefore it was not an unfair labor practice for the District Director to refuse to execute the agreement.

The most that the General Counsel proved was that some members of the union bargaining team misinterpreted certain words and actions of the management team. In particular, they misunderstood the action of writing up and initialling off on each item as agreement was reached on it. This new process was suggested by the Assistant Counsel of NTEU and acquiesced in by the management team. The process worked well; and all parties were pleased with it. It eliminated the need for each side to keep bargaining notes. And it also eliminated the chance of the parties later disagreeing as to the language actually agreed upon. But by initialling off on an item the management team did not intend, and never said, that this meant that they were thereby binding the agency. The management team made clear, at the outset of the bargaining session, that it had authority only to reach a tentative agreement at the bargaining table. It never receded from this statement.

The problem the union bargaining team had with understanding what the management team was saying may have been caused by the fact that the union team was, admittedly, a boisterous group of individuals, given to a lot of argument, with a lot of voices apparently being heard at one time. See finding 12(b), above. I found nothing in the credited record to suggest that any misunderstanding on the part of the union team was induced by words or actions of the management team, as is argued. See C.P. Br. 18, 20 and 41.

And I find significant the fact that the NTEU Assistant Counsel, after the three-hour bargaining session concluded, had "grave concerns" about the finality of the agreement reached insofar as the District Director was concerned. See finding 13, above. His astuteness proved to be correct -- there was no final agreement.

II. It has been demonstrated, by a preponderance of the evidence, that Respondent violated Section 7116(a)(1) and (5) of the Statute when, on February 14, 1985, it failed to send representatives to the bargaining table with authority to commit it to an agreement.

It is not disputed that this management obligation is included in the duty of parties to bargain in good faith, as required by Section 7116(a)(5) of the Statute, and not to interfere with the statutory rights of employees, as required by Section 7116(a)(1). See National Treasury Employees Union, 13 FLRA 554, 556.

What Respondent argues is that this was not a specific act with which it was charged and "would be prejudicial to Respondent and would deny Respondent due process of law [to now rely on this act as constituting a statutory violation] as Respondent was not put on notice that this was a charge in the case" (R. Br. 24). Respondent's defense would apparently have been to show that "the Charging Party knew of Respondent's past practice in this area, knew of this limited authority of [its negotiators], yet acquiesced in this practice by negotiating with them" (R. Br. 25).

Under similar circumstances, the Authority has rejected arguments of a respondent that it was denied the opportunity to present a proper defense, if the matter was fully litigated at the hearing. See Social Security Administration, 16 FLRA 56, fn. 1.

I believe the matter was fully litigated here. It was shown that the President of Chapter 53 was aware that Respondent was sending representatives to the bargaining table who were not fully authorized to commit it to an argument. See finding 11, above. And Respondent had a full opportunity to show that the union team, on February 14, 1985, acquiesced in the practice. Counsel for Respondent was advised, in the opening statement of the NTEU Assistant Counsel, that he was raising this matter as an issue. See TR. I. 20. Respondent thereafter called, as witnesses, both management representatives who were present at the February 14 bargaining table. The management representatives testified that negotiations continued even after it was made clear to the union team that the management team had no authority to bind the agency. See findings 12 and 13, above. From these facts Respondent argues that the union team "acquiesced" in Respondent's sending unauthorized-to-bind representatives to the bargaining table (R. Br. 20). It is unlikely that Respondent could have proved more, had it received earlier notice of this act as a violation.

Respondent did not prove union acquiescence, however. Respondent's own witnesses testified that the union team was "unhappy" about the situation. See finding 12(c) and TR. II. 130 and also 123 and 133. The union team had had to go through a difficult, lengthy process in getting management to the bargaining table over the matter on the table on February 14. See finding 6, above. And the NTEU Assistant Counsel, who is based in Washington, D.C. and does not normally participate in local negotiations, was present to assist in those local negotiations. Under these circumstances, unhappy though it was, the union team proceeded with negotiations. But I cannot conclude from this set of circumstances that it truly acquiesced in bargaining with management representatives who could not commit the agency. When a union waives a statutory right such as the right to face a management representative at the bargaining table who is authorized to commit the agency, it must so appear more clearly and unmistakably than it does in this case. See, e.g., Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 17 FLRA 408, 411 and Internal Revenue Service Service (District, Region National Office Units), 16 FLRA 904, 922-923.

III. As a remedy the General Counsel and the Charging Party propose, *inter alia*, that Respondent execute and fully implement the agreement reached at the bargaining table on February 14, 1985. See C.P. Exh. 1 and G.C. Exh. 8. I do not consider this to be appropriate, since I have found that Respondent did not intend for its negotiators to enter into a binding agreement. Furthermore, I conclude that the objections raised by the Assistant District Director to the agreement reached at the bargaining table are not frivolous ones. See finding 14, above.

Under all the circumstances, I believe a more appropriate order would be one requiring Respondent, upon request by NTEU, to bargain promptly and to send representatives to the bargaining table who are fully authorized to commit it to an agreement.

A cease-and-desist and a posting order is also deemed to be appropriate.

IV. Respondent continues to raise objections to the fact that the NTEU Assistant Counsel was allowed to participate in this proceeding as a witness and also as a counsel for NTEU. See R. Br. 14-15.

As stated at the hearing, I do not consider this practice to be a desirable one. See TR. I. 9-12. One undesirable feature is that credibility as a witness may suffer when the witness also assumes the role of advocate. Nevertheless, I allowed that NTEU Assistant Counsel to be the lead-off witness; and he did not attempt to take the stand as a rebuttal witness. Thus, NTEU gained no perceptible trial advantage from this procedure. The one possible advantage NTEU did gain was saving money by having its Assistant Counsel assume dual roles. In my view, reducing the cost to parties of administrative proceedings is a matter which is appropriately weighed in the circumstances such as this.

Since the credibility issues in this case have been resolved in favor of Respondent, it has no cause for further relief as to this matter.

In view of the above conclusions, other issues raised by the parties need not be resolved.

Ultimate Findings and Recommended Order

1. The General Counsel has not established, by a preponderance of the evidence, that Respondent committed the violative act named in paragraphs 8 and 9 of the complaint.

2. The General Counsel has established that Respondent violated Sections 7116(a)(1) and (5) of the Statute, as alleged in paragraphs 10 and 11 of the complaint by failing to send representatives to the bargaining table, an February 14, 1985, who were fully authorized to commit it to an agreement.

Pursuant to Section 7118 of the Statute, and 5 CFR 2423.29, it is hereby ORDERED that:

1. Internal Revenue Service, Brooklyn District shall cease and desist from:

(a) Failing to bargain in good faith by refusing and failing to authorize a designated agency representative to negotiate fully upon proper demand by the National Treasury Employees Union and enter into a final and binding agreement, subject only to review by the Respondent's National Office for legality and negotiability.

(b) In any like or related manner, interfere with, restrain or coerce any employee in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Internal Revenue Service, Brooklyn District shall take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon proper demand by the National Treasury Employees Union for bargaining, promptly send a designated agency representative to negotiate fully and enter into a final and binding agreement, subject only to review by the Respondent's National Office for legality and negotiability, as to the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York.

(b) Post in all offices and posts of duty of the Internal Revenue Service, Brooklyn District, copies of the Notice of All Employees, attached hereto as Appendix A, on forms to be furnished by the Regional Director, Region II, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director, Brooklyn District, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to bargaining unit employees are customarily posted. The District Director shall take all reasonable steps to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing within 30 calendar days from the date of this order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: December 17, 1985
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to bargain in good faith by refusing and failing to authorize a designated agency representative to negotiate fully upon proper demand by National Treasury Employees Union and enter into a final and binding agreement, subject only to review by the Respondent's National Office for legality and negotiability.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of the rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon proper demand by the National Treasury Employees Union for bargaining, promptly send a designated agency representative to negotiate fully and enter into a final and binding agreement, subject only to review by the Respondent's National Office for legality and negotiability, as to the relocation of the Group 1117 employees, Examination Division, Brooklyn District, Mineola, New York.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York, and whose telephone number is: (212) 264-4934.

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 387 REPORT OF CASE DECISIONS August 19, 1986

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 10 (August 12, 1986)

Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas and American Federation of Government Employees, National Border Patrol Council, AFL-CIO, Local 2455, Case No. 6-CA-30309

23 FLRA No. 14 (August 14, 1986)

Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota and American Federation of Government Employees, Local 1509, AFL-CIO, Case Nos. 57-CA-50257 and 57-CA-50265

NEGOTIABILITY CASES

23 FLRA No. 11 (August 13, 1986)

National Border Patrol Council, American Federation of Government Employees, AFL-CIO and United States Immigration and Naturalization Service, Case No. 0-NG-664

23 FLRA No. 13 (August 14, 1986)

National Federation of Federal Employees, Local 1429 and U.S. Department of the Army, Letterkenny Army Depot, Case No. 0-NG-1154

23 FLRA No. 17 (August 14, 1986)

American Federation of Government Employees, AFL-CIO, National Border Patrol Council and Department of Justice, Immigration and Naturalization Service, Case No. 0-NG-682

Y3. F 31/21-3:

23 FLRA No. 18 (August 14, 1986)

Federal Employees Metal Trades Council, AFL-CIO and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, Case No. 0-NG-1184

ARBITRATION CASES

23 FLRA No. 12 (August 14, 1986)

Military Department of Arkansas, Office of the Adjutant General, Arkansas National Guard and Local 1671, National Federation of Federal Employees (Barnhart, Arbitrator), Case No. 0-AR-1102

23 FLRA No. 15 (August 14, 1986)

Congressional Research Employees Association and the Library of Congress (Seidenberg, Arbitrator), Case No. 0-AR-624

23 FLRA No. 16 (August 14, 1986)

U.S. Department of Agriculture, Federal Grain Inspection Service and American Federation of Government Employees, Local 3157 (Barron, Arbitrator), Case No. 0-AR-1084

Case No. 0-AR-1166 (Order Denying Motion for Reconsideration) (August 12, 1986)

American Federation of Government Employees and U.S. Marine Corps, Camp Lejeune, North Carolina

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

August 5, 1986

0-AR-1032

August 14, 1986

0-AR-1170 0-AR-1173

23 FLRA No. 10

**Federal
Labor Relations
Authority**

Dep't of Justice, INS, U.S.
Border Patrol, Laredo, Tex.
and AFGE, National Border
Patrol Council, Local 2455,
Case No. 6-CA-30309
(Decided August 12, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Changes in Shifts and Schedules
        - Question Concerning Representation
          - Changes Necessary to Perform Mission
      - Mandatory Subjects of Bargaining
        - Procedures and Appropriate Arrangements
          - ULP Charge Barred By Grievance
          - Union Failed to Request Bargaining

STATUTE

7106(b)(1)
7116(a)(1) and (5)
7116(d)
7118

DIGEST NOTES

The activity's conduct in making changes in the shift and rotation schedules of unit employees, during the pendency of a question concerning representation was not violative of § 7116(a)(1) and (5). The changes involved the exercise of management's § 7106(b)(1) rights and were necessary for the agency to perform its mission; that is, the changes were consistent with the necessary functioning of the agency. The agency is engaged in law enforcement activities. The changes were deemed necessary "to permit the [activity] to effectively police the border and to perform its duties most effectively."

The Authority adopted the Judge's findings and held that the activity did not refuse to negotiate on procedures to be observed in implementing changes and appropriate arrangements for employees adversely affected by such changes. The activity's changes in shift and rotation schedules did not necessitate bargaining because the record evidence indicated that a grievance was filed and processed relating to the first change, therefore, processing the same issue as an unfair labor practice is prevented by § 7116(d). As to the second change in shift and rotation schedules, the union never requested bargaining after the activity notified it of the change.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

Federal Labor Relations Authority

23 FLRA No. 11

Nat'l Border Patrol Council, AFGE and Immigration and Naturalization Service, Case No. 0-NG-664 (Decided August 13, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Administratively Uncontrollable Overtime
    - Computation Procedures
  - Compelling Need Determination
    - DOJ Order 1551.4A
  - Conditions for Review
    - Proposal Alleged Inconsistent With Government-Wide Regulation
      - 5 CFR § 550.151-550.164
    - Proposal Alleged Inconsistent With Statute
      - § 7131(a)
- 5 U.S.C. § 2301(b)(3)
- 5 U.S.C. § 5545

STATUTE

7105(a)(2)(E)
7112(d)
7117(a)(2)
7131(a)

DIGEST NOTES

A proposal which provides that "all negotiations time, including travel to and from meetings, will be excludable for AUO [Administratively Uncontrollable Overtime] purposes," is not inconsistent with the provisions of 5 CFR § 550.151-550.164. Pursuant to these OPM regulations, the agency is given the discretion to determine the specific procedures by which computations as to appropriate rates of premium pay for AUO will be made. There is nothing in the OPM regulations cited which would preclude the agency from exercising its discretion regarding AUO computation by negotiations. Further, the agency's assertion that the proposed exclusion is nonnegotiable because it is not included within the specific exclusions, for AUO computation purposes, of 5 CFR § 550.162 was without merit. The provisions of 5 CFR § 550.162 directly concern the actual payment of premium pay when employees are on temporary assignments and leave with pay. They do not concern the determination of future eligibility for, and appropriate rates of, such pay. The agency also, did not show nor was it apparent that the proposal would necessarily result in an excess of payments in violation of 5 CFR § 550.152.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal which provides that "all negotiations time, including travel to and from meetings, will be excludable for AUO [Administratively Uncontrollable Overtime] purposes," is not inconsistent with an agency regulation for which there is a compelling need. The agency argued that the union's proposal would make payroll administration inefficient and ineffective. The Authority found that the agency failed to demonstrate how the addition of the union's proposed exclusion to the agency's already existing list of exclusions would render payroll administration inefficient or ineffective. The agency's argument that its regulation is necessary to the maintenance of merit system principles, that is, assure equal payment of overtime within its various bureaus, was also rejected. The agency failed to show that the regulation is essential, as opposed to helpful or desirable, in the achievement of its objective; that the procedures set forth in the regulation were the only means of achieving its objective; and that the regulation implements the principle of equal pay for work of equal value. Finally, there is nothing in either the law or the implementing OPM regulations governing premium pay for AUO which mandates that the discretion allowed agencies with respect to the administration of AUO must be sole and exclusive. The agency's regulation which embodies the exercise of that discretion does not constitute, in and of itself, the nondiscretionary implementation of a mandate to the agency under law or other outside authority.

A proposal which provides that "all negotiations time, including travel to and from meetings, will be excludable for AUO [Administratively Uncontrollable Overtime] purposes," is not inconsistent with § 7131(a). Section 7131(a) addresses entitlement to official time by employees who are representing a union in the negotiation of a collective bargaining agreement. The union's proposal addresses how time spent in such negotiations will be treated for purposes of determining eligibility for, and the appropriate rate of, premium pay in the future. The proposal does not relate to actual compensation for time spent in contract negotiations. It concerns a subject which is separate and distinct for that covered by § 7131(a) and does not conflict with that provision.

23 FLRA No. 12

Federal Labor Relations Authority

Military Dep't of Arkansas, Office of the Adjutant General, Arkansas National Guard and Local 1671, NFFE (Barnhart, Arbitrator), Case No. 0-AR-1102 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7122(a)
Exceptions Asserted in Appeal	7131(b)
Award Contrary to § 7131(b)	
Training	
Internal Union Business	
Employees Not Entitled to Administrative Leave	
Must be Conducted on Nonduty Time	

DIGEST NOTES

The grievance involved a request by three union members for administrative leave to attend a training seminar for union officers. The activity denied the full request, granting each employee 24 hours. The activity maintained that certain sessions of the seminar involved matters of internal union business and that such training was not training for which administrative leave can be granted, and that § 7131(b) provides that such activity must be performed during the time the employee is in a nonduty status. The arbitrator ruled that § 7131(b) does not require that training of union members or officers in the proper conduct of the internal business of the union must be performed when the employees are in a nonduty status. The arbitrator therefore, sustained the grievance.

In its exception to the arbitrator's award the agency asserted that the arbitrator's ruling that § 7131(b) does not require that training of union members or officers in the proper conduct of the internal union business must be performed when the employees are in a nonduty status, was deficient and contrary to § 7131(b). The Authority held that the Statute requires that "any activities" by an employee relating to internal union business must be on nonduty time. "Any activities" must encompass training in the proper conduct of the internal business of a union, consequently, under the express terms of the Statute, such training must be performed when any employee is in a nonduty status. Since administrative leave constitutes an excused absence without charge to leave, an employee is not in a "nonduty status" within the meaning of § 7131(b) when the employee is on administrative leave. The Authority found the award deficient because the arbitrator misinterpreted and misapplied § 7131(b). The award was modified to assure that it was consistent with the Statute.

23 FLRA No. 13

NFFE, Local 1429 and Dep't of the Army, Letterkenny Army Depot, Case No. 0-NG-1154 (Decided August 14, 1986)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Administrative Leave
    - Time Spent Donating Blood
    - Travel to Site of Blood Donations
  - Compelling Need Determination
    - DOD Regulation, CPM 1400.25-M, CPM 990-2, 630.S11-5
  - Conditions for Review
    - Proposal Alleged Inconsistent with Statute
      - § 7106(a)(2)(B)
      - § 7117(a)(2)
  - Management Rights
    - Assign Work
      - Conditions for Grant of Administrative Leave
        - Blood Donations

STATUTE

7105(a)(2)(D) and (E)
7106(a)(2)(B)
7114(c)
7117(a)(2)

DIGEST NOTES

A proposal which requires an agency to add the time spent donating blood and traveling to the donation site to the four hours of excused absence allowed employees who donate blood, is not inconsistent with tne agency's right to assign work. The Authority found that the union's intent was that the agency could deny permission for employees to donate blood when the time necessary for such donation would interfere with the agency's work. Thus, the provision would not restrict the agency's right to deny an employees request when the agency needed the employee to perform work.

A proposal which requires an agency to add the time spent donating blood and traveling to the donation site to the four hours of excused absence allowed employees who donate blood, is not inconsistent with an agency regulation for which a compelling need exists under § 7117(a)(2). Although the agency established that the provision conflicted with its regulation, it

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

failed to show that the regulation was "essential" or "necessary" and failed to support its assertion that the provision would raise costs to the agency by increasing the amount of time for excused absence for blood donation. The agency offered only generalized and conclusionary reasoning which was disputed by the union.

Federal
Labor Relations
Authority

23 FLRA No. 14

VA, Washington, D.C. and VA Medical Center and Regional Office, Sioux Falls, S.D. and AFGE, Local 1509, Case Nos. 57-CA-50257 and 57-CA-50265 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Interference, Restraint, Coercion
      - Interrogation During Job Interview
        - Employee Questioned About Protected Activity
    - Refusal to Negotiate
      - Starting and Quitting Times
    - Remedy
      - Reestablish Previous Starting and Quitting Times
  - Official Time
    - Representational Activity vs. Management Rights
      - Parties Must Seek Reasonable Accommodation

STATUTE

7116(a)(1) and (5)
7118
7131

DIGEST NOTES

The Authority held, contrary to the Judge, that the agency's conduct in questioning an employee about his protected activity, during an interview for a bargaining unit position, reasonably tended to interfere with the employee's rights under the Statute by communicating that time spent engaging in protected activity could adversely affect his chance for future job selection. The questions were asked of this labor organization representative during an employment interview. The questions concerned his position in the union, how may hours he spends in activities on behalf of the union, and how he would resolve hypothetical conflicts between work and his protected activities on behalf of the union. The Authority found that the context of the questioning established a connection between the protected activity and the employee's chance to be selected for the position.

In this consolidated case the Authority adopted the Judge's conclusion in Case No. 57-CA-50257, absent exceptions by the parties, that the agency violated § 7116(a)(1) and (5) by refusing to bargain over a change in the starting and quitting times of a bargaining unit employee.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 15

Federal Labor Relations Authority

Congressional Research Employees Association and The Library of Congress (Seidenberg, Arbitrator), Case No. 0-AR-624 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B)
Award Set Aside	7122(a)
Contracting Out	
Agency Determination Not Grievable	
Statute Precludes Contractual Limitations on Management's Rights	
Exceptions Asserted in Appeal	
Award Contrary to § 7106(a)(2)(B)	
2 U.S.C. § 166	

DIGEST NOTES

A grievance was filed challenging the agency's determination to contract out as violative of the parties' collective bargaining agreement. The arbitrator found the grievance arbitrable, but denied the grievance on the merits. In its exception the agency contended that by finding the grievance to be arbitrable, the award is contrary to the agency's right under § 7106(a)(2)(B) to make determinations with respect to contracting out. The Authority found that the grievance sought to enforce through grievance and arbitration a provision of the parties' agreement that denies the authority of the agency to make contracting out determinations under § 7106(a)(2)(B). The provision expressly prohibited the agency from contracting out when "the regular staff" possesses the required specialized skills or knowledge or can obtain the required skills or knowledge through normal employment procedures. Although law or regulation may place limitations on management's discretion, the Statute precludes the negotiation of contractual limitations on management's right to contract out. The Authority concluded that the grievance was precluded by § 7106 from grievance and arbitration and set aside the award.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 16

Federal Labor Relations Authority

Dep't of Agriculture, Federal Grain Inspection Service and AFGE, Local 3157 (Barron, Arbitrator), Case No. 0-AR-1084 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES STATUTE

Arbitration
  Award Set Aside
  Exceptions Asserted in Appeal
    Award Contrary to Government-Wide Regulation
      FPM Chapter, subchapter 4-3b
      5 CFR part 351, subpart G
  Reduction In Force
    Retreat Rights
      To Position "Substantially the Same"
        Must Be In Same Competitive Level

DIGEST NOTES

A grievance was submitted to arbitration protesting the activity's denial of retreat rights to the grievant (from a GS-7 position) to a GS-5 position. The activity denied the grievant retreat rights under FPM Chapter 351, subchapter 4-3b because it determined that the GS-5 position was not a position through which the grievant had been promoted; and that the GS-5 position was not substantially the same as any such position because it was not at the same grade level of any position from which or through which the grievant had been promoted. The arbitrator concluded that the intention of the FPM is to allow retreat to any entry level position in the situation where the employee had been appointed at the higher-grade level of a position series because of the employee's experience and where the duties of the position at the different grade levels are essentially the same. The arbitrator ruled that the grievant was entitled to have retreated to the GS-5 position, sustained the grievance and awarded the grievant backpay.

In its exception to the arbitrator's award the activity asserted that the award was deficient as contrary to FPM chapter 351, subchapter 4-3b. The activity asserted that the retreat rights provided by the regulation are narrow and specific and that the arbitrator improperly granted the grievant retreat rights to a GS-5 position which is not "substantially the same" as the position from which the grievant had been promoted. The Authority concluded that the award was deficient by granting the grievant retreat rights to the GS-5 position because the position was not one from which the grievant was promoted or a position essentially identical to or substantially the same as a position from which the grievant was promoted. The award is contrary to 5 CFR part 351, subpart G and FPM chapter 351 subchapter 4-3b. The Authority found that an employee is not promoted through the entry level position when the employee is appointed at a higher grade level. A position will be found to be substantially the same as a position from which an employee was promoted only when the positions are sufficiently alike so that they would be in the same competitive level. Under the cited regulations, the grievant had no right to retreat because the positions are not in the same competitive level since they are not at the same grade level.

Federal Labor Relations Authority

23 FLRA No. 17

AFGE, National Border Patrol Council and Dep't of Justice, Immigration and Naturalization Service, Case No. 0-NG-682 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Administratively Uncontrollable Overtime
    - Computation Procedures
      - Does Not Concern Rates of Pay
  - Compelling Need Determination
    - DOJ Order 1551.4A
  - Conditions for Review
    - Proposal Alleged Inconsistent With Government-Wide Regulation
      - 5 CFR § 550.151-550.164
    - Proposal Alleged Inconsistent With Statute
      - § 7106(a)(2)(A) and (B)
  - Management Rights
    - Assign Employees
      - Details
    - Assign Work
      - Work for Which AUO Is Not Authorized
- 5 U.S.C. § 5545(c)

STATUTE

7105(a)(2)(D) and (E)
7106(a)(2)(A) and (B)
7117(c)

DIGEST NOTES

A proposal which would set up a computational scheme for administratively uncontrollable overtime (AUO), which is different from the agency's scheme, does not conflict with 5 CFR § 550.151-550.164. The Authority found that neither the governing statute or the OPM regulations, either literally or as judicially interpreted requires absolute equity between Executive agencies or even between similarly situated employees within the agency. Rather, law and regulations leave agencies with discretion to decide how to arrive at individual AUO entitlements. The agency proffered no persuasive arguments that either the statutory or regulatory grants of discretion are limited so as to bar bargaining over the methods of computing AUO entitlements. (proposal 1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal which would set up a computational scheme for administratively uncontrollable overtime (AUO), which is different from the agency's scheme, is not an unauthorized attempt to bargain over rates of pay. It merely concerns the computation of AUO within the specific constraints set by law and implementing Government-wide regulations. The proposal is negotiable inasmuch as, the agency does not suggest that the proposal is inconsistent with regulatory guidelines nor does it assert that the proposal is an inherently inaccurate indicator of future uncontrollable overtime. The Authority further held that a portion of the proposal requiring recertification of employees at the same percentage of AUO for which they were certified prior to their detail, was negotiable, where the agency did not allege nor was it apparent the the proposal was nonnegotiable. (proposal 1)

A union proposal concerning the computation of administratively uncontrollable overtime does not conflict with an agency regulation for which there is a compelling need. The agency raised and the Authority rejected all of the agency's compelling need arguments in United States Immigration and Naturalization Service, 23 FLRA No. 11 (1986). (proposal 1)

A proposal which prevents an agency from assigning certain employees to details which would render them ineligible for AUO payments in nonnegotiable. The proposal conflicts with the agency's right to assign employees under § 7106(a)(2)(A) because it would prevent the assignment of specified employees to certain types of details. Additionally, the detailing of employees in this case involved a change in work which is assigned to those employees. Therefore, management would also be prevented from assigning work for which AUO pay is not authorized. The provision is inconsistent with management's right, under § 7106(a)(2)(B), because if specifically prevents the agency from requiring employees to perform certain duties.

Federal Labor Relations Authority

Federal Employees Metal Trades Council and Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal., Case No. 0-NG-1184 (Decided August 14, 1986)

SUBJECT MATTER INDEX ENTRIES   STATUTE

Negotiability
  Conditions of Employment
    Motorcycle Rider Training
      Nexus Between Failure to Complete and Employee's Job
    Management Rights
      Determine Internal Security Practices
        Motorcycle Rider Training
          Secure and Safeguard Premises and Personnel

DIGEST NOTES

A union proposal stating opposition to an agency requirement for motorcycle rider training concerns a condition of employment. The Authority held that completion of the proposed motorcycle safety course is a prerequisite to the Agency's issuance of a motorcycle parking decal without which an employee would be denied access to the installation. The proposal concerned a condition of employment "because a nexus exists between the penalty imposed for failure to complete the training, i.e., the employee cannot park or drive on the installation without a decal, and the employee's job."

A union proposal stating opposition to an agency requirement for motorcycle rider training interferes with the agency's right to determine internal security practices. The explicit language of the proposal opposed any requirement of motorcycle rider training. The agency's right to determine internal security practices includes the right to determine policies and actions which are part of its plan to secure or safeguard its personnel and property. The proposal would conflict with a preventive safety measure taken by the agency to guard against harm to its property and personnel, hence, it would directly interfere with the agency's § 7106(a)(1) rights and place a substantive limitation on its decision as to whether and the circumstances under which a motorcycle decal granting the privilege of driving on the premises will be issued.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE
UNITED STATES BORDER PATROL
LAREDO, TEXAS

Respondent

and

Case No. 6-CA-30309

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, AFL-CIO, LOCAL 2455

Charging Party

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority based on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel and the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, Local 2455 (the Union). An opposition to these exceptions was filed by the Respondent. The complaint, as amended, basically alleged two things: the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to notify the Union and refusing to bargain over the procedures to be observed in implementing revisions in shift and rotation schedules and appropriate arrangements for employees adversely affected by such changes; and the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to maintain the existing shift and rotation schedules to the maximum extent possible during the pendency of a question concerning representation (QCR).

II. Background

The facts are fully set out in the Judge's Decision. Briefly, they indicate that during the time the events in this case occurred, a question was pending concerning representation of, among others, employees located at the Respondent's Laredo Station.

In April 1983, the Union learned that the Respondent was planning a change in the shift and rotation schedules for employees of the Laredo Station. The Union filed a grievance based on management's failure to provide it with timely notice of the change and allow it to present its views on the matter. The parties met, also in April, at which time various elements of the proposed change were discussed. The Union then requested bargaining, which request was denied, and the new schedule was implemented in May. Another shift and rotation change was implemented the following September. The Union received notification prior to this change but did not request bargaining.

III. Judge's Decision

The Judge recommended dismissal of the amended complaint in its entirety. As to the failure to maintain existing conditions of employment during the QCR, the Judge cited the Authority's decision in United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), in which we determined that agency management is required to maintain existing conditions of employment, to the maximum extent possible, during the pendency of a QCR unless changes in those conditions of employment are required consistent with the necessary functioning of the agency. The United States Court of Appeals for the Fifth Circuit, on appeal, reversed certain of the Authority's unfair labor practice findings on the basis that the particular changes in that case involved the exercise of management's rights under the Statute, but stated that its decision "should not be read as invalidating the rule." United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481, 489 (5th Cir. 1984). Here, the Judge applied this rule to the particular circumstances of the case and found that the changes in shift and rotation schedules were required consistent with the necessary functioning of the agency and, also, were matters covered by section 7106(b)(1) of the Statute.[1] The Judge concluded, therefore, that there was no obligation to bargain over the substance of the changes. As to the other allegation of the complaint involving a refusal to bargain over procedures and appropriate arrangements of changes in the shift and rotation schedules, the Judge found that section 7116(d) of the Statute[2] barred processing of the unfair labor practice allegation concerning one of the changes and that the Union had failed to request bargaining over the other change.

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[1] Section 7106(b)(1) of the Statute provides:

> § 7106. Management rights
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(Continued)

IV. Positions of the Parties

The General Counsel excepted to a number of findings and conclusions of the Judge, specifically, the following: that the April meeting between the Respondent and the Union was a grievance meeting; that the grievance covered the May shift and rotation schedule changes; that the Union was given timely notice of the September change; and that section 7116(d) of the Statute bars processing of the unfair labor practice allegation concerning the May shift and rotation schedule changes. Rather, the General Counsel argues that the Respondent unlawfully refused to bargain over the impact and implementation of the May and September shift changes. Further, the General Counsel asserts that the changes were not consistent with the necessary functioning of the agency so that their implementation during the pendency of a QCR violated section 7116(a)(1) and (5) of the Statute.

The Union excepted to the Judge's finding that the Union was given reasonable notice of the changes, arguing that the Respondent breached the parties' contractual requirement that at least 10 days notice be given. The Union

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(Continued)

> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work[.]

[2] Section 7116(d) of the Statute provides, in relevant part:

> [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

also argued that the subject of shift changes was within the duty to bargain. Finally, the Union expressed its disagreement with the Court's decision in Immigration and Naturalization Service v. FLRA.

The Respondent generally opposed the exceptions of the General Counsel and the Union. The Respondent also made certain arguments it wished the Authority to consider in the event the Judge's findings and conclusions were reversed.

V. Analysis

We find, as did the Judge, that the changes in the shift and rotation schedules which involved the exercise of management's section 7106(b)(1) rights were necessary for the Respondent to perform its mission; that is, the changes were consistent with the necessary functioning of the agency. As noted by the Judge in his Decision, the Respondent is engaged in law enforcement activities. The changes made were deemed necessary "to permit the Laredo Station to effectively police the border and to perform its duties most effectively." Therefore, the Respondent's conduct in making these particular changes during the pendency of a question concerning representation was not violative of section 7116(a)(1) and (5) of the Statute.

We also adopt the Judge's finding that no violation of the Statute occurred with respect to the Respondent's alleged failure to bargain over the procedures to be observed in implementing the changes as well as on appropriate arrangements for employees adversely affected by such changes. As to the change in shift and rotation schedules that were implemented in May, we find that section 7116(d) of the Statute bars processing of this portion of the complaint. Record evidence indicates that a grievance was filed and processed with regard to this change. Therefore, the Union selected the procedure it wished to pursue and processing of the same issue as an unfair labor practice is precluded.3/

3/ Compare Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 17 (1985) and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA No. 100 (1985).

Finally, as to the change in shift and rotation schedules implemented in September, we find, as did the Judge, that the Union never requested bargaining after having received notice of the change. Therefore, the Respondent did not unlawfully refuse to bargain. *U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center*, 16 FLRA 749 (1984); *General Services Administration*, 15 FLRA 22 (1984).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings, conclusions and recommended Order. The Authority therefore concludes that the complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 6-CA-30309 be, and it hereby is, dismissed.

Issued, Washington, D.C., August 12, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, UNITED STATES BORDER PATROL
SECTOR, LAREDO, TEXAS

Respondent

and — Case No.: 6-CA-30309

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, AFL-CIO, Local 2455

Charging Party

. . . .

Shirley A. Epperson
Dennis L. Elkberg
For Respondent

James P. Jones
For Charging Party

Elizabeth Martinez
For General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191, (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, et seq.

An unfair labor practice charge was filed on July 7, 1983 by Local 2455 American Federation of Government Employees, National Border Patrol

Council, AFL-CIO[1] alleging that U.S. Immigration and Naturalization Service, U.S. Border Patrol (hereinafter called Respondent or Border Patrol) violated Sections 7116(a)(1) and (5) of the Statute. Based upon the foregoing on October 6, 1983 the General Counsel of the FLRA, by the Director of Region 6, issued a Complaint and Notice of Hearing. Respondent filed a timely Answer denying that it had violated the Statute.

A hearing was held before the undersigned in Laredo, Texas. Respondent, Charging Party and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter,[2] my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Council has been the exclusive collective bargaining representative for a unit of Respondent's employees that includes those assigned to the Laredo Border Patrol Station. The Council and the United States Immigration and Naturalization Service (hereinafter called INS) were parties to a collective bargaining agreement, covering the aforedescribed unit, which expired on September 30, 1978. On January 19, 1978 the International Brotherhood of Police Officers (IBPO) filed a representation petition with the FLRA and an election was conducted. The Council filed timely objections and the FLRA issued a decision in which the objections were sustained and a second election ordered. The FLRA was sustained by the Fifth Circuit Court of Appeals. United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982) affirm'd sub nom. United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir., March 19, 1984). During the period the above described representation case was pending, the Council continued to represent Respondent's employees and the parties continued to give effect and operate under the terms of the collective bargaining agreement.

The INS is divided into regions, one of which is the Southern Region, which are in turn divided into sectors which are in turn divided into stations. One of the sectors of the Southern Region is the Laredo Sector which contains the Laredo Station, among other stations. Approximately sixty-seven bargaining unit employees were employed at the Laredo Station during 1983. At all material times, William Selzer held the position of Chief Patrol Agent (CPA) of the Laredo Sector and Miguel Vallina occupied the position of Assistant Chief Patrol Agent (ACPA). Joe Trevino held the position of Patrol Agent In Charge (PAIC) of the Laredo Station and James Fulgham was the Assistant Patrol Agent In Charge (APAIC).

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[1] American Federation of Government Employees will hereinafter be referred to as AFGE, and the National Border Patrol Council will hereinafter be referred to as the Council.

[2] The General Counsel of the FLRA's unopposed Motion to Correct the Official Transcript is hereby granted.

The Council had a president and five vice-presidents. The vice-presidents had responsibility at the regional level. Below the regional level, there are local presidents that had responsibility at the sector level. At all times material herein, Benito Lopez was the President of AFGE Local 2455, which covers the Laredo Sector.

On April 20, 1983 AFGE Local 2455 President Lopez asked PAIC Trevino whether rumors which were circulating concerning a change in the shift schedules were accurate. Trevino stated that on May 1, 1983 the shifts would in fact be rolled back two hours.3/ Lopez noted that the union had not received prior official notice of the proposed change and that there was insufficient time prior to the implementation date of May 1 for the union to submit proposals. Trevino stated that the change would go into effect on May 1, 1983.

On April 21, 1983 AFGE Local 2455 filed a grievance under the collective bargaining agreement concerning management's failure to provide the union with timely written notice of the proposed changes and to allow the union to present its views on the matter.4/ AFGE Local 2455's grievance stated:

> In accordance with Article 32-Grievance Procedure in the negotiated agreement between the American Federation of Government Employees National Border Patrol Council and the U.S. Immigration and Naturalization Service, I hereby submit this formal grievance on behalf of all union members and all Border Patrol Agents in the Laredo Station.

3/ At that time, the four established shifts were as follows: 8:00 a.m. - 4:00 p.m., 4:00 p.m. - 12:00 a.m., 12:00 a.m. - 8:00 a.m., and a variable shift from 6:00 p.m. - 2:00 p.m.

4/ Article 36 of the collective bargaining agreement provides that the union will be provided 30 calendar days to present its views on proposed changes. In a memorandum of understanding between the Council and INS, dated June 10, 1977, the parties agreed that the local union would be allowed 15 days to submit proposals on changes made at the district and sector levels.

> On April 20, 1983 PAIC Joe Trevino, of the Laredo Station, advised me, upon my request, that all Border Patrol Agents in the Laredo Station would be divided into eight (8) units or squads headed by one supervisor. PAIC Trevino also advised me that all the shifts would be rolled back two (2) hours. The new Shifts would be from 6A-2P, 2P-10P, 10P-6A, 9P-5A. Implementation, as stated by PAIC Trevino, would be on May 1, 1983.
>
> PAIC Joe Trevino has violated Article 3 section G of the negotiated agreement between the American Federation of Government Employees National Border Patrol Council and the U.S. Immigration and Naturalization Service. Violations are that PAIC Trevino failed to notify in writing, The Union, of proposed changes in personnel policies, practices, or working conditions and that PAIC Trevino violated the same article by not allowing The Union, to present its views to the proposed change or its impact.

On April 22, 1983 Trevino and ACPA Vallina informed Lopez that they had reconsidered their decision to implement the change on May 1, 1983, and that there would be a meeting between management and the union on April 29, 1983, at 1 p.m. in Vallina's office to discuss the matter. During the afternoon of April 22, 1983, CPA Selzer gave the same information to Lopez. In addition, Selzer informed Lopez that since management did not intend to implement the change on May 1, he considered the grievance to be moot and did not intend to issue a written response to the grievance as is required by Article 32, Section E of the contract.[5]

On April 29, 1983 a meeting was held between Respondent and AFGE Local 2455, as scheduled. Present for AFGE Local 2455 were Lopez, AFGE Local 2455 Treasurer Joe Bradley, and Conrado Villanueva. Present for Respondent were Vallina, Trevino, and Fulgham. This was a meeting held to discuss the grievance pursuant to provisions of Article 32E, Step II of the collective bargaining agreement. Vallina stated that Respondent intended to begin operating on an eight shift system as opposed to the four shift operation that existed at the time. Vallina further stated that employees would be selected for the various shifts under a draft system comparable to that used in professional football. AFGE Local 2455 requested more specific details concerning the draft system and the implementation of the change, but Respondent responded that the details of the plan had not yet been finalized. At the meeting on April 29, 1983 AFGE Local 2455 was not advised of the details such as the hours of the various shifts, the exact way the draft would work and the names of employees assigned to these shifts. At the close of the meeting, the Union requested a written copy of the proposed shift change. Vallina stated that he would relay this request to Selzer. Later, Vallina informed Lopez that the Selzer had denied the request for a written copy without specifying any reason for the denial.

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[5] Lopez' undenied testimony on this point was that he concurred with Chief Selzer and considered the grievance dropped. Respondent did not call Chief Selzer as a witness at the hearing. Accordingly, Lopez' testimony as to this conversation is fully credited.

By letter dated May 9, 1983 AFGE Local 2455 set forth examples of adverse impact of the changes and requested to bargain concerning the proposed changes. By letter dated May 16, 1983 Selzer denied the bargaining request and stated the new shifts would be implemented. The new shift schedule was implemented on May 29, 1983.

A few days before the implementation date, Lopez found a copy of the new schedule marked "union" and a blank scheduling form in his mailbox. Lopez did not know who had put them there. According to the schedule, the hours of the shifts in the actual order of rotation were as follows: 12:00 a.m.-8:00a.m., 5:00 p.m.-1:00 a.m., 10:00 p.m.-6:00 a.m., 4:00 p.m.-12:00 a.m., 2:00 p.m.-10:00 p.m., 6:00 a.m.-2:00 p.m. (signcutting),[6] 6:00 a.m.-2:00 p.m. (regular day shift), and 8:00 a.m.-4:00 p.m.

Because border patrol agents would rotate to a new shift every two weeks, under this new shift and rotation schedule agents were assigned to work ten weeks of consecutive night shifts. Under the prior four-shift system, employees worked six weeks of consecutive night shifts. The change to the eight-shift system might reasonably foreseeably have an adverse impact upon the health and personal situations of bargaining unit employees. Specifically, it might reasonably be anticipated that the increase in night shift assignments would cause employees to become fatigued and irritable, thereby decreasing their reaction time in critical situations and increasing their usage of sick leave. Further, the excessive night-shift work might reasonably create serious conflicts in employees' marital and family relationships. In addition, the reduced size of shifts might reasonably foreseeably cause hardships for employees who needed particular days off each week to attend college classes.[7] The new system might reasonably be foreseen to adversely affect employees who had been actively involved in religious, civic, and social functions.

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[6] "Signcutting" involves searching outlying areas for signs or trails of illegal aliens and tracking them down.

[7] In this regard, the record established that the Respondent has, for years, encouraged employees to obtain college degrees and to otherwise further their education. Prior to the implementation of the eight-shift system, employees had no problems obtaining particular days off to attend college classes. However, after the change, there might foreseeably be an increased difficulty in obtaining requested days off; the burden was placed on these employees to find other agents who were willing to trade shifts and this might be more difficult under the new schedule and thus might interfere with the employees' ability to obtain the days off when classes were scheduled.

On or about August 27 or 28, 1983, Lopez found a copy of a routing slip dated August 26, 1983 in his mailbox which was addressed to all supervisors from APAIC Fulgham. The slip stated that effective September 4, 1983 the shift and rotation schedule would be further revised. Pursuant to this revision, the new shifts in the proper order of rotation were listed as follows: 11:00 p.m.-7:00 a.m., 3:00 p.m.-11:00p.m., 4:00 p.m.-12:00 a.m. or 5:00 p.m.-1:00 a.m., 7:00 a.m.-3:00 p.m., and 6:00 a.m.-2:00 p.m. (signcutting shift). Thus, this new five-shift schedule changed the former eight-shift schedule by eliminating the following three shifts: (1) 10:00 p.m.-6:00 a.m., (2) 2:00 p.m.-10:00 p.m., and (3) 6:00 a.m.-2:00 p.m. (regular day shift). Under this system, employees were assigned to work six weeks of consecutive night shifts and four weeks of day shifts. The new schedule was in fact implemented on September 4, 1983. Lopez testified that the slip had been put in his box sometime when he was on leave and that he did not discover it until on or about August 27 or 28, 1983. AFGE Local 2455 did not request to bargain and no bargaining occurred over the shift and rotation change that was implemented on September 4, 1983.

The record establishes that, prior to the May 29, 1983 and September 4, 1983 shift changes, Respondent had made changes and adjustments in shifts, including the establishment and removal of specific shifts (commando, train, etc.). However none of the previous changes or adjustments were of the magnitude nor so all affecting as the changes that are the subjects of the instant case.

The May 29, 1983 and September 4, 1983 shift changes were made by Respondent, pursuant to the best available intelligence, in order in its view, to intercept illegal aliens as effectively as possible.

Article 28 of the Collective bargaining agreement provides:

> ARTICLE 28 - Tours of Duty (Border Patrol Council)
>
> A. The parties to this agreement recognize that the Agency must, to carry out its mission, vary tours of duty. In the interest of good employee morale, it is agreed that changes in an employee's scheduled hours of duty shall be kept to the minimum necessary to accomplish the mission of the Agency.
>
> B. Assignment to tours of duty shall be posted five days in advance in the appropriate work area covering at least a two week period.
>
> C. Except in an emergency, the Agency agrees to schedule eight (8) hours between changes in shifts, and when practical will schedule more time between shifts.

D. Any employee may retain a carbon copy of his DJ-296 and/or Form I-50 if he so desires.

E. The Agency agrees that maximum effort will be made to assign consecutive days off duty.

F. The administrative workweek shall be seven consecutive days, Sunday through Saturday.

G. Breaks in working hours of more than one hour shall not normally be scheduled in any basic workday.

H. When practical, an employee shall be given 24 hours advance notice of individual shift changes. Exceptions to this provision may be made where there is mutual agreement between the employees and supervisors involved. Individuals involved in a change of tour should be notified of the reasons for the change.

I. Where mutually agreeable to all employees affected employees may trade shifts out of the normal rotation consistent with the needs of the Service.

Discussion and Conclusions of Law

General Counsel of the FLRA alleges that Respondent violated Sections 7116(a)(1) and (5) of the Statute by implementing revisions and changes in shift and rotation schedules at the Laredo Border Patrol Station on May 29, 1983 and on September 4, 1983 without providing AFGE Local 2455 proper notice and without bargaining concerning the revisions and changes and without bargaining over the procedures to be observed in implementing the changes and appropriate arrangements for adversely affected employees.[8]

The General Counsel of FLRA recognizes that the establishment of a shift or tour of duty involves the "numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty" within the meaning of Section 7106(b)(1) of the Statute and is therefore negotiable only at the discretion of the agency. U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982). Thus it is recognized by the General Counsel of the FLRA that, absent more, the Border Patrol was not obliged to bargain concerning the substance of the substantial and far reaching shift changes made on May 29, 1983 and September 4, 1983.[9] General Counsel of the FLRA contends that Respondent violated Sections 7116(a)(1) and (5) of the Statute by making unilateral changes in shift and rotation schedules of employees at the Laredo Station during the pending of a representation case, which changes were not "required consistent with the necessary functioning of the Agency." United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982) enforcement denied sub nom. United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir., March 19, 1984). In this case, involving the same parties as in the subject case, the FLRA held that during the pendency of the question concerning representation Respondent was obligated to maintain existing conditions of employment, except Respondent could make such changes as were required consistent with the necessary functioning of the agency. In that case the changes implemented concerned traffic check points and uniforms and the Administrative Law Judge concluded that the reasons for the changes were of long-standing origin and were merely desirable, rather than essential or necessary to the functioning of the agency, and further were made during the election period because management felt the election turmoil could weaken the union's response to the changes.[10] The Court of Appeals concluded that the changes made by the agency were management rights covered by Section 7106 of the Statute and that the pendency of the representation case did not negate management's right to make the changes.

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[8] The Complaint and Notice of Hearing alleged the violations of Sections 7116(a)(1) and (5) of the Statute with respect to the failure to bargain about the implementation and impact of the changes. The Complaint was amended at the hearing to allege that the Statute was also violated by Respondent's alleged refusal to bargain concerning the substance of the changes.

In the subject case I am constrained to follow the holdings of the FLRA[11] and in so doing I conclude that, in the subject case, the shift and schedule changes made by Respondent were "required consistent with the necessary functioning of the agency." In so concluding I rely on the facts that the Border Patrol is engaged law enforcement entrusted, inter alia, with intercepting illegal aliens attempting to cross our national borders.

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[9] It is concluded that the shift changes made on May 29 and September 4, 1983 were so fundamental and basic that they more closely resemble the creation of a new shift than merely the changing the time an existing shift starts and ends. See U.S. Customs Service, Region V, New Orleans, Louisiana, supra. For example on May 29 when eightt shifts were substituted for four shifts it is difficult, if not impossible, to determine which of the eight shifts were new and which were the prior four with merely changed starting and finishing hours. It is noted, that such a distinction was recognized by the FLRA in U.S. Customs Service, Region V, New Orleans, Louisiana, supra.

[10] See United States Department of Justice, United States Immigration and Naturalization Service, supra at 286.

[11] See also Immigration and Naturalization Service, 16 FLRA 80 (1984), Immigration Naturalization Service, 16 FLRA 88 (1984).

In the judgment of the Border Patrol the shift changes made in the subject case were perceived by Respondent as necessary in order to permit the Laredo Station to effectively police the border and to perform its duties most effectively. They were not just desirable changes, they were changes deemed necessary by Respondent's officials, based on the best intelligence available, to effectively stop the maximum number of illegal aliens. Thus, noting also the period of time during which the representation case was pending, it is concluded that the shift changes made on May 29 and September 4 were consistent with the necessary functioning of the Border Patrol as reasonably perceived by Respondent's officials. Further since the changes were, as discussed above, covered by Section 7106(b)(1) of the Statute, Respondent was not obligated to negotiate with the Council concerning the substance of the changes. Therefore Respondent's failure to bargain concerning the substance of the shift and schedule changes did not violate Sections 7116(a)(1) and (5) of the Statute.

Respondent defended its failure to negotiate concerning the substance of the scheduling changes on the grounds that the Council waived its right to negotiate concerning the schedule change by Article 28 of the collective bargaining agreement and that Section 7116(d) barred processing the complaint because a grievance was filed that allegedly covered the same issues. Because of the foregoing conclusions, I need not reach any conclusions with respect to these defenses.12/

12/ In the event the FLRA concludes my prior disposition of the issue of Respondent's alleged failure to bargain concerning the substance of the schedule changes, in an error, I would reject Respondent's contention that Article 28 of the collective bargaining agreement constituted a waiver by the Council of its rights to negotiate concerning the schedule change, but I would agree that Section 7116(d) of the Statute bars the finding of any violation with respect to the May 29, 1983 changes, but not with respect to the September 4, 1983 changes. The conclusions with respect to the contract waiver is based on the FLRA's decisions holding that the waiver of a statutory right must be "a clear and unmistakable waiver of bargaining rights." Cf. Immigration and Naturalization Service, 10 FLRA 202 (1982); Internal Revenue Service, 10 FLRA 182 (1982). Article 28 of the collective bargaining agreement, although recognizing that the Border Patrol will have to, on occasion, vary and change schedules, does not constitute a clear and unmistakable waiver of any rights the Council might have to bargain about such schedule changes.

Section 7116(d) of the Statute provides, in part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice. . ., but not under both procedures." The grievance filed

(continued)

Even though, as concluded above, Border Patrol was privileged, under Section 7106(b)(1) of the Statute, to refuse to bargain about the institution of the schedule changes, it nevertheless was obligated, pursuant to Section 7106(b)(2) and (3) of the Statute, to bargain over the impact and implementation of such changes. U.S. Customs Service, Region V, New Orleans, Louisiana, supra.

In the subject case, with respect to the May 29 changes, the Council raised the issue of these changes as part of the grievance and not only would that grievance reasonably have included the impact and implementation of the change, but at the April 29 meeting the Council specifically raised the adverse impact of the proposed changes. Accordingly it is concluded that, because the May 29 changes and their impact and implementation were issues raised in the grievance, Section 7116(d) of the Statute bars the finding of any unfair labor practice with respect to the issues raised in the grievance.

The General Counsel of the FLRA alleges, additionally, that Border Patrol failed and refused to bargain about the impact and implementation of the September 4 schedule changes. Respondent routed a notification of these changes to AFGE Local 2455 President Lopez. The routing slip was dated August 26, 1983 and Lopez' testimony as to when he actually received it is unclear; he apparently received it on August 27 or August 28, 1983.[13] Thus the notice was given and received some seven days before the anticipated changes. There is no showing that this notice was not given sufficiently in advance of the September 4 schedule changes so as to permit the union to request to bargain and to bargain about the impact and implementation of the changes. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982). The Council, after the timely notification

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(continued)

by the Local President Lopez on April 24, 1983 specifically raised the issue of the Laredo Station Border Patrol Agents being "divided into eight (8) units or squads headed by one supervisor". There was no explanation as to what these eight squads referred to except the eight new shifts. Although the record does not establish that Respondent advised AFGE Local 2455 about the eight new squads, the union could reasonably have learned about them in the same manner it learned about the change in shifts. Thus it would be found, if necessary, that the grievance did in fact, deal with the schedule changes effective May 29, 1983 and therefore Section 7116(d) of the Statute would require that no unfair labor practice can be found with respect to substance of the May 29, 1983 schedule changes.

13/ If Lopez did not receive the notification until after August 27 or 28 because he had been on leave, it was incumbent upon the union to designate someone to receive such notification and not just to await Lopez return.

was given, did not request to bargain about the September 4 changes[14] and accordingly I find Respondent did not refuse to bargain about the impact and implementation of the September 4, 1983 changes.[15]

In light of all of the foregoing I conclude that Respondent did not refuse to bargain with the Council concerning the May 29 and September 4, 1983 schedule changes or about the impact and implementation of the changes and therefore did not violate Sections 7116(a)(1) and (5) of the Statute. Accordingly, I recommend that the FLRA issue the following:

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 6-CA-30309 be, and it hereby is, dismissed.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: February 20, 1985
Washington, DC

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[14] Although the memorandum between the Council and INS provided for 15 days notice for changes at the local level, that was a contract provision and any breach of it should have been raised under the grievance procedure. The seven days notice that was given was sufficient notice under the Statute.

[15] In light of the foregoing conclusions I need not decide whether Article 28, Sections B-I of the contract constituted a waiver of the Council's right to bargain about the impact and implementation of schedule changes. If the FLRA were to determine that such a finding was necessary, I would conclude that these sections did not constitute a clear and unmistakable waiver of the Council's right to negotiate concerning the impact and implementation of major schedule changes; rather, these sections merely deal with the requirements when an individual employee's schedule is changed.

23 FLRA No. 11

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

and Case No. 0-NG-664

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal:

> All negotiations time, including travel to and from meetings, will be excludable for AUO purposes.

II. Background

This proposal arose in the context of ground rules for negotiations which were being conducted pursuant to an agreement between the parties in settlement of an unfair labor practice charge. AUO refers to "administratively uncontrollable overtime." Under the AUO concept, heads of agencies may, pursuant to regulations prescribed by the Office of Personnel Management (OPM) at 5 C.F.R. § 550.151-550.164 and consistent with law,[1] authorize premium pay on an annual basis for an employee in a position for which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled overtime. In accordance with applicable regulations, AUO may be paid only if the amount involved would be less than the employee would be entitled to under regular overtime. Premium pay for AUO in the Agency is governed by a Department of Justice regulation, DOJ 1551.4A, which sets forth policies and procedures for the implementation of such payments within the Department. As relevant here, that regulation has established a system for the computation and payment of premium pay which consists of an ongoing, two-part process. Under the Agency's procedure, determinations of an employee's continuing eligibility for such pay and the rate appropriate are made during a 12 pay period interval referred to as the "computation period." The "computation period" ends 3 pay periods before the "eligibility period" for which the particular determination was made. The "eligibility period" is a 4 pay period interval during which an employee is compensated for AUO at the particular rate determined to be appropriate based on experience during the "computation period."

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[1] 5 U.S.C. § 5545.

The proposal would exclude the days spent in the negotiations flowing from the settlement agreement from computations used to determine the "average" number of hours of AUO worked by employees representing the Union during the "computation period(s)" in which the negotiations occur. The proposal does not concern any payments or benefits for, or in connection with, such negotiations. Rather, it is solely concerned with minimizing or eliminating the future adverse economic impact on certain employees of spending time in connection with negotiations. In view of the regulatory restriction discussed above, the effect of the proposal would be to minimize the difference between the AUO and the amount an employee would receive if paid regular overtime.

III. Positions of the Parties

As a procedural matter the Agency contends, in essence, that the scope of the negotiations involved is strictly limited to the impact and implementation of assigning Border Patrol personnel to assist in the Cuban Refugee Program and that the proposal is beyond that limited scope. The Agency argues that this is particularly true in view of the existence of a question concerning representation (QCR) stemming from pending petitions for exclusive recognition (RO) and unit consolidation (UC). Substantively, the Agency contends that the proposal is nonnegotiable because:

1. The proposal conflicts with a Government-wide rule or regulation, specifically the regulations issued by OPM which are found at 5 C.F.R. § 550.151-550.164;

2. The proposal is contrary to an Agency regulation, DOJ Order 1551.4A, for which there is a compelling need;

3. The proposal violates section 7131(a) of the Statute.

The Union disputes both the Agency's procedural contention that it has no obligation to bargain over the proposal and its substantive contentions.

IV. Analysis

A. Procedural Issue

The Authority has found that the negotiation of ground rules is an integral part of the collective bargaining process. Department of Health and Human Services, Region VII, Kansas City, Missouri, 14 FLRA 258 (1984); American Federation of Government Employees, AFL-CIO and U.S. Environmental Protection Agency, 15 FLRA 461 (1984) (Proposal 1). In the Authority's view, contrary to the Agency, the question of how an employee's participation in a particular set of negotiations will affect that employee's future eligibility for premium pay is appropriately within the scope of ground rules for those negotiations pursuant to the terms of the settlement agreement.[2] The Authority also rejects the Agency's contention that a UC petition raises a QCR. By definition a UC petition does not bring into question whether the existing exclusive representative will continue as such. It is limited to a determination of whether existing units will be consolidated, as specified in section 7112(d) of the Statute. Therefore, in view of the fact that the proposal relates to a subject which is appropriately encompassed within the scope of ground rules relating to the parties' negotiations, there is no merit in the Agency's position that the proposal is outside the scope of bargaining.

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[2] See United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982) reversed in part sub nom. United States Department of Justice, United States Immigration and Naturalization Service v. Federal Labor Relations Authority, 727 F.2d 481 (5th Cir. 1984) for a discussion as to changes in conditions of employment during the pendancy of a QCR.

B. Substantive Issues

1. Proposal's Consistency with 5 C.F.R § 550.151-550.164

The Agency contends that 5 C.F.R. § 550.151-550.164 reserves to it the responsibility for authorizing and determining the appropriate rate of premium pay for AUO. The Authority finds that pursuant to the OPM regulations involved, the Agency is given the discretion to determine the specific procedures by which computations as to appropriate rates of premium pay for AUO will be made. It is well established that to the extent that an agency has discretion with respect to a matter affecting conditions of employment of bargaining unit employees and where the discretion is not intended to be sole and exclusive, the matter is within the duty to bargain. See, for example, National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980). There is nothing in the OPM regulations cited which would preclude the Agency from exercising its discretion regarding AUO computation by negotiations.

Additionally, the Agency contends that the regulations set forth specific exclusions for AUO computation purposes and that because the exclusions proposed by Union are not among those specified by the OPM, proposal therefore conflicts with the regulation. The specific exclusions set forth in the OPM regulations are contained in 5 C.F.R. § 550.162. However, those provisions directly concern the actual payment of premium pay when employees are on temporary assignments and leave with pay. They do not concern the determination of future eligibility for, and appropriate rates of, such pay. As the regulatory provisions relied upon by the Agency concern not computation but actual payment of premium pay under AUO, the Agency's assertion that a conflict exists cannot be sustained.

Finally, the Agency contends that the proposal violates 5 C.F.R. § 550.152. That provision specifies that an agency may pay premium pay for AUO only if such pay would, over a period of time, be less than the premium pay to which the particular employee would otherwise be eligible if paid overtime pursuant to 5 U.S.C § 5542. According to the Agency, premium pay for AUO would exceed that to which the employees covered by the proposal would be entitled if overtime payments had been made pursuant to 5 U.S.C. § 5542, and, thus, the proposal would result in payments which exceed those permissible under the regulations. The Agency has not shown nor is it otherwise apparent that the proposal would necessarily result in excess payments in violation of 5 C.F.R. § 550.152. Moreover, the Union has specifically stated that in any instances where the operation of the exclusions proposed would result in excess payment the Agency could cease applying the exclusion. Noting particularly the Union's stated intent, which is not incompatible with the plain terms of the proposal, the Authority finds that the proposal is not inconsistent with the provisions of 5 C.F.R. § 550.152.[3]

2. Compelling Need for DOJ Order 1551.4A Under Section 7117(a)(2)

The Agency contends that there is a compelling need under section 2424.11(a),(b) and (c) of the Authority's Rules and Regulations for its agency-wide regulation DOJ Order 1551.4A. However, the Agency has not demonstrated that DOJ Order 1551.4A meets the criteria for concluding that a compelling need exists for agency rules and regulations. Under section 2424.11(a), the Agency must demonstrate that its regulation is essential to the accomplishment of its mission in a manner consistent with the requirements of an effective and efficient government. While the Agency argues that the Union's proposal would make payroll administration inefficient and ineffective, the Authority notes that the record does not support this contention. DOJ Order 1551.4A, paragraph 11(c), provides for exclusion of days in certain circumstances, such as paid and unpaid leave, from the computation of weekly averages of AUO. The Agency has not demonstrated how the addition of another circumstance to an already existing list would render payroll administration inefficient or ineffective. Thus, the Agency has not established that the regulation cited is essential to the execution of its function. American Federation of Government Employees, AFL-CIO, Local 2875 and Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southeast Fisheries Center, Miami Laboratory, Florida, 5 FLRA 441 (1981) (Union Proposal 4).

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[3] In view of these findings it is unnecessary to rule on whether 5 C.F.R. § 550.151-550.164 constitute Government-wide regulations within the meaning of the Statute.

The Agency further argues that DOJ Order 1551.4A is necessary to the maintenance of merit system principles, which is the compelling need criterion established by the Authority under section 2424.11(b) of the Authority's Rules and Regulations.[4/] See, generally, American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981). Specifically, it contends that the regulation is necessary to assure equal payment of overtime within the various bureaus of the Department of Justice which are subject to AUO payments. However, the Agency has failed to demonstrate that its regulation is essential, as opposed to helpful or desirable, in the achievement of the objective of providing equal pay for work of equal value. The Agency has not established that the procedures set forth in that regulation for the administration and implementation of premium pay for AUO are the only means of achieving that particular objective and, hence, has not established that the regulation is necessary to insure the maintenance of basic merit principles. Moreover, the Agency's argument

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[4/] 5 U.S.C. § 2301(b)(3) provides:

§ 2301. Merit system principles

(b) Federal personnel management should be implemented consistent with the following merit system principles:

. . . .

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

that DOJ Order 1551.4A is a regulation which implements the principle of equal pay for work of equal value is not supported in the record. That regulation implements a system which is based on projections and prescribes the same payment for a range of average hours of AUO and, thus, is inherently inequitable. The Agency has not demonstrated that such a system constitutes an application of the concept of equal pay for work of equal value.

The Agency has not shown that the regulation implements a mandate of law or other outside authority which is essentially nondiscretionary, under section 2424.11(c) of the Authority's Rules and Regulations. According to the Agency, DOJ Order 1551.4A implements 5 U.S.C. § 5545(c)(2) and 5 C.F.R. § 550.161. It characterizes this mandate as making the Agency head responsible for determining and reviewing AUO payments on a regular basis. As noted earlier, to the extent that an agency has discretion with respect to a matter affecting conditions of employment of its employees and such discretion is not intended to be sole and exclusive, the discretion is subject to negotiations with the representative. Contrary to the Agency's assertion, there is nothing in either the law or the implementing OPM regulations governing premium pay for AUO which mandates that the discretion allowed agencies with respect to administration of AUO must be sole and exclusive. Therefore, the Agency's regulation which embodies the exercise of that discretion does not constitute, in and of itself, the nondiscretionary implementation of a mandate to the Agency under law or other outside authority.

3. No Inconsistency with Section 7131(a)

The Agency's contention that the proposal is inconsistent with section 7131(a) of the Statute is similarly without merit. Section 7131(a) addresses entitlement to official time by employees who are representing an exclusive representative in the negotiation of a collective bargaining agreement. The Union's proposal addresses how time spent in such negotiations will be treated for purposes of determining eligibility for, and the appropriate rate of, premium pay in the future. The proposal does not relate to actual compensation for time spent in contract negotiations. It concerns a subject which is separate and distinct from that covered by section 7131(a) of the Statute and does not conflict with that provision.

V. Conclusion

There is no merit in the Agency's procedural contention that the proposal is beyond the scope of negotiations.

Furthermore, the proposal does not conflict with 5 C.F.R. § 550.151-550.164 or with section 7131(a) of the Statute, nor is it contrary to an Agency regulation, DOJ Order 1551.4A, for which there is a compelling need. Therefore, the proposal is within the duty to bargain.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union's proposal.[5]

Issued, Washington, D.C., August 13, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[5] In finding this proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MILITARY DEPARTMENT OF ARKANSAS
OFFICE OF THE ADJUTANT GENERAL
ARKANSAS NATIONAL GUARD

Activity

and

Case No. 0-AR-1102

LOCAL 1671, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Ralph C. Barnhart filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case involved the request of three union members for an excused absence without charge to leave (commonly known as administrative leave) to attend a training seminar for union officers. Each individual had requested 40 hours of administrative leave, but was granted only 24 hours. A grievance was filed and submitted to arbitration protesting the Activity's refusal to grant the full amount of the requests. Before the Arbitrator the Activity maintained that certain sessions of the training seminar involved matters of internal union business and that such training was not training for which administrative leave can be granted. Specifically, the Activity argued that under the provisions of section 7131(b) of the Statute, such training must be performed during the time the employee is in a nonduty status. The Arbitrator rejected the Activity's argument. He concluded instead that section 7131(b) does not require that training of union members or officers in the proper conduct of the internal business of the union must be performed when the employees are in a nonduty status. On this basis, he sustained the grievance, ruling that the requested leave should have been granted. Since no remedy was requested in the grievance, the Arbitrator stated that the only remedy available was "the bearing" his ruling may have on future requests for similar administrative leave.

III. EXCEPTION

The Agency contends that the award is deficient as contrary to section 7131(b) of the Statute.

IV. ANALYSIS AND CONCLUSIONS

The Authority agrees with the Agency. The Statute requires that "any activities" by an employee relating to internal union business must be on nonduty time. Service Employees International Union, Local 556, AFL-CIO, 17 FLRA 862 (1985). Thus, contrary to the conclusion of the Arbitrator, we find that "any activities" must encompass training in the proper conduct of the internal business of a union. Consequently, under the express terms of the Statute, such training must be performed when an employee is in a nonduty status. Since administrative leave constitutes an excused absence without charge to leave, an employee is not in a "nonduty status" within the meaning of section 7131(b) when the employee is on administrative leave. See generally Long Beach Naval Shipyard, Long Beach, California and International Federation of Professional and Technical Engineers, Local 174, AFL-CIO, 7 FLRA 362 (1981). In sustaining the grievance, the Arbitrator misinterpreted and misapplied section 7131(b) of the Statute, and therefore the award is deficient and must be modified to assure that it is consistent with the Statute.

The Arbitrator did not address the extent to which the training actually related to internal union business within the meaning of section 7131(b). Accordingly, we do not reach that issue and our modification of the award is intended to recognize that the grievance may be sustained only insofar as the training did not relate to internal union business.

V. DECISION

For the reasons stated above, the award is modified to provide as follows:

> The grievance is sustained only insofar as the training for which leave was requested and denied did not pertain to the proper conduct of the internal affairs of the Union.

Issued, Washington, D.C., August 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1429

Union

and

Case No. O-NG-1154

U.S. DEPARTMENT OF THE ARMY
LETTERKENNY ARMY DEPOT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The petition for review comes before the Authority pursuant to section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of a single provision of an agreement disapproved by the Agency head pursuant to section 7114(c) of the Statute.

II. Provision

Article 22, Section 2--

> Employees who volunteer as blood donors will normally be authorized four hours of excused absence, insofar as scheduling of donors will allow, for recuperation following blood donation. In unusual cases, i.e. the unusual need for recuperation occurs, up to an additional four hours may be authorized (Ref: CPM 990-2, Book 630.S11). Such absence will not include time spent in donating blood, traveling from the site of donation nor will it include the employees' lunch hour. The scheduling of blood donation times will be the

> function of the depot blood coordinator through the division office with times being equally rotated throughout the divisions. Employees who request, but are not scheduled for the quarterly bloodmobile visit, will be given an opportunity to donate in accordance with FPM Supplement 990-2, Book 630. Emergency donations will be handled on a case-by-case basis by the depot blood coordinator. [Only the underlined portion of the provision is in dispute.]

III. Positions of the Parties

The Agency contends that the provision is inconsistent with (1) the Agency's right to assign work under section 7106(a)(2)(B) of the Statute; and (2) Department of Defense Regulation, Civilian Personnel Manual (CPM) 1400.25-M, CPM 990-2, 630.S11-5,[1] for which a compelling need exists under section 7117(a)(2) of the Statute and section 2424.11 of the Authority's Rules and Regulations. In support of its first contention, the Agency argues that the granting of an employee's request for administrative leave in an amount in excess of four hours for the purposes of donating blood without regard to the necessity of the employee's service during the period covered by the request interferes with the Agency's right to assign work under the Statute. In support of its second contention, the Agency argues that the provision conflicts with its regulation by requiring more than four hours of administrative leave to be granted and that a compelling need exists for that regulation.

In response to the Agency's first contention, the Union maintains that its intent in using the language, "normally be authorized four hours of excused absence," is that the Agency can deny permission for employees to donate blood when the time necessary for such donation would interfere with the Agency's mission and, therefore, it does not interfere with the assignment of work. According to the Union, the provision applies only to those employees who can be scheduled by management for that time off. In response to the Agency's second contention, the Union argues that the Agency regulation (1) does not have a compelling need, and (2) is a guideline rather than a mandatory provision.

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[1] S-11.5. Administrative Discretion.

. . . .

> b. Blood Donation. DOD employees are encouraged to serve as blood donors and will be excused from work without charge to leave for the time necessary to donate the blood, for recuperation following blood donation, and for

(Continued)

IV. Analysis and Conclusion

The disputed provision requires the Agency to add the time spent donating blood and traveling to the donation site to the four hours of excused absence for employees who donate blood.

Contrary to the Agency's contention, the provision, as interpreted by the Union, is not inconsistent with its right to assign work under the Statute. As noted, the Union's intent is that the Agency can deny permission for employees to donate blood when the time necessary for such donation would interfere with the Agency's work. Thus, the provision would not restrict the Agency's right to deny an employee's request when the Agency needed the employee to perform work. Accordingly, the provision is not inconsistent with the Agency's right to assign work.

The Agency's second contention is that the provision is inconsistent with Agency regulation, CPM 1400.25-M, CPM 990-2, 630.S11-5. In order for the Agency to establish that the provision is barred by an Agency regulation, it must (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the provision; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in section 2424.11 of its Regulations. See American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA No. 104 (1986) (Union Proposal 7). To establish compelling need the Agency must

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(Continued)

> necessary travel to and from the donation site. The maximum excusal time will not exceed 4 hours, except in unusual cases. When the employee must travel a long distance, or when unusual need for recuperation occurs, up to an additional 4 hours may be authorized.

demonstrate that its regulation is "essential" or "necessary" to achieve certain ends. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 220 (1981). Generalized and conclusionary reasoning is not enough to support a finding of compelling need. Federal Deposit Insurance Corporation, Madison Region, supra.

The first two requirements of the three part test have been met. The Agency has identified a specific Agency-wide regulation, CPM 1400.25-M, CPM 990-2, 630.S11-5 and the provision authorizes the grant of more than four hours of excused absence in situations other than those specified in the regulation. Thus, the provision conflicts with the Agency regulation.

As to the final requirement, the Agency argues that under criterion (a) of section 2424.11[2] the provision is not "consistent with the requirements of an effective and efficient government" because the provision would raise costs to the Agency by increasing at least 50% the amount of time for excused absence for blood donation. The increase, the Agency asserts, would be the result of additional time in giving blood and traveling to and from the donation site. The Union disputes these assertions, contending that the time taken in actually giving blood is only 10 to 15 minutes and that the time for traveling to the donation site is minimal since most donations are made at bloodmobiles on the military installation.

As noted in Federal Deposit Insurance Corporation, Chicago Region, Illinois, supra, to establish compelling need the Agency must demonstrate that its regulation is "essential" or "necessary". In this case the Agency has not done so. The Agency has offered only generalized and conclusionary reasoning, which was disputed by the Union, in support of its assertion that there is a compelling need for the Agency regulation. With reference to the alleged increase in costs, the Agency has not shown that there would be any increase in the number of employees who donate blood or the number of hours of excused absence used by employees under the provision. Even assuming that the provision would result in an increase in the hours of excused absence, the Agency has not shown that the increase would be sufficient to justify a finding that the provision is inconsistent with an effective and efficient government. Since the Agency has not established a compelling need for the Agency regulation under section 2424.11 of the Authority's Rules and Regulations, the Agency has not shown that the provision is barred by an Agency regulation. Therefore, the provision is within the Agency's duty to bargain under the Statute.

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[2] Section 2424.11(a) of the Authority's Rules and Regulations contains the following criterion:

> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of the disputed provision.[3]

Issued, Washington, D.C., August 14, 1986.

J. C. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In deciding that the provision is within the duty to bargain, the Authority expresses no opinion as to the merits of the provision.

23 FLRA No. 14

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
WASHINGTON, D.C. AND VETERANS
ADMINISTRATION MEDICAL CENTER
AND REGIONAL OFFICE, SIOUX FALLS,
SOUTH DAKOTA

Respondent

and

Case Nos. 57-CA-50257
57-CA-50265

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1509, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority because of exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge, which are limited to the Judge's findings with respect to Case No. 57-CA-50265. No exceptions were filed by any party with respect to the Decision of the Administrative Law Judge concerning Case No. 57-CA-50257. The issue raised in the General Counsel's exceptions is whether questioning by an agent of the Respondent during a Union representative's interview for a bargaining unit position constituted interrogation and thus interference, restraint, or coercion in violation of section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background, Judge's Decision, and Adoption in Part

The Judge concluded with respect to the allegations raised in Case No. 57-CA-50257, that the Respondent's refusal to bargain over its decision to change a bargaining unit employee's starting and quitting times constituted a violation of section 7116(a)(1) and (5) of the Statute. Noting the absence of exceptions, we adopt the Judge's conclusion and supporting rationale in Case No. 57-CA-50257.

With regard to the allegations raised in Case No. 57-CA-50265, the Judge noted in his findings that during the interview, the agent of the Respondent asked the Union representative "if he was chief union steward and how much time he spent on union activities." Also, he was asked "what would happen if . . . [he] . . . was needed at the warehouse at the same time he was needed by the union . . . [and] . . . what he would do if a truck needed to be unloaded and he was on official time performing union duties." Finally, he was asked "if his position was an elected or an appointed one."

The Judge viewed this questioning as permissible, concluding that it did not interfere with the employee's protected rights in violation of section 7116(a)(1) of the Statute. In reaching this conclusion, the Judge relied upon the Authority's holding in Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 89 (1985), petition for review filed sub nom. National Association of Government Employees, Local R7-23 v. FLRA, No. 86-1011 (D.C. Cir. Jan. 1, 1986). He viewed that decision as standing for the proposition that when conflicts arise between an employee's entitlement to official time for representational functions under section 7131 of the Statute and the entitlement of management under section 7106 of the Statute to manage, consistent with effective and efficient Government, the parties must recognize the need for and seek reasonable accommodations. In recognizing the need for accommodation, the Judge found that it was reasonable for an agency to "ask an employee the questions necessary to reasonably determine if a conflict exists and how accommodations can be achieved." The Judge concluded that the questioning by Respondent's agent here was directed at ascertaining whether there would be such a conflict concerning demands upon the employee's time in the warehouse position and was therefore relevant to reaching a permissible goal.

III. Positions of the Parties

The General Counsel alleges that any statements or questions which suggest a relationship between an employee's protected activity and the employee's present or future employment status constitute interrogation and are violative of section 7116(a)(1) of the Statute. The General Counsel also contends that the Judge's reliance on Department of the Air Force, Scott Air Force Base, Illinois, is misplaced. The General Counsel argues that the cited case, and the cases cited therein, all involve a specific problem with respect to the granting of official time or an employee's inability to perform certain duties, whereas the subject case involves the interrogation of a job applicant about his union duties prior to his selection.

IV. Analysis

As previously held by the Authority, conduct by an agency which may reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Statute is violative of section 7116(a)(1) of the Statute. See Department of the Treasury, Internal Revenue Service, Louisville District, 20 FLRA No. 77 (1985), petition for review filed sub nom. National Treasury Union v. FLRA, No. 86-1015 (D.C. Cir. Jan. 8, 1986), and the cases cited at n.2. Contrary to the Judge, we find that this interrogation falls within that category. The questions were asked of this labor organization representative during an employment interview. The questions concerned his position in the Union, how many hours he spends in activities on behalf of the Union, and how he would resolve hypothetical conflicts between work and his protected activities on behalf of the Union. The context of the questioning establishes a connection between the protected activity and the employee's chance to be selected for the position. We conclude that this questioning reasonably tends to interfere with the employee's rights under the Statute by communicating that time spent engaging in protected activity could adversely affect his chance for future job selection.

We agree with the General Counsel that the Judge's reliance on Department of the Air Force, Scott Air Force Base, Illinois, was misplaced. That case involved a specific ongoing conflict between an employee's right to use official time and the agency's right to manage effectively and efficiently. The Authority held that when such conflicts arise, the parties must recognize the need for and seek reasonable accommodation. The Authority viewed the statements made by the agency representative to the employee as an attempt to seek accommodation and, in the circumstances, should have been understood to have been made in that context by a reasonable employee. No such conflict has arisen in this case.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommendations, to the extent consistent with the above. Thus, we adopt the Judge's conclusion in Case No. 57-CA-50257 that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over the change in starting and quitting times of a bargaining unit employee. However, contrary to the Judge's finding in Case No. 57-CA-50265, we find that the interrogation of the bargaining unit employee during his interview for a bargaining unit position about his protected activity constitutes interference, restraint and coercion in violation of section 7116(a)(1) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, shall:

1. Cease and desist from:

(a) Instituting any change in the starting and quitting times of its employees without affording the American Federation of Government Employees, Local 1509, AFL-CIO, the exclusive bargaining representative of its employees, the opportunity to negotiate with respect to any proposed changes thereto.

(b) Interrogating any bargaining unit employees concerning their protected right to represent the American Federation of Government Employees, Local 1509, AFL-CIO, the exclusive representative of its employees, during an interview for a bargaining unit position.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reestablish the previous starting and quitting times for employee Raymond Ellis and afford the American Federation of Government Employees, Local 1509, AFL-CIO, the opportunity to negotiate with respect to any proposed changes thereto.

(b) Post at its facilities in the Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 14, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the starting and quitting times of our employees without affording the American Federation of Government Employees, Local 1509, AFL-CIO, the exclusive bargaining representative of our employees, the opportunity to negotiate with respect to any proposed changes thereto.

WE WILL NOT interrogate bargaining unit employees concerning their protected right to represent the American Federation of Government Employees, Local 1509, AFL-CIO, the exclusive representative of our employees, during an interview for a bargaining unit position.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reestablish the previous starting and quitting times for employee Raymond Ellis and afford the American Federation of Government Employees, Local 1509, AFL-CIO, the opportunity to negotiate with respect to any proposed changes thereto.

____
(Agency or Activity)

Dated:_______________ By:___________________________________
(Signature)

[23 FLRA No. 14]

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: Suite 1359-A, 175 Jackson Boulevard, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION, WASHINGTON,
D.C. AND VETERANS ADMINISTRATION
MEDICAL CENTER AND REGIONAL OFFICE,
SIOUX FALLS, SOUTH DAKOTA

Respondent

and

Case Nos. 57-CA-50257
57-CA-50265

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1509, AFL-CIO

Charging Party

. . . .

William H. Ranney, Esq.
For the Respondent

Patricia Niemann
For the Charging Party

Sandra LeBold, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

[23 FLRA No. 14]

A charge against Veterans Administration, Washington, D.C. (hereinafter called VA), and VA Medical Center and Regional Office, Sioux Falls, South Dakota, (hereinafter called VA Sioux Falls),[1] was filed by American Federation of Government Employees, Local 1509, AFL-CIO, (herein called AFGE Local 1509), in January 21, 1985 in Case No. 57-CA-50257 and was amended on March 8, 1985. Pursuant to the above described charge and amended charge on March 12, 1985, the General Counsel of the FLRA, by the Acting Regional Director for Region V, issued a Complaint and Notice of Hearing alleging that Respondents violated Sections 7116(a)(1) and (5) of the Statute by unilaterally changing the duty hours of an employee.

A charge against the Respondents was filed by AFGE Local 1509 on January 31, 1985 in Case No. 57-CA-50265 and was amended on February 14, 1985 and was amended a second time on March 13, 1985. Pursuant to the above described charge, as twice amended, on March 13, 1985 the General Counsel of the FLRA, by the Regional Director for Region V, issued a Complaint and Notice of Hearing alleging that Respondents violated Section 7116(a)((1) of the Statute by interrogating an employee concerning his union activities. By Order dated March 13, 1985, Case Nos. 57-CA-50257 and 57-CA-50265 were consolidated for the purpose of hearing. Respondents filed timely Answers denying that the Statute had been violated.

A hearing was conducted before the undersigned in Sioux Falls, South Dakota. Respondents, Charging Party and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce and to argue orally. Post-hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein American Federation of Government Employees (AFGE) has been recognized as the exclusive collective bargaining representative for an appropriate unit of VA employees, including the employees assigned to VA Sioux Falls that are the subject of this case. AFGE Local 1509 has been AFGE's representative on behalf of the employees at VA Sioux Falls.

At all times material VA and AFGE have been parties to a Master Collective Bargaining Agreement and VA Sioux Falls and AFGE Local 1509 have been parties to a Local Agreement.

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[1] Collectively referred to herein as Respondents.

Case No. 57-CA-50257

The laundry crew was staffed with 12 employees[2] and, prior to December 23, 1984, all employees of the laundry worked from 7:00 AM to 3:30 PM Monday through Friday, except for one employee in the linen room worked from 8:00 AM to 4:30 PM. These hours were in effect during the entire year except during the summer months when all employees commenced work at 6:00 AM and worked to 2:30 PM, because of the extreme heat in the laundry.

By memorandum to "Patricia Niemann, President, AFGE 1509" dated November 15, 1984, VA Sioux Falls, proposed "a new tour of duty (6:00 AM - 2:30 PM) for employees in both the sanitation and the laundry sections. Half of the employees in the sanitation would be affected, and Raymond Ellis, Laundry Machine Operator, would be the only laundry employee who would start this tour."

On November 26, 1984, a meeting was held by representatives of VA Sioux Falls and AFGE Local 1509 to discuss the proposed change. After discussion AFGE Local 1509 agreed to the change in duty hours in the sanitation section. AFGE Local 1509 raised the problem that Ellis and his wife car pooled. VA Sioux Falls pointed out that Ellis' wife was on sick leave and might not return, but if she did she could work the same hours as Ellis. AFGE Local 1509 suggested that Ellis' hours of work, 7:00 AM - 3:30 PM, be maintained. Chief of Personnel Elmer Richards stated the hours were non-negotiable. The change in Ellis' hours was to be made so that Ellis could have a washing cycle completed so that the employees coming to work at 7:00 AM could immediately start drying, ironing, folding, etc.

By memorandum dated November 28, 1984, to VA Sioux Falls, AFGE Local 1509, stated that Ellis was happy with his existing hours (7:00 AM - 3:30 PM) and that the maintaining of two cars for car pooling was very expensive. The memo also stated "Mr. Elmer Richards stated, In our negotiating session on 11/28/84 that 'Raymond Ellis, new tour of duty 6 AM - 2:30 PM is non-negotiable.' Please reply within (3) days with your written answer stating if this new tour of duty 6 AM - 2:30 PM is non-negotiable."

By memorandum dated December 3, 1984, VA Sioux Falls responded to AFGE Local 1509 that the new 6:00 - 2:30 PM tour of duty for Ellis would commence pay period 26 and "management will not negotiate tours of duty." On December 23, 1984, the new duty hours for Ellis went into effect.

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[2] Ten of these employees are WG-2 Laundry workers; One is a WG-3 Laundry Machine Operator; and one WG-5 Laundry Machine Operator, Mr. Raymond Ellis. The WG-3 Laundry Machine Operator ran the dryers and Ellis ran the washers.

Except for the change in Ellis' hours there has been no change in the number of employees in grades and in the types of employees working in the laundry section.

Case No. 57-CA-50265

At all times material herein, Gail Alexander, Assistant Chief, Supply Service, and Carl Meyerhoff, Chief of Storage and Distribution section and Chief of the Warehouse, were management officials and agents of VA Sioux Falls. Meyerhoff is Alexander's subordinate.

On December 24, 1984, a vacant position in Storage and Distribution was announced. In January 1985, Joe Turner, AFGE Local 1509 Chief Steward, applied for the vacant position, was one of five finalists and, as part of the promotional process, was interviewed.

On or about January 16, 1985 Turner was interviewed for the vacancy by Alexander and Meyerhoff. Alexander asked Turner if she could question him about his union activities. Turner agreed. During the interview Alexander asked Turner, *inter alia*, how Turner came to work at VA, what he thought the duties were of a warehouseman, etc. Alexander asked Turner if he was chief union steward and how much time he spent on union activities. Turner explained he was entitled to spend four hours of official time per week on union activities but that sometimes he was required to spend more than four hours per week on union business. Turner stated that he was occasionally called by personnel to discuss a problem or attend a meeting. Alexander asked what would happen if Turner was needed at the warehouse at the same time he was needed by the union; she asked what he would do if a truck needed to be unloaded and he was on official time performing union duties. Alexander pointed out that there were only limited people working in the warehouse. Turner answered it was no problem and that he had always been able to resolve such conflicts in his position in housekeeping. Alexander asked Turner if his position was an elected or an appointed one. Turner answered that he was appointed and had a right to keep the position as long as he wished.

Discussion and Conclusions

Case No. 57-CA-50257

It is well settled that starting and quitting times of employees on an established shift is a condition of employment and an agency violates the Statute by not affording its employees' exclusive representative opportunity to negotiate fully on the decision to change the starting and quitting times. U.S. Customs, 9 FLRA 116 (1982) and Internal Revenue Service, Los Angeles District, 10 FLRA 653 (1982); See also Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 107 (1985).

The FLRA has also concluded that the establishment of a new shift or tour of duty is negotiable only at the election of the agency because it involves "numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty" within the meaning of Section 7106(b)(1) of the Statute. U.S. Customs, supra, and National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984) and Department of the Air Force, Scott Air Force Base, Illinois, supra.

In the subject case, therefore, if the change in Ellis' hours constituted a change in Ellis' starting and quitting time, VA Sioux Falls was obligated to negotiate with AFGE Local 1509 concerning the substance of such a change. On the other hand, if the change in Ellis' hours constituted the establishment of a new shift, it would have involved rights reserved to VA Sioux Falls by Section 7106(b)(1) of the Statute and would have been negotiable only at the election of the agency. These distinctions drawn by the FLRA are very fine ones and somewhat arcane. Cf. National Treasury Employees Union v. FLRA, 732 F2d 703 (1984).

In light of the distinctions drawn by the FLRA, I conclude that VA Sioux Falls changed Ellis' starting and quitting times and did not establish a new shift. In so concluding, I note that Ellis continued to work with the existing shift and employees. He was merely directed to come in earlier so that he could have a load of wash ready for the rest of his shift when it arrived an hour after Ellis. Ellis continued his duties with the established shift.[3] Further, VA Sioux Falls was willing to let Ellis' wife, who also worked in the laundry, keep the same hours as Ellis. Since she too worked on the same laundry shift, it is clear that VA Sioux Falls merely perceived this as involving a changing and adjusting of the starting and quitting times of Ellis, and his wife, and not the establishment of a new shift.

In light of the foregoing conclusion VA Sioux Falls was obligated to negotiate with AFGE Local 1509 concerning the decision to changing Ellis' starting and quitting times. Its refusal to do so therefore violated VA Sioux Falls' obligation as set forth in Section 7116(a)(1) and (5) of the Statute. U.S. Customs, supra and Internal Revenue Service, Los Angeles District, supra.

Case No. 57-CA-50265

The FLRA has recognized conflicts between employees' entitlements to official time for representational functions under Section 7131 of the Statute and the entitlement of management under Section 7106 of the Statute to manage, consistent with effective and efficient Government. When such conflicts arise the FLRA has stated that the parties must recognize the need for and seek reasonable accommodations. Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA No. 89 (1985) and the cases cited therein.

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[3] In this regard, it is further noted that another member of the shift had a starting time one hour after the bulk of the shift arrived.

Recognizing this need to seek accommodations it seems only reasonable that an agency can ask an employee the questions necessary to reasonably determine if a conflict exists and how accommodations can be achieved. In the subject case, Alexander's questioning of Turner seemed directed at ascertaining whether there would be such a conflict concerning demands upon Turner's time in the warehouse position, and how Turner would deal with such a conflict. Such questioning, since it was relevant to reaching a permissible goal, and was clearly so stated, would not interfere with an employee's protected rights and would not violate Section 7116(a)(1) of the Statute.[4/] Although Alexander's asking Turner how he was chosen as Steward seem unrelated to the rest of questions, and, although, by itself it might seem suspicious, it is not, in light of the total conversation, sufficient to constitute an interference with Turner's protected rights. I conclude, in light of the foregoing, that Alexander's questioning of Turner did not violate Section 7116(a)(1) of the Statute.

Having found and concluded that in Case No. 57-CA-50257 VA Sioux Falls violated Section 7116(a)(1) and (5) of the Statute and that in Case No. 57-CA-50265 VA Sioux Falls did not violate the Statute, I recommend that the FLRA issue the following:

ORDER

IT IS ORDERED that the complaint in Case No. 57-CA-50265 be, and it hereby is, dismissed.

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, shall:

1. Cease and desist from:

   (a) Instituting any change in the starting and quitting times of employees without affording the American Federation of Government Employees, Local 1509, AFL-CIO, the

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[4/] In so concluding I do not rely upon the fact that Alexander asked Turner if she could question him about his union steward work. Such a question to a job applicant could hardly be refused by the applicant. Had the questioning been impermissible, asking permission to ask such questions, in such circumstances, would hardly have cured the fundamental nature of the questioning.

exclusive bargaining representative of its employees, the opportunity to negotiate with respect to any proposed changes thereto.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Reestablish the previous starting and quitting times for employee Raymond Ellis and afford the American Federation of Government Employees, Local 1509, AFL-CIO Union the opportunity to negotiate with respect to any proposed changes thereto.

(b) Post at its facilities in the Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, 175 W. Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: January 30, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the starting and quitting times of employees without affording the American Federation of Government Employees, Local 1509, AFL-CIO, the exclusive bargaining representative of its employees, the opportunity to negotiate with respect to any proposed changes thereto.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reestablish the previous starting and quitting times for employee Raymond Ellis and afford the American Federation of Government Employees, Local 1509, AFL-CIO Union the opportunity to negotiate with respect to any proposed changes thereto.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region V, whose address is: 175 W. Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

23 FLRA No. 15

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

CONGRESSIONAL RESEARCH
EMPLOYEES ASSOCIATION

Union

and

Case No. 0-AR-624

THE LIBRARY OF CONGRESS

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Jacob Seidenberg filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration challenging the Agency's determination to contract out certain functions as violative of Article XVI[1] of the parties' collective bargaining agreement. The Arbitrator as his award found that the grievance was arbitrable, but denied the grievance on the merits.

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[1] Article XVI of the parties' collective bargaining agreement pertinently provides:

> Section 1. With the approval of the Librarian of Congress, the Library may employ, in order to improve its service and operation, experts and consultants on a temporary basis in those situations when the regular staff does not possess the required specialized skills or knowledge which cannot practicably be obtained through normal employment procedures.

III. EXCEPTIONS

In its exceptions, the Agency contends that the award is contrary to law and regulation in several respects. In particular, the Agency contends that by finding the grievance to be arbitrable, the award is contrary to the Agency's right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out.

IV. ANALYSIS AND CONCLUSIONS

The Authority concludes that the award is deficient under the Statute. The plain language of section 7106 of the Statute provides that "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated in that section. Thus, the Authority has expressly held that a matter cannot be grieved which would deny the authority of an agency to exercise its statutory rights under section 7106. *American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York*, 5 FLRA 70, 79 (1981), *aff'd sub nom. AFGE Local 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983). Specifically, the Authority has held that proposals which would, as their sole effect, subject management's determinations concerning the identification of critical elements of a position and the content of performance standards to the grievance procedure and arbitral review constituted improper interference with management's rights. *Saint Lawrence Seaway Development Corporation*, (Proposal 4). In so holding, the Authority has noted that subjecting managerial evaluations concerning critical elements and performance standards to arbitral review would require an arbitrator to substitute his or her judgment as to how the agency should be run for that of management. *National Treasury Employees Union and Department of Health and Human Services, Region 10*, 13 FLRA 732, 734 (1982), *aff'd sub nom. NTEU v. FLRA*, 767 F.2d 1315 (9th Cir. 1985). Thus, the Authority has found that an arbitrator cannot determine that a grievance directly challenging an agency's identification of job elements or establishment of performance standards is grievable and arbitrable. *Bureau of Prisons, Department of Justice and American Federation of Government Employees, Local 148*, 21 FLRA No. 15 (1986); *Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2, IPDEU, AFL-CIO*, 20 FLRA No. 39 (1985). The Authority has also found an arbitration award deficient which enforced a collective bargaining agreement provision that imposed a substantive limitation on management's right to identify critical elements. The Authority concluded that by imposing such a limitation, the agreement provision prompted the interference by grievance and arbitration with management's rights because the provision provided the basis for the arbitrator's review of management's identification of an element as critical and permitted the substitution of judgment by the arbitrator for that of management as to how the agency should be run. National Treasury Employees Union and U.S. Customs Service, 17 FLRA 38 (1985). Of course, section 7106 provides that the exercise by management of the rights enumerated in section 7106(a)(2) must be in accordance with applicable laws and is subject to any procedures or appropriate arrangements that have been negotiated by the parties. In Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986), this principle was applied to a grievance alleging that a decision to contract out was not made in accordance with applicable procurement law and regulation governing such determinations. The Authority concluded that such a grievance was not contrary to section 7106(a)(2)(B) of the Statute and was grievable and arbitrable.

The grievance in this case does not concern whether the disputed procurement action is in accordance with applicable laws. Similarly, Article XVI of the agreement does not constitute a negotiated procedure to be observed in, or an appropriate arrangement for employees adversely affected by, the exercise by management of its right to make a determination to contract out. Instead, Article XVI expressly prohibits the Agency from contracting out when "the regular staff" possesses the required specialized skills or knowledge or can obtain the required skills or knowledge through normal employment procedures. By preventing the Agency from contracting out in these circumstances, the provision is inconsistent with section 7106(a)(2)(B) which reserves such determinations with respect to contracting out to management. See National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981) (Proposal 2), enforced sub nom. National Federation of Federal Employees v. FLRA, 681 F.2d 886 (D.C. Cir. 1982).

The Arbitrator's determination that Article XVI merely incorporated by reference the provisions of existing procurement laws and regulations, including specifically 2 U.S.C. § 166, does not alter this conclusion. As the Authority explained in Homestead Air Force Base, 6 FLRA at 577, incorporation into the collective bargaining agreement of specific terms of law or regulation would require management to comply with those terms during the period of the collective bargaining agreement regardless of whether the specific provisions from which they were derived might subsequently be revised or rescinded. Thus, the Authority concluded that incorporation of specific terms "would impose an independent contractual requirement upon management's discretion with respect to contracting out" and therefore "goes beyond contractual recognition of any external limitations and imposes substantive limitations in and of itself." In short, the Authority stated that although law or regulation may place limitations on management discretion, the Statute precludes the negotiation of contractual limitations on management's rights.

The grievance in this case sought to enforce through grievance and arbitration a provision of the parties' collective bargaining agreement that denies the authority of the Agency to make determinations with respect to contracting out under section 7106(a)(2)(B) of the Statute. Consistent with established precedent pertaining to arbitral review of management's exercise of its rights in performance appraisal matters, we find that such a grievance is precluded by section 7106 from grievance and arbitration. Thus, the Arbitrator's award finding the grievance to be arbitrable is deficient as contrary to the Statute.

V. DECISION

Accordingly, paragraphs 2-3 of the award, finding the grievance arbitrable and resolving the grievance on the merits, are set aside.[2]

Issued, Washington, D.C., August 14, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In view of this decision, it is not necessary to address the other contentions of the Agency in its exceptions to the award.

23 FLRA No. 16

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE
FEDERAL GRAIN INSPECTION SERVICE

Activity

and Case No. 0-AR-1084

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3157

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Paul Barron filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition and the Office of Personnel Management filed a brief as an amicus curiae.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the furlough of the grievant as the result of a reduction-in-force. A grievance was filed and submitted to arbitration protesting the Activity's denial of retreat rights to the grievant to the position of agricultural commodity technician, GS-5. According to the Arbitrator, the grievant was initially appointed in the Federal service as an agricultural commodity technician, GS-7, and subsequently was promoted from that position. As a result of an earlier reduction-in-force, the grievant at the time of the disputed reduction-in-force held the position of agricultural commodity grader, GS-7. The Activity had denied the grievant retreat rights under FPM chapter 351, subchapter 4-3b which entitles an employee to retreat to a position from or through which the employee had been promoted or to a position substantially the same as a position from or through which the employee had been promoted. The Activity had determined that the position of agricultural commodity technician, GS-5, was not a position from or through which the grievant had been promoted. The Activity had also determined that the GS-5 technician position was not substantially the same as any such position because it was not at the same grade level of any position from or through which the grievant had been promoted.

The Arbitrator ruled that the grievant was entitled to have retreated to the position of agricultural commodity technician, GS-5, at the time of the reduction-in-force. He concluded that the intention of the FPM is to allow retreat to an entry level position in the situation, as in this case, where the employee had been appointed at the higher-grade level of a position series because of the employee's experience and where the duties of the position at the different grade levels are essentially the same. He stated that in a real sense the employee when appointed at a higher grade is promoted through the entry level position. The Arbitrator also rejected the Activity's argument under FPM chapter 351, subchapter 4-3b that in order to be substantially the same, positions must be at the same grade level. The Arbitrator noted that the argument was based on subchapter 4-3b(3)*/ essentially providing that in order to be substantially the same, the two positions must be enough alike that they would be "in the same competitive level if they were in the same competitive area." The Arbitrator acknowledged that in order to be "in the same competitive level," FPM chapter 351, subchapter 2-3 requires that they be at the same grade level. However, the Arbitrator rejected the contention that this competitive level limitation requiring positions to be at the same grade level applied in this case. He explained that the position comparison of subchapter 4-3b(3), incorporating the competitive level requirement, is between positions in different competitive areas and that there is no such requirement when the position comparison is between positions in the same competitive area as in this case. He observed that this interpretation was supported by the provision in subchapter 4-3b that described retreat rights in terms of a "substantially similar position" rather than a position that is "substantially the same" as a position from or through which the employee had been promoted. Accordingly, the Arbitrator sustained the grievance and awarded the grievant backpay for any wages lost as the result of his furlough.

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*/ FPM chapter 351, subchapter 4-3b is set forth in full in the appendix.

III. EXCEPTION

A. Contentions of the Activity

The Activity contends that the award is deficient as contrary to FPM chapter 351, subchapter 4-3b. The Activity asserts that the retreat rights provided by regulation are narrow and specific and that the Arbitrator has granted the grievant retreat to a position contrary to the FPM. In particular, the Activity maintains that because the grievant was never promoted from the position of agricultural commodity technician, GS-5, the grievant would be entitled to retreat to that position only if it were "substantially the same," within the meaning of FPM chapter 351, subchapter 4-3b, as the position of agricultural commodity technician, GS-7, from which the grievant had been promoted. The Activity argues that in order to be substantially the same under subchapter 4-3b, the positions must be in the same competitive level which requires that they must be at the same grade level. Because the position of agricultural commodity technician, GS-5, and the position of agricultural commodity technician, GS-7, are not at the same grade level, the Activity argues that the grievant was not entitled to retreat to the GS-5 technician position. Moreover, the Activity argues that the Arbitrator therefore misinterpreted subchapter 4-3b when he held that the intent of the FPM was to allow retreat to entry level positions in situations such as presented in this case. The Activity also argues that the Arbitrator misinterpreted subchapter 4-3b when he held that the competitive level limitation, requiring that positions be at the same grade level to be substantially the same, only applies when the positions being compared are in different competitive areas. The Activity asserts that the requirement applies regardless of competitive area and that one instance of the use of an interchangeable term to "substantially the same" in subchapter 4-3b does not alter the requirement.

B. Opposition of the Union

In its opposition the Union contends that the award granting the grievant retreat rights in the circumstances of this case has not been shown to be contrary to any express provisions of FPM chapter 351. The Union maintains that the arguments presented in support of the exception are the same arguments presented to the Arbitrator and properly rejected by him.

C. Position of the Office of Personnel Management (OPM)

In agreement with the Activity, OPM maintains that the intent of the FPM is not to allow retreat to entry level positions in situations such as presented in this case. OPM specifically asserts, contrary to the ruling of the Arbitrator, that FPM chapter 351, subchapter 4-3b requires that positions must be in the same competitive level in order to be substantially the same, regardless of competitive area. OPM notes that in order to be in the same competitive level, positions must be at the same grade level. OPM also agrees with the Activity that the one instance of the use of the term "substantially similar" rather than "substantially the same" does not alter this requirement. OPM maintains that under FPM chapter 351, subchapter 4-3b, the grievant was not entitled to retreat to the GS-5 technician position because it was not a position from or through which he had been promoted and because it was not a position substantially the same as a position from or through which he had been promoted since it was at a lower grade level.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the award is deficient by granting the grievant retreat rights to the position of agricultural commodity technician, GS-5. For the reasons that follow, we find that this is not a position from which the grievant was promoted or a position essentially identical to or substantially the same as a position from which the grievant was promoted.

The Merit Systems Protection Board has repeatedly recognized that the right of retreat is narrow and specific. See Shell v. Department of Labor, MSPB Docket No. CH035184I0511 (March 25, 1985). Specifically, at all relevant times, an employee has been entitled under 5 CFR part 351, subpart G to retreat only to the same position or an essentially identical position previously held by the employee. The Board has noted that OPM has elaborated on retreat rights in FPM chapter 351, subchapter 4-3b, Johnson v. HUD, MSPB Docket No. DE03518310282 (August 2, 1984), and holds that in order for an employee to exercise the right of retreat, the employee must have been promoted from or through the position to which such right is claimed or promoted from or through a position that is substantially the same or substantially similar. See Berry v. Department of Energy, MSPB Docket No. DC035182I1433 (May 8, 1984) and Gallegos v. DoD, 9 MSPB 467 (1982). In addition, the Board has cited and applied the interpretation of these regulations that the Activity and OPM assert in this case. Thus, the Board has indicated that it will find a position to be substantially the same as a position from which the employee was promoted only when the positions are sufficiently alike so that they would be in the same competitive level. *Lover v. HHS*, MSPB Docket No. DC03518410189 (October 1, 1984). Similarly, the Board has also cited OPM's interpretation of these regulations to provide that appointments from OPM registers are not promotions and therefore may not be used when determining an employee's retreat rights. *Shell v. Department of Labor*.

In view of the consistent interpretation of these regulations by OPM, and in view of MSPB's adoption and application of this interpretation in resolving retreat right disputes in numerous reduction-in-force cases, we conclude that the Arbitrator's award is contrary to 5 CFR part 351, subpart G and FPM chapter 351, subchapter 4-3b. We find that there is no right of retreat to entry level positions in situations such as presented in this case. An employee is not promoted through the entry level position when the employee is appointed at a higher grade level. *See Shell v. Department of Labor*. We further find, contrary to the Arbitrator, that under these regulations the grievant was not entitled to retreat to the GS-5 technician position because it was not a position essentially identical to or substantially the same as the GS-7 technician position. Under the regulations there was no right to retreat because the positions are not in the same competitive level since they are not at the same grade level. Consequently, the award is deficient.

V. DECISION

Accordingly, for these reasons, the award is set aside.

Issued, Washington, D.C., August 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL BORDER
PATROL COUNCIL

Union

and Case No. O-NG-682

DEPARTMENT OF JUSTICE, IMMIGRATION
AND NATURALIZATION SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals.

II. Background

These proposals were offered by the Union during negotiations held as the result of a settlement agreement between the parties resolving an unfair labor practice (ULP) charge filed against the Agency. The settlement agreement obligated the Agency to bargain over the impact and implementation of detailing bargaining unit employees to work at sites used for detention of illegal Cuban and Haitian aliens. The proposals specifically address the fact that unit employees lose their eligibility under Agency regulations for administratively uncontrollable overtime (AUO) while on detail to the detention centers.

The purpose and method of computing AUO is fully explained in National Border Patrol Council, American

Federation of Government Employees, AFL-CIO and United States Immigration and Naturalization Service, 23 FLRA No. 11 (1986). In accordance with applicable regulations, AUO may be paid only if the amount involved would be less than employees would be entitled to under regular overtime. These proposals seek to mitigate the effect upon employee entitlements to AUO payments which results from the details. In essence, the proposal would minimize the difference between AUO and the amount the employee would receive if paid regular overtime.

Union Proposal 1

> The initial ten (10) working days of a detail to the Cuban/Haitian Refugee Program will be considered excludable for AUO purposes and immediately upon return to his official duty station, the employee will be certified for the same percentage of AUO for which he was certified prior to detail to the Cuban/Haitian Refugee Program.

A. Positions of the Parties

As a procedural matter, the Agency asserts that the Union's negotiability appeal should be dismissed for failure to comply with section 2424.5 of the Authority's Rules and Regulations. That is, the Agency asserts that the Union filed a ULP charge against the Agency concerning the same matter as Union Proposal 1, yet did not select, as required by section 2424.5 of the Rules, which procedure (the ULP charge or the negotiability appeal) the Authority should process first.

The Agency further argues that it has no duty to bargain on Union Proposal 1 in the circumstances of this case because, in essence, the proposal falls outside the scope of the parties' settlement agreement.

Substantively, the Agency argues that Union Proposal 1 is nonnegotiable because:

> 1. The proposal violates law and/or Office of Personnel Management (OPM) regulations. In particular, the proposal conflicts with 5 C.F.R. § 550.151 to .164 which was issued pursuant to 5 U.S.C. § 5545(c);
>
> 2. The proposal constitutes an attempt to negotiate rates of pay in violation of law; and

3. The proposal violates an Agency regulation, DOJ Order 1551.4A, for which there is an asserted compelling need.

The Union contends that a negotiability determination is warranted because the issues present in the ULP proceeding cited by the Agency are distinguishable from the issue raised in its proposal. Substantively, the Union asserts that the matter of excluding days from AUO computation is within the discretion of the Agency and, therefore, is within its duty to bargain.

B. Analysis

1. Procedural Issue

The ULP charge, which the Agency claims concerns the same issue as Union Proposal 1, was closed by the Regional Director without any substantive determination having been made on the underlying issue shortly after the Agency filed its Statement of Position in the negotiability appeal. Thus, even assuming that the Union failed to make the election required by section 2424.5 of the Rules as to which procedure (the ULP charge or the negotiability appeal) should be processed first, such procedural issue has been rendered moot.

2. Duty to Bargain

When a union files a negotiability appeal under section 7105(a)(2)(D) and (E) of the Statute, section 7117(c) entitles it to a decision on the negotiability issues in the appeal. To the extent that there are factual issues in dispute between the parties in the circumstances of a case, such issues should be resolved in other appropriate proceedings. American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984). Hence, the Agency arguments that under the circumstances it has no duty to bargain on the disputed proposal are not relevant in the context of a negotiability appeal.

3. Substantive Issues

a. Conflict with Law and Government-wide Regulation

While the Agency concedes that the development of a formula for establishing AUO entitlements is left to agencies' discretion, it contends that the law and regulations implicitly require all similarly situated employees within an agency to be treated in like manner. In support, the Agency relies on two decisions of the Court of Claims, namely, Byrnes, et al. v. United States, 330 F.2d (Ct. Cl. 1964) and Fix, et al. v. United States, 368 F.2d 609 (Ct. Cl. 1966).

The Agency's reliance on the two Court of Claims decisions is misplaced. Those cases dealt with agency attempts to exclude certain employees from eligibility for overtime pay in violation of statutory eligibility criteria. The cases did not specifically examine the agencies' methods of computing AUO overtime pay. In fact, the court in the Fix case noted that an agency does have discretion in the calculation of overtime pay under an AUO statute. 368 F.2d at 614. Further, the court in the Fix case stated that a "necessary consequence" of the AUO scheme is that "some will get the same pay for much more work." 368 F.2d at 615.

The Agency contends that its own regulations are applicable throughout the entire Department of Justice and ensure the required uniform treatment of all Justice employees. The Agency argues that Union Proposal 1 would set up a different computational scheme for unit employees detailed to the detention centers, which would result in higher subsequent AUO payments to covered employees than those received by non-bargaining unit employees assigned to other details of similar length for which AUO pay is also not authorized.

The Authority finds that neither the governing statute nor the related OPM regulations, either literally or as judicially interpreted, requires absolute equity between Executive agencies or even between similarly situated employees within an agency. Rather, the law and regulations leave agencies with discretion to decide how to arrive at individual AUO entitlements. To the extent that an agency has discretion respecting a matter sought to be bargained affecting conditions of employment within a bargaining unit and where the grant of discretion is not sole and exclusive, the matter is within the duty to bargain. National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 758 (1980). In this case, the Agency has proffered no persuasive arguments that either the statutory or regulatory grants of discretion are limited so as to bar bargaining over the methods of computing AUO entitlements.

b. Negotiation over Pay Rates

The Agency's view that Union Proposal 1 constitutes an unlawful attempt to bargain over rates of pay is based on the fact that exclusion of the first ten days of a detail to the detention centers, as required by the proposal, would result in the concerned employees receiving a higher rate of AUO upon return to their regular assignments than otherwise would be granted under the Agency regulation. This proposal, however, merely concerns the computation of AUO within the specific constraints set by law and implementing Government-wide regulations. That is, 5 U.S.C. § 5545(c)(2) establishes that an employee eligible for AUO payments may receive "not less than 20 percent nor more than 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position." The Agency has not alleged, nor is it otherwise apparent, that this proposal seeks to circumvent these statutory limitations.

The OPM regulations issued pursuant to 5 U.S.C. § 5545(c) state, at 5 CFR § 550.161(d) (1986), that determinations as to AUO payments ". . . shall be based on consideration of available records of the hours of irregular or occasional overtime work required in the past, and any other information bearing on the number of hours of duty which may reasonably be expected to be required in the future." The Agency does not suggest that the proposal is inconsistent with the quoted regulatory guidelines nor does it assert that the proposal is an inherently inaccurate indicator of future uncontrollable overtime work. In fact, the Agency states, at 20 of its Statement of Position, that it does not "claim that there is a specific . . . need to include or exclude the first 10 days of an assignment to 'other duties' within the meaning of 5 CFR § 550.162(c)(1)."

c. Compelling Need for the Agency's Regulation

The Agency argues that its regulations governing AUO computations meet the criterion for compelling need set forth at section 2424.11(b) and (c) of the Authority's Rules and Regulations. Both of these compelling need arguments were raised in United States Immigration and Naturalization Service, 23 FLRA No. 11 and were rejected by the Authority. For the reasons fully stated in that case, they are likewise rejected here.

d. Recertification After Return from Detail

In the Agency's assertion of nonnegotiability it contended that the portion of the proposal requiring recertification of employees at the same percentage of AUO for which they were certified prior to their detail is moot. The Agency has not argued that this portion of the proposal is nonnegotiable, nor is it otherwise apparent that it is inconsistent with any law, rule or regulation. In fact, this portion of the proposal appears to be consistent with the Agency's regulation, as modified by the first part of the proposal, concerning the calculation and payment of AUO for employees returning from a detail. Thus, the Authority finds this portion of the proposal to be within the duty to bargain.

C. Conclusion

The proposal is properly before the Authority and does not conflict with 5 U.S.C. § 5545(c) or 5 C.F.R. § 550.151 to .164. Further, the Agency has not demonstrated that negotiation of the proposal is barred by an Agency regulation, DOJ Order 1551.4A, for which a compelling need exists. Consequently, Union Proposal 1 is within the duty to bargain.

IV. Union Proposal 2

> The Service agrees where possible to attempt to avoid assigning employees who are within three years of retirement to details which have the effect of reducing the employees' compensation for their "high three" years (for retirement purposes).

A. Positions of the Parties

The Agency contends that the proposal is inconsistent with management's rights to assign employees and work, under section 7106(a)(2)(A) and (B) of the Statute.

The Union characterizes the proposal as being "hortatory rather than mandatory" and, thus, within the duty to bargain.

B. Analysis

In effect, Union Proposal 2 prevents the Agency from assigning certain employees to details which would render them ineligible for AUO payments. A provision similar in effect was before the Authority in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 14 FLRA 243 (1984). Provision 2 in that case sought to prevent the agency from rotating details among employees to avoid compensating them at a higher level. Finding that the provision imposed substantive restrictions on management's right to assign employees by limiting its discretion to determine which particular employees would be assigned, the Authority held the provision to be inconsistent with section 7106(a)(2)(A) of the Statute. In like manner, Union Proposal 2 would prevent the Agency from assigning the specified employees to certain types of details.

The detailing of employees in this case involves a change in the work which is assigned to those employees. In this case management would be prevented from assigning to certain employees work for which AUO pay is not authorized. In National Federation of Federal Employees, Local 1622 and Department of the Army, Headquarters, Vint Hill Farms Station, Warrenton, Virginia, 16 FLRA 578 (1984), Union Provision 2 required management, "insofar as possible," to refrain from assigning to employees work which was inappropriate to their positions or qualifications. The Authority determined that the provision was inconsistent with management's right, under section 7106(a)(2)(B) of the Statute, to assign work because it specifically prevented the agency from requiring employees to perform certain duties.

Further, this analysis is not altered by the inclusion of the qualifying term "to attempt" in the proposal. An argument that qualifying words made a proposal nonmandatory, similar to that urged by the Union here, was addressed in National Federation of Federal Employees, Local 943 and Department of the Air Force, Headquarters Keesler Technical Training Center, Keesler Air Force Base, Mississippi, 19 FLRA No. 113 (1985) (Union Proposal 2). In that case, the union suggested that the proposal only required management to "attempt" to undertake certain actions which were otherwise within the realm of management rights. The Authority determined that the import of the proposal was that, where management determined that the prescribed actions were possible, it was obligated to take them. Consequently, the qualification did not cure the proposal's inconsistency with management's rights. Based on the reasoning and cases cited in Keesler Air Force Base, the Union's position in this case cannot be sustained.

C. Conclusion

Union Proposal 2 substantively violates the rights to assign employees and work reserved to management by section 7106(a)(2)(A) and (B) of the Statute. It is, therefore, outside the duty to bargain.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 1.*/ IT IS FURTHER ORDERED that the petition for review, as it relates to Union Proposal 2, be, and it hereby is, dismissed.

Issued, Washington, D.C., August 14, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding Union Proposal 1 to be within the duty to bargain, the Authority makes no judgment as to its merits.

23 FLRA No. 18

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Union

and

Case No. O-NG-1184

DEPARTMENT OF THE NAVY
MARE ISLAND NAVAL SHIPYARD
VALLEJO, CALIFORNIA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents an issue concerning the negotiability of a single Union proposal.

II. Union Proposal

Motorcycle Rider Training

> [The Union] is opposed to any requirement for motorcycle rider training.

III. Positions of the Parties*/

The Agency contends that the proposal concerns a matter which is not a condition of employment within the meaning of section 7103(a)(12) of the Statute. Rather, the Agency asserts that the motorcycle safety program is an exercise of the installation commander's general police powers pursuant to the mandates of Highway Safety Program Standards - Applicability to Federally Administered Areas, 23 CFR § 1230. The Agency also contends that its motorcycle safety training program is an exercise of its right to determine internal security practices, and since the proposal opposes any training, it thereby interferes with management's right pursuant to section 7106(a)(1) of the Statute to determine its internal security practices.

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*/ The Union did not file a Reply Brief in this case.

In its petition for review, the Union argues that the Agency has erroneously decided that the above mentioned Highway Safety Program Standards as delineated in a Department of Navy Instruction, OPNAVINST 5100.12B, apply to commuters when in actuality they only apply to those employees who use motorcycles while performing work for the Agency. The Union also argues that there is no compelling need for the proposed training program and that it does not implement a mandatory, Government-wide regulation.

IV. Analysis and Conclusion

The threshold issue in this case is whether the Union's proposal concerns a condition of employment as described under section 7103(a)(14) of the Statutue. As noted by the Union and in the absence of any alternative explanation by the Agency, completion of the proposed motorcycle safety course is a prerequisite to the Agency's issuance of a motor cycle parking decal without which an employee would be denied access to the installation. Further, the proposal in this case relates to safety training which may or may not be given during working hours. Consequently, the Authority finds that this proposal concerns a condition of employment because a nexus exists between the penalty imposed for failure to complete the training, i.e. the employee can not park or drive on the installation without a decal, and the employee's job. See American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center, and Fort Knox, Fort Knox, Kentucky, 19 FLRA No. 95 (1985) (Proposal 1); National Federation of Federal Employees, Local 1363 and U.S. Army Garrison, Yongsan, Korea, 15 FLRA 134 (1984); National Treasury Employees Union and NTEU Chapter 70 and Department of the Treasury, Internal Revenue Service, Atlanta Service Center, Georgia, 8 FLRA 37, 40 (1982) (Proposal 5). Therefore, contrary to the Agency's contention, the Union's proposal does concern a matter which is a condition of employment within the meaning of the Statute.

The Agency's remaining contention is that the Union's proposal interferes with the Agency's right to determine its internal security practices. The explicit language of the proposal opposes any requirement for motorcycle rider training. The Authority has held that an agency's right to determine internal security practices includes the right to determine policies and actions which are part of its plan to secure or safeguard its personnel and physical property. *See* *Defense Logistics Council of American Federation of Government Employees Locals and Defense Logistics Agency*, 20 FLRA No. 19 (1985), *petition for review filed sub nom. Defense Logistics Council of American Federation of Government Employees Locals v. FLRA*, No. 85-1743 (D.C. Cir. Nov. 13, 1985). In agreement with the Agency, the Authority concludes that the proposal at issue in the present case would conflict with a preventive safety measure taken by the Agency to guard against harm to its property and personnel and, hence, would directly interfere with the Agency's right to determine its internal security practices. The proposal would, by precluding the implementation of any motorcycle rider training program, impose a substantive limitation on management's exercise of its right to determine its internal security practices, in particular the decision as to whether and the circumstances under which a motorcycle decal granting the privilege of driving on its premises will be issued. The proposal would therefore directly interfere with the Agency's right under section 7106(a)(1) of the Statute to determine its internal security practices, and is thus outside the duty to bargain.

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., August 14, 1986.

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[ORDER DENYING MOTION FOR RECONSIDERATION
OF 22 FLRA No. 33]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Union

and

Case No. 0-AR-1166

U. S. MARINE CORPS,
CAMP LEJEUNE, NORTH CAROLINA

Activity

ORDER DENYING MOTION FOR RECONSIDERATION

The case is before the Authority on a motion for reconsideration filed by the Union on July 8, 1986, seeking reconsideration of the Authority's Order of June 30, 1986, dismissing the Union's exceptions (22 FLRA No. 33 (1986)). For the reasons set forth below, the Union's motion must be denied.

The Union's exceptions to the arbitrator's award were dismissed on the basis that the exceptions were untimely. It was found that the arbitrator's award was served on the parties by mail on or about April 23, 1986. Therefore, under Section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] and sections 2429.21 and 2429.22 of the Authority's Rules and Regulations, which are also applicable to computation of time limit here involved, the exceptions had to be filed in the National Office of the Authority not later than the close of business on May 27, 1986. However, the exceptions were not filed at the National Office until June 6, 1986. In this regard, the record established that the Union mailed the exceptions to the Authority's Atlanta Regional Office at its former address on May 22, 1986. The Atlanta Regional Office received them on June 2, 1986, and exercised due diligence in forwarding the exceptions that same day. However, they were not received by the Authority's national office until June 6, 1986. Therefore, the exceptions were untimely filed.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

In its motion for reconsideration, the Union argues that the Arbitrator received a copy of the Union's exceptions prior to May 29, 1986, and that the Atlanta Regional Office should have also received the exceptions prior to May 29, 1986. The Union also enclosed a copy of a letter dated May 29, 1986, from the Arbitrator. In addition, the Union contends that it was unaware that an unfair labor practice and an exception to an arbitrator's award had to be filed at different addresses.

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

The Union's arguments do not demonstrate the existence of extraordinary circumstances within the meaning of section 2429.17 of the Authority's Rules and Regulations. Under sections 2429.21 and 2429.24 of the Rules and Regulations, when a document is required to be filed with the Authority, the document must be received in the National Office of the Authority before the close of business on the last day of the prescribed time limit. See Bremerton Metal Trades Council, United Association, Local 631 and Puget Sound Naval Shipyard, 9 FLRA 1094 (1982); request for reconsideration denied June 24, 1982. While the Union did mail the exceptions on May 22, 1986, presumably in sufficient time to be timely received if properly addressed, exceptions to an arbitrator's award cannot be filed at a Regional Office.

Since the inception of the Authority in 1979, applicable regulations have required that exceptions to arbitration awards filed with the Authority be filed at the National Office. *See The Panama Canal Commission and Maritime Metal Trades Council, AFL-CIO*, 21 FLRA No. 38, n.5 (1986); request for reconsideration denied April 16, 1986.

Accordingly, since the Union has failed to establish the existence of extraordinary circumstances warranting reconsideration of the Authority's decision, the Union's motion is hereby denied.

Issued, Washington, D.C., August 12, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1032

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator L. Lawrence Schultz filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., August 5, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR

Agency

and

Case No. 0-AR-1170

LOCAL 12, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Joseph A. Sickles filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. MARINE CORPS LOGISTICS
BASE, BARSTOW, CALIFORNIA

Activity

and

Case No. 0-AR-1173

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1482

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert D. Steinberg filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/case 388

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 388 REPORT OF CASE DECISIONS September 7, 1986

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NEGOTIABILITY CASES

23 FLRA No. 20 (August 15, 1986)

American Federation of Government Employees, AFL-CIO, Local 3748 and U.S. Department of Agriculture, Agricultural Research Service, Northern States Area, Case No. 0-NG-1101

23 FLRA No. 21 (August 15, 1986)

American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services Social Security Administration, Case No. 0-NG-412

23 FLRA No. 24 (August 15, 1986)

Hawaii Federal Employees Metal Trades Council, AFL-CIO and Pearl Harbor Naval Shipyard, Case No. 0-NG-1186

23 FLRA No. 25 (August 15, 1986)

American Federation of Government Employees, Local 2185 and Tooele Army Depot Tooele, Utah, Case No. 0-NG-1215

ARBITRATION CASES

23 FLRA No. 19 (August 15, 1986)

U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO (Smith, Arbitrator), Case No. 0-AR-1113

23 FLRA No. 22 (August 15, 1986)

U.S. Army Communications Command Agency, Redstone Arsenal and American Federation of Government Employees, Local 1858 (Byars, Arbitrator), Case No. 0-AR-573

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23 FLRA No. 23 (August 15, 1986)

United States Army Communications Command, Fort McClellan and Local No. 1941, American Federation of Government Employees, AFL-CIO (Clarke, Arbitrator), Case No. O-AR-633

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

August 15, 1986

O-AR-1164 O-AR-1175 O-AR-1178

23 FLRA No. 19

Federal Labor Relations Authority

HHS, SSA and AFGE (Smith, Arbitrator), Case No. 0-AR-1113 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7122(a) and (b)

Arbitration
  Procedure
    Timeliness
      Request for Clarification Does Not Extend Time

DIGEST NOTES

The Authority dismissed the agency's exceptions as untimely filed because they failed to comply with SS 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The agency's request for clarification of the arbitrator's award did not operate to extend the time limit for filing exceptions. The filing period for exceptions begins with the arbitrator's response to a request for clarification only when an arbitrator, in response to the clarification request, modifies an award and the modification gives rise to the deficiencies alleged in the exceptions.

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23 FLRA No. 20

Federal Labor Relations Authority

AFGE, Local 3748 and Dep't of Agriculture, Agricultural Research Service, Northern States Area, Case No. 0-NG-1101 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Negotiability
  Conditions of Employment — 7105(a)(2)(E)
    List of Nonunit Employees — 7117(a)(1)
      Employees Work Directly Related to Conditions of Employment of Unit Employees
  Information
    Not Agency Records Subject to Disclosure
      Information May Be Provided By Local Management
  Cooperative Agreements (Dep't of Agriculture)
    OMB Circular No. A-76 Does Not Regulate Such Agreements

DIGEST NOTES

Proposals concerning the agency's "Cooperative Agreement" (nonunit) employees also concern the conditions of employment of unit employees and are negotiable. The Authority held that although the subject employees were not members of the bargaining unit, knowledge of when, where and how the employees work in relation to bargaining unit employees was directly related to conditions of employment of unit employees. The Authority noted that it was common to fill unit vacancies with "Cooperative Agreement" employees, thereby reducing the size of the unit, which in turn reduces promotion or reassignment opportunities for unit employees. Further, "Cooperative Agreement" employees worked side-by-side with and were often trained by unit employees. Because the unit and nonunit employees were jointly engaged in furtherance of a common agency objective--the accomplishment of the cooperative project--the information sought by the union was necessary so that unit employees could be properly evaluated on training assignments and on their overall performance of the cooperative project. The Authority rejected the agency's contention that the information was not maintained and therefore, not agency records. It did not show nor did it appear that local management could not provide the information or that providing the information was inconsistent with Government-wide regulation. (proposals 1 and 2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal which requires an agency to comply with OMB Circular A-76 and all other applicable laws and regulations on cooperative agreements was nonnegotiable. The Authority held that the proposal was inconsistent with OMB Circular A-76, a Government-wide regulation, because OMB A-76 does not regulate the use of cooperative agreements. The union stated that it did not intend the proposal to require the application of OMB A-76 to cooperative agreements. The Authority concluded that if the proposal was revised to precisely reflect the union's stated intent of requiring decisions to contract out or to enter into cooperative agreements merely to comply with applicable laws and regulations, it would be negotiable. However, the union's stated intent was inconsistent with the plain language of the proposal which expressly required the application of OMB A-76 to cooperative agreements. (proposal 2)

A proposal requiring the payment of travel and per diem expenses for union representatives is negotiable. Since the parties filed their statements of position, the Authority has found in U.S. Customs Service, 21 FLRA No. 2 (1986), that a proposal requiring payment by an agency of travel and per diem expenses of union representatives using official time, to be within the duty to bargain. The Agency made no argument that this proposal did not meet the statutory and regulatory standards discussed in U.S. Customs Service. In view of the Authority's decision, finding certain aspects of travel and per diem negotiable, certain court precedent, issued prior to the Authority's decision does not constitute a "mandate" to sustain a compelling need for the agency regulation issued pursuant to the precedent.

Federal Labor Relations Authority

23 FLRA No. 21

AFGE, Local 1760 and HHS,
SSA, Case No. 0-NG-412
(Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions For Review
    - Proposal Inconsistent With 5 CFR § 531.404
  - Management Rights
    - Assign Work
      - Quantity, Quality and Timeliness of Work
      - Training
  - Performance Appraisal System
    - Auditing Procedures
    - Within Grade Increase
  - Subjects of Bargaining - Mandatory
    - Appropriate Arrangement
      - Change in Auditing Procedures
        - Proposed Amelioration Precludes Exercise of Agency Rights
  - Procedures
    - Audit of Employees Work Performance
      - Excessive Interference
    - Counting Work Accomplished By Employees
- 5 U.S.C. § 4302
- 5 U.S.C. § 5335 and 5336
- 5 CFR § 531.404

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7106(b)(1), (2) and (3)
7117(a)

DIGEST NOTES

A proposal is nonnegotiable, which provides that when a employee's within grade increase or ladder promotion is pending, the last audit on record will be used to assess the employee's qualifications and no further audits will conducted. The Authority held that the proposal was inconsistent with 5 CFR § 531.404(a)(1), governing within-grade increases. The proposal would require that an agency use an employee's last audit on record in determining whether the employee merits a within-grade increase. The proposal would also require that no further audits be conducted after the last audit of record. However, 5 CFR § 531.404(a)(1) specifies that "when a within-grade increase decision is not consistent with the employee's most recent rating

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

of record a more current rating of record must be prepared." Under the proposal if there were an inconsistency between a management official's decision to grant (or deny) a within-grade increase and the results of the employee's most recent rating of record, the official would be precluded from conducting any additional audits in preparing a more current rating of record. The proposal is therefore outside the duty to bargain under § 7117(a)(1). (proposal 1)

Proposals establishing procedures relating to the assignment of cases during an audit and which seek to ameliorate the adverse effects of management's decision to change its auditing procedures are nonnegotiable. The Authority found that all of the proposals would place restrictions and impose conditions on the exercise of management's right to evaluate its employees and, hence, to assign work. The Authority has held that proposals which require an agency to sample employees work in a particular way in order to audit employees' ongoing work performance interfere with management's rights to direct employees and assign work. Section 7106(a)(2)(A) and (B) encompass the right to determine the quantity, quality and timeliness of employees' work, the aspects of employees' work which will be evaluated in connection with the preparation of employee performance appraisals, and the right to audit employees' work by the methods management deems most appropriate. The proposals were not appropriate arrangements because each proposed amelioration would totally preclude the agency from exercising the various aspects of the right to assign work. (proposals 2, 3, 4, 5 and 6)

A proposal which provides that employees will be credited for having processed two cases in the event of a "dual-entitlement" case, is negotiable. The Authority determined that the proposal merely established procedures for counting the work accomplished by employees in a manner which the representative believed would result in an equitable and accurate measure of each employee's quantity of production. The agency had already determined, at its sole discretion to assign work and to direct employees to accomplish the work through the establishment of performance standards. In addition, the agency retained the right to adjust the performance standards to accommodate the manner in which work was to be counted. The proposal does not directly interfere with the agency's right to assign work, but constitutes a negotiable procedure under § 7106(b)(2). (proposal 7)

A proposal which requires that employees be provided formal training when a deficiency trend is discovered as a result of an audit is nonnegotiable. Proposals which require an agency to provide training to bargaining unit employees are outside the duty to bargain because the assignment of training constitutes an assignment of work. The union intended that the proposal impose the requirement that management provide training for employees who display deficiency trends. The proposal would require certain other employees to perform such training. In both aspects the proposal conflicts with management rights to assign work within the meaning of § 7106(a)(2)(B) by requiring the assignment of training to certain employees to the exclusion of other responsibilities. Further, the proposal did not constitute merely a remedial procedure leading to the fair and equitable application of of audit results. (proposal 8)

23 FLRA No. 22

Federal Labor Relations Authority

Army Communications Command Agency, Redstone Arsenal and AFGE, Local 1858 (Byars, Arbitrator), Case No. 0-AR-573 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	
Award Modified	7106(a)(2)(B)
Contracting Out	7122(a)
Remedial Authority of Arbitrator	
Exceptions Asserted in Appeal	
Award Contrary to Law and Regulation	
Award Contrary to § 7106(a)(2)(B)	
Remedy	
Abide by Provisions of Collective Bargaining Agreement	

DIGEST NOTES

The grievance concerned management's determination to contract out telephone operator functions and alleged that the activity had violated the parties collective bargaining agreement by not providing a copy of the bid solicitation package. The arbitrator found that the activity had violated the parties' agreement by not providing a copy of the solicitation package. As a remedy, the arbitrator ordered that the procurement action be cancelled until the provisions of the parties' agreement were fulfilled.

In its first exception to the arbitrator's award, the agency contended that the award was deficient as contrary to law and regulation in finding the grievance arbitrable. The union contended, with respect to the procurement action, that had the agreement not been violated, the activity's determination to contract out might have been precluded by applicable procurement law and regulation. The Authority held that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is grievable and arbitrable under the Statute and is not precluded by law or regulation. Because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

In its second exception to the arbitrator's award the agency asserted that the award ordering cancellation of the procurement action was contrary to § 7106(a)(2)(B). In Blytheville AFB, 22 FLRA No. 72 (1986), the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action. Arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the action only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. The arbitrator did not make the required finding in this case, therefore he was not authorized to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the procurement action, and he could not have properly directed reconstruction. The award was found deficient under § 7106(a)(2)(B). The Authority noted that nothing in Blytheville AFB prevented the arbitrator from finding, as he did, that the activity violated the parties collective bargaining agreement. Nor was the arbitrator precluded from sustaining the grievance to the extent of the claimed violation of the agreement and from awarding a proper and appropriate remedy for that violation. The Authority concluded that the award should be modified because the arbitrators remedy was designed without the guidance of Blytheville AFB , and ordered that the activity abide by the provisions of the collective bargaining agreement.

23 FLRA No. 23

Federal Labor Relations Authority

Army Communications Command, Fort McClellan and Local 1941, AFGE (Clarke, Arbitrator), Case No. 0-AR-633 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B)
Award Modified	7122(a)

Arbitration
  Award Modified
  Contracting Out
    Remedial Authority of Arbitrator
  Exceptions Asserted in Appeal
    Award Contrary to Law and Regulation
    Award Contrary to § 7106(a)(2)(B)
  Remedy
    Abide by Provisions of Collective Bargaining Agreement

DIGEST NOTES

The grievance concerned management's determination to contract out telephone operator functions and alleged that the activity had violated the parties collective bargaining agreement by not providing a copy of the pertinent statement of work and other acquisition information prior to the issuance of the bid solicitation. The arbitrator found that the activity had violated the parties' agreement by not providing a copy of the specification of contractor wages. As a remedy, the arbitrator ordered the activity to cease contracting out the disputed functions and implementing a reduction-in-force because of the contracting out until the activity complied with the requirements of the parties' agreement. The arbitrator further ordered the activity to restore to their jobs any employees affected by a reduction-in-force caused by the procurement action.

In its first exception to the arbitrator's award, the agency contended that the award was deficient as contrary to law and regulation in finding the grievance arbitrable. The union contended with respect to the procurement action that had the agreement not been violated, the activity's determination to contract out might have been precluded by applicable procurement law and regulation. The Authority held that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is grievable and arbitrable under

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

the Statute and is not precluded by law or regulation. Because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

In its second exception to the arbitrator's award the agency asserted that the award ordering cancellation of the procurement action was contrary to § 7106(a)(2)(B). In Blytheville AFB, 22 FLRA No. 72 (1986), the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action. Arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the action only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. The arbitrator did not make the required finding in this case, therefore he was not authorized to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the procurement action, and he could not have properly directed reconstruction. The arbitrator's order that the activity cease contracting out telephone services constituted a cancellation of the procurement action and therefore was deficient under § 7106(a)(2)(B). The award directing the activity to cease any RIF is also deficient because it follows directly from the cancellation. The Authority noted that nothing in Blytheville AFB prevented the arbitrator from finding, as he did, that the activity violated the parties collective bargaining agreement. Nor was the arbitrator precluded from sustaining the grievance to the extent of the claimed violation of the agreement and from awarding a proper and appropriate remedy for that violation. The Authority concluded that the award should be modified because the arbitrator's remedy was designed without the guidance of Blytheville AFB, and ordered that the activity abide by the provisions of the collective bargaining agreement.

Federal Labor Relations Authority

23 FLRA No. 24

Hawaii Federal Employees, Metal Trades Council and Pearl Harbor Naval Shipyard, Case No. 0-NG-1186 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Management Rights	7106(a)(1)
Assign Work	7106(a)(2)(B)
Reestablish Abolished Committee	7106(b)(1)
Determine Organization	
Reestablish Abolished Committee	

DIGEST NOTES

A proposal to reestablish a committee, and to add equal numbers of labor representatives, is nonnegotiable because it interferes with management's right to assign work under § 7106(a)(2)(B). The duties of the committee involved the deliberative process of the agency in making decisions and resolving problems "with funding, priorities, or implementation of specific projects." The proposal to require union representatives on such a committee constituted an assignment of work to individuals not chosen by management.

A proposal to reestablish a committee, and to add equal numbers of labor representatives interfered with management's right to determine its organization. The committee was created by regulation to address and resolve problems in the agency's safety and health deficiency abatement program. The decision to deestablish the committee and redistribute its functions determines the manner in which these agency responsibilities will be accomplished. The proposal's requirement to reverse that decision, and to add union representatives, interferes with management's decision as to the formal organizational structure by which it makes decisions. Therefore, the proposal directly interfered with management's rights under § 7106(a)(1).

Federal Labor Relations Authority

[illegible]

23 FLRA No. 25

Federal Labor Relations Authority

AFGE, Local 2185 and Tooele Army Depot, Tooele, Utah, Case No. 0-NG-1215 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	
Management Rights	7105(a)(2)(E) 7106(a)(2)(A) and (B) 7106(b)(2) and (3)

- Negotiability
  - Management Rights
    - Assign Employees
      - Leave
        - Mandatory Leave Requirement
          - Temporary Closing of Facility
    - Assign Work
      - Leave
        - Mandatory Leave Requirement
          - Temporary Closing of Facility
  - Subjects of Bargaining - Mandatory
    - Appropriate Arrangements
      - Avoid Requirement of Mandatory Leave
        - Excessive Interference
    - Procedures
      - Selection From Among Equally Qualified Employees
        - Seniority List
        - Volunteers

DIGEST NOTES

A proposal which requires management to make "every conceivable attempt" to avoid requiring an employee to take annual leave or leave without pay is nonnegotiable. The proposal effectively could require management to forego its plan to partially close down if more employees wanted to work (rather than take leave) than were called for by the management plan. The proposal could result in depriving management of its rights to require employees to take leave, and ultimately prevent the closing of operations, contrary to management's rights to assign employees under § 7106(a)(2)(A) and to assign work under § 7106(a)(2)(B). The "every conceivable attempt" language does not limit the proposal because the Authority has held that proposals requiring an agency to make an effort to accomplish an objective which is outside the duty to bargain are themselves nonnegotiable. The proposal excessively interferes with management's rights and is not an appropriate arrangement. (proposal 1)

A proposal which requires an agency to assign work "for which the employee is qualified" is not nonnegotiable on that ground alone. The Authority rejected the agency's argument that such language could result in the assignment of an over-qualified employee at higher pay than necessary. As long as the agency can set qualifications, there is nothing to preclude it from limiting its definition of "qualified" to those employees who are not over-qualified or whose work would not require the agency to pay a higher rate than normal for the job. Thus, management's discretion to select and assign employees based on job related characteristics is not limited by the language of the proposal. (proposal 1)

A proposal providing that annual leave or leave without pay will not be denied unless there is an emergency or "work demands leave no other alternatives;" and that such leave requests will not be denied where there are other qualified employees who want to work, is negotiable. The agency's right to determine when work will be performed was unaffected because there was no indication that the phrase "unless . . . work demands leave no other alternatives" was intended to restrict management's control over deciding and defining what are the demands of work. As long as management can determine what constitutes "work demands," it controls completely any decision as to scheduling or delaying all aspects of accomplishment of its mission, consistent with any decision to close during holiday periods. Further a proposal to allow qualified volunteers to work in lieu of other employees does not interfere with management's right to make work assignments. So long as management can determine the qualifications for a given assignment, such a proposal constitutes a negotiable procedure under § 7106(b)(2). The proposal merely provides that selection among equally qualified employees, as defined by management, will take into account volunteers rather than require another employee to work who prefers to take available leave. (proposal 3)

A proposal is negotiable, which provides that prior to forcing employees to take annual leave or leave without pay, where there are more employees desiring to work than there is work available, work assignments will be given to qualified employees with the greatest seniority. The Authority held that so long as the proposal does not limit management's right to define the "demands of work, it does not interfere with management's authority to decide what work will be performed. By preserving management's right to define the category and qualifications of employees to do a job, the proposal to give seniority preference to employees desiring to work rather that take forced leave is negotiable as long as those on the seniority list are determined to be equally qualified under criteria determined by management. (proposal 4(a))

23 FLRA No. 19

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1113

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This matter is before the Authority on exceptions to the award of Arbitrator Justin C. Smith filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. For the reasons that follow, it has been determined that the Agency's exceptions must be dismissed as untimely.

This case involves a dispute submitted by the parties to the Arbitrator concerning official time for representational activities. By agreement of the parties, a two-phase arbitration process was established to resolve the basic dispute and the resulting numerous individual grievances. The first phase involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement. In the second phase, the Arbitrator held hearings to resolve, by bench decisions when practicable, specific grievances pending in the various regions of the Agency. The exceptions in this case have been filed to bench decisions of the Arbitrator rendered on May 16, 1985, in which he awarded travel time and preparation time for representatives in the Agency's Boston field office. In December 1985, the Agency requested that the Arbitrator clarify whether his bench decisions were to be considered final awards. The Arbitrator responded to the Agency's request by letter of January 22, 1986, essentially reiterating his position as originally announced in January 1984, that bench awards were to be considered final on the day they were rendered. The Agency then filed its exceptions with the Authority on March 4, 1986.

Under section 7122(b) of the Statute, as amended,1/ section 2425.1 of the Authority's Rules and Regulations, as amended,2/ which amendments are applicable to these exceptions, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit involved in this case, any exceptions to the Arbitrator's award of May 16, 1985, had to be filed with the Authority by the close of business on June 14, 1985.

The Authority has repeatedly indicated that a party's request for clarification of an award does not operate to extend the time limit for filing exceptions. Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, 15 FLRA 181 (1984). Only when an arbitrator in response to a clarification request modifies an award and the modification gives rise to the deficiencies alleged in the exceptions has the Authority held that the filing period for exceptions began with the arbitrator's response to the request for clarification. See U.S. Department of the Interior, Bureau of Land Management, Eugene District Office and National Federation of Federal Employees, Local 1911, 6 FLRA 401, 403 n. 2 (1981). In this case, however, it is clear that in his response of January 22, 1986, the Arbitrator did not modify his bench decisions of May 16, 1985, so as to give rise to the deficiencies alleged by the Agency. To the contrary, the Arbitrator essentially confirmed his January 1984 announcement that bench decisions were to be final when rendered and nothing in his January 22 letter constitutes a clarification of any decision regarding the individual grievances. Thus, the Agency is in effect seeking Authority review of the May 16, 1985, awards and the exceptions filed on March 4, 1986, are clearly untimely. Moreover, from the record before the Authority it is apparent that the Agency considered other related bench awards of this Arbitrator in the parties' official time dispute to be final when rendered and ripe for filing exceptions with the Authority. See American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986); U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 22 FLRA No. 16 (1986).

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

Accordingly, and apart from other considerations, the Agency's exceptions are dismissed.

For the Authority.

Issued, Washington, D.C., August 15, 1986.

Harold D. Kessler

Harold D. Kessler
Director, Office of Case Management

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3748

Union

and

Case No. O-NG-1101

U.S. DEPARTMENT OF
AGRICULTURE, AGRICULTURAL
RESEARCH SERVICE, NORTHERN
STATES AREA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three Union proposals.

II. Background

Two of the three Union proposals concern Cooperative Agreements which are devices used by the Agency to accomplish certain projects. According to the Agency, a Cooperative Agreement may be one of several types of agreements providing for mutual undertaking and contribution between a Federal agency and a cooperator to perform research, extension, information or education service or work. In this case, cooperators are State Land-Grant colleges and universities or State Agricultural Experiment Stations.

There are three types of such Cooperative agreements commonly used by the Agency:

A Broadform Cooperative Agreement is an agreement between the Agricultural Research Service (ARS) and other parties covering a broad area of cooperative research, extension, information or education work where specific details are planned jointly as the project proceeds. Such an agreement may cover a broad area and deal with numerous individual research problems. Federal and State resources may be brought to bear on a problem by mixing funds, personnel, equipment, lab space, soil plots and computer use.

A General Cooperative Agreement is also an agreement between the ARS and other parties. It describes in detail a particular research, extension, information or education program usually of long duration and funded on a fiscal year basis.

A Specific Cooperative Agreement is similarly an agreement between ARS and other parties, describing in detail a specific research, extension, information or education project. The duration may be short or could extend up to five years.

Broadform agreements are a means of providing nonprofessional personnel to support research programs. The other two types of agreements make available professional as well as nonprofessional personnel.

Subsequent to the statements of positions by the parties summarized below, the Agency distributed a memorandum to all employees of the Agricultural Research Service dated September 1985, and notified the Union by letter dated November 15, 1985, announcing discontinuance of use of Broadform Cooperative Agreements by October 1986. In the letter to the Union, the Agency stated that it had already discontinued the use of General Cooperative Agreements. As these two types of agreements would no longer be used, the Agency stated that the issues giving rise to the Union's concerns no longer applied and asked the Union to withdraw its petition with respect to the two proposals involving Cooperative Agreements. By letter of December 17, 1985, the Union declined to withdraw the petition as "not in the best interest of the Union."

There is no basis for a finding that the Agency's announced intention to discontinue some or all of the Cooperative Agreements has rendered Union Proposals 1 and 2 moot. In any event, the continued existence of such agreements is not itself a prerequisite to finding negotiable proposals like the ones involved here which require that, to the extent Cooperative Agreements exist, they will be administered in accordance with applicable laws and regulations and the identity of Cooperative Agreement employees will be furnished to the Union. Accordingly, we proceed to consider the parties' contentions concerning the negotiability of those proposals.

III. Union Proposals 1 and 2

Proposal 1:

> Section 4 Upon request, location management will provide the union President with an updated list of Cooperative Agreement Employees.

Proposal 2:

> Section 6 Area and location management agree to comply with OMB Circular No. A-76 and all other applicable laws and regulations on contracting out and cooperative agreements. [Only the underlined portion of this proposal is in dispute].

A. Positions of the Parties

The Agency contends that Proposal 1 is nonnegotiable because "it does not have custody over the requested information and it does not maintain lists of cooperative agreement employees in the regular course of business. Further, it is the Agency's position that the information cannot be considered 'agency records' subject to disclosure under the Freedom of Information Act." Agency Statement at 6. Finally, the Agency contends that the Proposal 1 does not concern a condition of employment of unit employees and that it thus has no bargaining obligation under the Statute.

The Union's position is that Proposal 1 concerns conditions of employment of unit employees, and that the Agency's arguments regarding its records and the Freedom of Information Act (FOIA) are irrelevant.

The Agency's position as to Union Proposal 2 is that, like Proposal 1, it is nonnegotiable because it does not concern conditions of employment of unit employees. In addition, the Agency asserts the proposal is inconsistent with Government-wide rules and regulations. The Union takes issue with both arguments.

B. Analysis and Conclusions

1. Union Proposal 1

Whether Union Proposal 1 is negotiable depends, first, on whether a proposal for management to give the Union a list of Cooperative Agreement employees concerns conditions of employment of unit employees.

Although Cooperative Agreement employees are not members of the bargaining unit, we agree with the Union that knowledge of when, where and how these employees work in relation to unit employees is directly related to conditions of employment of unit employees. Specifically, and without contravention by the Agency, the Union points out that it is common to fill unit vacancies with Cooperative Agreement employees, thereby reducing the size of the unit, which in turn reduces promotion or reassignment opportunities for unit employees. Further, Cooperative Agreement employees "work side-by-side with and are often trained by unit employees." Union Reply Brief at 3. Because Cooperative Agreement employees and unit employees are jointly engaged in furtherance of a common agency objective--the accomplishment of a cooperative project--the information sought by the Union is necessary so that unit employees can be properly evaluated on training assignments and on their overall performance of the cooperative project. As the Authority concludes that Union Proposal 1 does affect working conditions of unit employees, it is necessary to review the other bases for the Agency's assertion that the proposal is nonnegotiable.

As to the Agency's arguments that it does not maintain the data sought and that such information cannot be considered Agency records subject to disclosure under the FOIA, the Agency does not contend, nor does anything in the record establish, that local management could not provide such information. Further, the Agency does not assert, nor does it otherwise appear, that providing this information would be inconsistent with law or Government-wide regulation. We therefore reject these Agency arguments as bases for finding the proposal nonnegotiable.

In view of the foregoing, the Authority finds that the proposal that "upon request, location management will provide the Union President with a list of Cooperative Agreement employees" is negotiable.

2. Union Proposal 2

For the reasons set out above in the discussion of Proposal 1, the Authority finds that Proposal 2 concerns conditions of employment of unit employees. The Agency also asserts that the proposal is nonnegotiable because it is inconsistent with Government-wide rules and regulations. Essentially, it argues that an agreement to "comply with OMB Circular No. A-76 and all other applicable laws and regulations on contracting out and Cooperative agreements" is nonnegotiable as to the underlined phrase because Circular No. A-76 does not regulate the use of cooperative agreements. The Union states that since the reference to OMB Circular No. A-76 is clearly followed by "and all applicable laws and regulations," it "does not intend, and the proposal does not require, OMB A-76 to be applied to the administration of cooperative agreements." Union Response at 4. Rather, it states that the proposal was inclusive because of the Union's "legitimate interest in [assuring] the employer's compliance with applicable procedures when it exercise[s] either the right to contract out or to enter a cooperative agreement." Id. at 4-5.

If this proposal were revised to more precisely implement the Union's stated intent of requiring decisions to contract out or to enter into cooperative agreements merely to comply with applicable laws and regulations, it would be negotiable. See American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (Proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 54 U.S.L.W. 4408 (U.S. April 29, 1986) (per curiam). However, the Union's stated intent is inconsistent with the plain language of the proposal which expressly requires OMB Circular A-76 to be applied to cooperative agreements.

Consequently, although we find that Union Proposal 2 concerns conditions of employment of unit employees, we conclude that to the extent the proposal requires OMB Circular No. A-76 to be applied to Cooperative Agreements, it is inconsistent with that Government-wide regulation and therefore outside the duty to bargain under section 7117(a)(1) of the Statute.

IV. Union Proposal 3

> Section 17 Any union representative required to represent an employee at a location other than his own will be given official time, travel, and per diem. [Only the underlined portion of this proposal is in dispute].

A. Positions of the Parties

The Agency contends that the proposal is nonnegotiable because (1) there is no entitlement to travel and per diem expenses for Union representatives either by law or collective bargaining and (2) it is inconsistent with a published Agency regulation for which there is a compelling need.

The Union disputes in detail the Agency's argument regarding the legality of negotiated provisions for travel and per diem expenses for Union representatives, and argues that the Agency has not established a compelling need for its published regulation under the rules and regulations of the Authority.

B. Analysis and Conclusions

Since the parties filed their statements of position in this case, the Authority has found a proposal which would require payment by an agency of the travel expenses of Union representatives using official time to be within the duty to bargain. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. Mar. 27, 1986).

In Customs Service, the Authority found that agencies have discretion, under the Travel Expense Act and implementing regulations, to determine whether and under what circumstances travel related to labor-management relations activities is sufficiently within the primary interest of the United States so as to constitute official business for which employees may receive appropriate expenses from Federal funds. The exercise of that discretion was held to be subject to the negotiation process. The Agency here makes no specific argument that this proposal concerning the circumstances under which otherwise appropriate travel expenses would be payable does not meet the statutory and regulatory standards discussed in Customs Service. Moreover, the proposal does not preclude case-by-case determinations as to the appropriateness of specific travel and expenses which are necessary and proper under law and governing regulation. See also American Federation of Government Employees, AFL-CIO, National EPA Council and Environmental Protection Agency, 21 FLRA No. 80 (1980) (Union Proposal 1). For the reasons stated in those cases, the Authority concludes that Union Proposal 3 is negotiable, unless it conflicts with an Agency regulation for which there is a compelling need.

The Agency issued Personnel Letter No. 711-10 on May 16, 1984, "to establish procedures for agencies as a result of the . . . decision of the Supreme Court" in Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) (BATF), and OPM guidance contained in FPM Letter 711-162. The Personnel Letter stated as background that travel and per diem payments to Union negotiators are nonnegotiable and that such payments could only be made unilaterally by the Agency. The letter also set out various procedures regarding payment of travel and per diem as determined by the Agency. In its statement of position, the Agency asserts that a compelling need exists for this regulation because it implements a "mandate" to the Agency flowing from the Supreme Court's decision in BATF, cited above. The "mandate," according to the Agency, is that agencies comply with the requirements of a decision of the Comptroller General, 46 Comp. Gen. 21 (1966), cited in BATF. However, in view of the Authority's decisions subsequent to BATF finding that certain aspects of travel and per diem are negotiable, BATF does not preclude negotiating over travel and per diem expenses, nor would it constitute a "mandate" to sustain a compelling need for the Agency's regulation under section 2424.11(c) of the Authority's Rules and Regulations. See National Federation of Federal Employees and U.S. Department of the Interior, U.S. Geological Survey, Eastern Mapping Agency, 21 FLRA No. 127 (1986) (Provision 3). Therefore, Union Proposal 3 is found to be negotiable.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Proposal 2, found to be nonnegotiable, be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain on Union Proposals 1 and 3.*/

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

23 FLRA No. 21

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760, AFL-CIO

Union

and

Case No. 0-NG-412

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of eight Union proposals in connection with changes made by the Agency in its procedures for evaluating employees.

II. Union Proposal 1

1. 6-If an employee's Within-Grade Salary Increase (WIGI) or ladder promotion is pending, the last audit on record will be used to assess the employee's qualifications for as long as the audit record is maintained in the SF-7B Extension File. No further audits will be conducted.

A. Positions of the Parties

The Agency contends that the proposal conflicts with Office of Personnel Management (OPM) regulations, as stated in the Federal Personnel Manual (FPM), Chapter 531. The

Agency also contends that the proposal would require promotion decisions to be based on a single audit record which would be the sole criterion for the decision.

The Union contends that the proposal is fully consistent with the requirements of law and that the Agency's position reveals that it has misunderstood the nature of the proposal. The Union asserts that the proposal falls within the Agency's duty to bargain under section 7106(b)(2) and (3) of the Statute.

B. Analysis

5 U.S.C. § 4302 requires agencies to establish performance appraisal systems under Office of Personnel Management (OPM) prescribed Government-wide regulations,[1] which, among other things, shall provide for recognizing and rewarding employees whose performance so warrants. 5 U.S.C. §§ 5335 and 5336 specifically govern the granting of within-grade increases. Subsequent to the filings in this case, OPM revised its regulations implementing these sections of title 5. OPM's revised regulations concerning within-grade increases appear at 5 C.F.R. § 531.404 ("Earning within-grade increase."). Generally speaking, management decisions regarding such increases are made according to an OPM-approved Performance Management Plan (PMP). Under OPM guidelines, each agency is required to establish performance standards against which an employee's work is measured. An employee's performance evaluation results in a written "rating of record." In order to receive a within-grade increase, the employee's performance of the duties and responsibilities of his or her assigned position must be at an acceptable level of performance, which is defined elsewhere in the regulations as "Fully Successful."

In terms of this proposal, the audits to which it refers must be a part of an OPM-approved PMP for evaluating employees' performance or it would conflict with Government-wide regulations. That is, if audits are not part of an OPM-approved PMP, they cannot legally be used for making within-grade or ladder promotion determinations. Moreover, assuming that the audits referred to in the proposal are part of the Agency's OPM-approved performance appraisal system, the Authority finds that the proposal is inconsistent with 5 C.F.R. § 531.404(a)(1) of OPM's revised regulations governing within-grade salary increases. The proposal would require that an agency use an employee's last audit on record in determining whether the employee merits a within-grade salary increase. The proposal would also require that no further audits be conducted after the last audit on record. However, 5 C.F.R § 531.404(a)(1) specifies that "when a within-grade increase decision is not consistent with the employee's most recent rating of record a more current rating of record must be prepared." This means, for example, that if the management official responsible for determining whether an employee merits a within-grade increase decides that the increase should be granted (or denied), the decision must be consistent with the employee's most recent rating of record. That is, the decision to grant such an increase (or to deny such an increase) must be validated by the results of the employee's most recent performance evaluation in order for the within-grade increase to be approved (or to be disapproved). If there is an inconsistency between what the management official believes the employee should receive and the results of the employee's most recent rating of record, the regulation requires that a more current rating of record be prepared to be used as the basis for an acceptable level of competence determination for the within-grade increase.

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[1] The Authority has previously determined that Office of Personnel Management requirements codified at title 5 of the Code of Federal Regulations are Government-wide regulations within the meaning of section 7117(a) of the Statute. Professional Air Traffic Controllers Organization, AFL-CIO and Department of Transportation, Federal Aviation Administration, 4 FLRA 232, 233 (1980).

Under the proposal, if there were an inconsistency between a management official's decision to grant (or to deny) a within-grade increase and the results of the employee's most recent rating of record, the official would be precluded from conducting any additional audits in preparing a more current rating of record. However, under the assumption that audits are a part of the Agency's OPM-approved performance appraisal system, 5 C.F.R. § 531.404(a)(1) requires the Agency to perform a new audit in the evaluation of the employee to prepare a more current rating of record. Therefore, the proposal is inconsistent with this section of the C.F.R.

C. Conclusion

The audits referred to in Union Proposal 1 must be part of an OPM-approved performance appraisal system or the proposal conflicts with OPM regulations. Moreover, assuming that the audits referred to in the proposal are part of an OPM-approved performance appraisal system, for the reason cited above, the proposal is inconsistent with 5 C.F.R. § 531.404(a)(1). Therefore, Union Proposal 1 is outside the duty to bargain under section 7117(a)(1) of the Statute. In view of this holding, section 7106(b)(2) and (3) are not applicable. See, for example, National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, Corps of Engineers, 21 FLRA No. 31 (1986).

III. Union Proposals 2, 3, 4, 5, and 6

2. 8-On the day prior to the first day of the audit, the authorizer will be supplied with cases.

3. 9-The authorizer will be given cases only from his/her terminal digit area to maintain the integrity of the terminal digit system.

4. 10-Employees will not be required to work out-of-module cases during the audit.

5. 17-To ensure uniformity, each employee will receive the same number of the same types of cases.

6. 30-Awards will be distributed on a terminal digit basis and may be selected before or after screening.

A. Positions of the Parties

The Agency contends that all of these proposals conflict with its right to assign work under section 7106(a)(2)(B) of the Statute. In addition, the Agency contends that Union Proposal 2 also violates section 7106(b)(1).

The Union, on the other hand, disagrees with the Agency's view that these proposals violate management's right to assign work. Rather, the Union contends that it is attempting to negotiate either procedures relating to the assignment of cases during an audit or the impact and implementation of that assignment.

B. Analysis

1. Right to Assign Work Under Section 7106(a)(2)(B)

Section 7106(a)(2)(B) of the Statute reserves to management the right to assign work. It is well established that proposals which place restrictions on the exercise of management's right to assign work are outside the duty to bargain. Specifically, the Authority has held that proposals which require an agency to sample employees' work in a particular way in order to audit employees' ongoing work performance interfere with management's right to "direct employees" and "assign work." In so holding, the Authority has stated that section 7106(a)(2)(A) and (B) encompass the right to determine the quantity, quality, and timeliness of employees' work, the aspects of employees' work which will be evaluated in connection with the preparation of employee performance appraisals, and the right to audit employees' work by the methods management deems most appropriate for such purposes. See Social Security Administration, Northeastern Program Service Center, 18 FLRA No. 60 (1985) (Union Proposals 1, 2, 5 and 7); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603, 631 (1980) (Union Proposal XVI), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982).

All the proposals here would place restrictions and impose conditions on the exercise of management's right to evaluate its employees and, hence, to assign work. Specifically, Union Proposal 2 would require management to assign cases prior to an audit rather than the day of the audit and unduly restricts management in the exercise of its right to assign work when it chooses to do so. Union Proposal 3, which would restrict the assignment of cases to those in the employees' terminal digit area, would prevent management from assigning cases outside the terminal digit area. Union Proposal 4 would preclude the assignment of a certain type of case ("out-of-module") to employees undergoing an audit. Union Proposal 5 would prevent management from assigning different types or numbers of cases to employees subject to an audit. While the Union claims that this proposal merely requires that the Agency exercise its right to assign work in a fair manner, the proposal would in reality require the assignment of the same number and types of cases to employees undergoing an audit, thereby clearly interfering with that right. Finally, Union Proposal 6 would require the assignment of certain types of claims ("awards") on a terminal digit basis, that is, based on a claimant's social security number, again limiting management in the distribution of work assignments.

2. "Appropriate Arrangements" Under Section 7106(b)(3)

Whether a proposal constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute depends upon whether the proposal "excessively interferes" with the exercise of management's rights. A threshold question is whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 slip op. at 8, (1986).

On the basis of the record, the Authority finds that Union Proposals 2, 3, 4, 5 and 6 are intended as arrangements for employees adversely affected by the exercise of management's rights. Specifically, these proposals are intended by the Union to ameliorate the adverse effects on employees as a result of changes made by the Agency in the auditing procedures by which employees are evaluated, pursuant to the Agency's right to assign work under section 7106(a)(2)(B) of the Statute. However, the Authority finds that in each case the proposed amelioration would totally preclude the Agency from exercising the various aspects of the right to assign work covered by the proposals. A proposed amelioration which totally abrogates the exercise of a management right clearly does not constitute an appropriate arrangement within the meaning of section 7106(b)(3). See American Federation of Government Employees, Local 2782 v. FLRA, 702 F.2d 1183, 1188 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

3. Union Proposal 2 and Section 7106(b)(1)

The Agency contends that Union Proposal 2 violates section 7106(b)(1) of the Statute by proposing "how" and "when" work will be performed. However, the Agency fails to demonstrate in what respect the proposal concerns the technology, methods and means of performing work so as to be negotiable only at the election of the Agency. Therefore, the Authority finds that the Agency's contention in this regard must be denied.

C. Conclusion

Union Proposals 2, 3, 4, 5 and 6 directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute, and therefore do not constitute negotiable procedures under section 7106(b)(2) of the Statute. Moreover, the proposals excessively interfere with management's right to assign work, so as to make them inappropriate as arrangements, under section 7106(b)(3), for employees adversely affected by the Agency's exercise of that right. In addition, the Agency has failed to demonstrate that Union Proposal 2 violates section 7106(b)(1) of the Statute. The Authority concludes, for the reasons and cases cited above, that the Agency is under no obligation to bargain concerning these proposals.

IV. Union Proposal 7

> 7. 21-In the event of dual-entitlement cases, the authorizer will be given credit for having processed two cases.

A. Positions of the Parties

The Agency states that the proposal is nonnegotiable because it conflicts with the right to assign work. The Agency further contends that it is under no obligation to bargain over this proposal because there has been no change in its practice of crediting a dual-entitlement case as one case.

The Union asserts that there is no merit to the Agency's statement that the proposal interferes with the assignment of work. In addition, while not disputing the Agency's contention that no change has taken place in its practice of crediting dual-entitlement cases, the Union nevertheless claims that this is not a basis for finding the proposal to be outside the duty to bargain.

B. Analysis

1. Assignment of Work Under Section 7106(a)(2)(B)

The Authority has previously held that the right to assign work, under section 7106(a)(2)(B) of the Statute, includes, among other things, the right to determine what work shall be done, how it shall be done, by which employee it shall be done, and to determine the quantity, quality and timeliness of work required of an employee. See National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 7 FLRA 235, 238 (1981). The Authority has also held that proposals which substantively restrict management in its establishment of performance standards are inconsistent with section 7106(a)(2)(A) and (B) of the Statute because they improperly interfere with management's right to direct employees and to assign work. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. NTEU v. FLRA, 691 F.2d 553 (D.C. Cir. 1982). The issue in terms of this proposal is whether, by requiring the Agency to give employees performing the work associated with dual-entitlement cases credit for having processed two cases, the proposal would in any way infringe upon management's right to assign work. In agreement with the Union, the Authority finds that it does not.

In Department of the Treasury, 7 FLRA 235 at 238, the Authority determined that five union proposals relating to the counting of work for purposes of employee evaluation were within the duty to bargain. In that case, as here, the proposals merely established procedures for counting the work accomplished by employees in a manner which the representative believed would result in an equitable and accurate measure of each employee's quantity of production. The Agency had already determined, at its sole discretion, to assign work and to direct employees to accomplish the work through the establishment of performance standards. In addition, the agency retained the right to adjust the performance standards to accommodate the manner in which work was to be counted. For the same reasons that the proposals in that case were found to be negotiable, the Agency's contention here that Union Proposal 7 interferes with management's right to assign work, under section 7106(a)(2)(B), must be denied.

2. The Duty to Bargain

The Authority will decide here only the negotiability issues raised under section 7105(a)(2)(E) of the Statute. Insofar as the Agency questions its obligation to bargain over this proposal because of its belief that there has been no change in its practice of crediting a dual-entitlement case as one case, the resolution of this question may be pursued in the context of other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 at 306, n. 6 (1984).

C. Conclusion

The Authority concludes, for the reasons and cases cited above, that Union Proposal 7 does not directly interfere with the Agency's right to assign work, but constitutes a negotiable procedure under section 7106(b)(2) of the Statute. Moreover, insofar as the parties disagree concerning their mutual obligation to bargain over the proposal, such a disagreement may be pursued in the forum most appropriate for its resolution.

V. Union Proposal 8

> 8. 31-If deficiency trends are noted by the Technical Assistant as a result of the audit, the employee responsible will be subject to formal training by EDTS personnel, if the employee so desires, prior to being placed on any partial or 100% audit The parties agree, of course, that the intent of the audit is positive, not punitive; that it is a method to determine the need for, and extent of, additional training or re-training.

A. Positions of the Parties

The Agency contends that the proposal interferes with the right to assign work, under section 7106(a)(2)(B) of the Statute, because it would require management to provide training to its employees. In addition, the Agency states that the proposal is nonnegotiable because it does not address management's implementing procedures or any identifiable adverse impact of management's decision regarding the selection of cases for audit.

The Union states that the proposal is intended as a remedial procedure to insure that the auditing of particular employees will be fair and equitable, and that the application of particular audits to employees would be grievable. The Union also states that the clear intent of the proposal is to authorize training to employees who display deficiency trends, which would be conducted by employees in the Employee Development and Training Section (EDTS).

B. Analysis

It is well established that proposals which require an agency to provide training to bargaining unit employees are outside the duty to bargain because the assignment of training constitutes an assignment of work. See, for example, International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and U.S. Government Printing Office, Washington, D.C., 8 FLRA 188 (1982) (Proposal 1); International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 752 (1982). By its own admission, the Union intends this proposal to require the training of employees who display deficiency trends. The proposal also would require EDTS employees to perform such training. In both respects the proposal conflicts with management's right to assign work within the meaning of section 7106(a)(2)(B) of the Statute by requiring management to assign a specific type of work (training) to certain employees to the exclusion of other responsibilities management might wish to assign to such employees. Contrary to the Union's contention, therefore, the proposal does not constitute merely a remedial procedure leading to the fair and equitable application of audit results. Rather, the proposal would directly interfere with management's statutory right to assign work. See, for example, American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA No. 104 (1986) (Union Proposal 4).

C. Conclusion

Union Proposal 8 directly interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute, and therefore is not a negotiable procedure under section 7106(b)(2). Accordingly, the Agency is under no obligation to bargain concerning the proposal.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 7.[2] Further, IT IS ORDERED that the Union's petition for review as to Union Proposals 1, 2, 3, 4, 5, 6 and 8 be, and it hereby is, dismissed.

Issued, Washington, D.C. August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding Union Proposal 7 to be within the duty to bargain, the Authority makes no judgment as to its merits.

23 FLRA No. 22

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY COMMUNICATIONS COMMAND
AGENCY, REDSTONE ARSENAL

Activity

and

Case No. 0-AR-573

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1858

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Lloyd L. Byars filed by the Department of the Army (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned management's determination to contract out telephone operator functions. The grievance alleged that the Activity had violated the parties' collective bargaining agreement by not providing a copy of the bid solicitation package, which included a prevailing wage determination, to the Union at the time the package was sent to prospective contractors. The Union argued that it was deprived of a meaningful opportunity to affect the decision of whether to contract out. In support of its argument, the Union claimed that if it had received the bid solicitation package when the package was sent to the contractors, the Union might have persuaded the Department of Labor to direct a new prevailing wage survey which could have precluded the Activity's decision to contract out. The Arbitrator found that the Activity had violated the parties' agreement by not timely providing the Union a copy of the solicitation package. With respect to a remedy, the Arbitrator rejected the Activity's argument that to cancel the procurement the Union had to establish that but for the Activity's failure to timely provide the Union with a copy of the solicitation package, the decision of whether to contract out would have been different. The Arbitrator stated that it was impossible to know what the result would have been if the agreement had not been violated. Instead, he determined that it was sufficient for the Union to establish that the Activity violated the parties' agreement. The Arbitrator therefore sustained the grievance and, as a remedy, ordered that the procurement action be cancelled until the provisions of the parties' agreement were fulfilled.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Agency contends that by finding the grievance to be arbitrable, the award is deficient as contrary to law and regulation.

B. Analysis and Conclusions

The Authority concludes that the Agency fails to establish that by finding the grievance to be arbitrable, the award is deficient. To the extent that the grievance claimed a violation of the collective bargaining agreement, the Agency fails to establish that the matter of the Activity's compliance with the terms of the agreement was not properly grievable and arbitrable. To the extent that the grievance subjected the disputed procurement action to arbitral review, the Agency likewise fails to establish that the award is deficient. As noted, the Union ultimately contended with respect to the procurement action that had the agreement not been violated, the Activity's determination to contract out might have been precluded by applicable procurement law and regulation.

The Authority has previously indicated that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is grievable and arbitrable under the Statute and is not precluded by law or regulation. See General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236, 22 FLRA No. 84 (1986); Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986); American Federation of Government Employees, Local 1904, AFL-CIO and United States Army Communications and Electronics Materiel Readiness Command, 16 FLRA 358 (1984); American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (Proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986) (per curiam). Further, our decision in Congressional Research Employees Association and The Library of Congress, 23 FLRA No. 15 (1986), where we found a grievance challenging a procurement action on the basis of a provision of the collective bargaining agreement not to be arbitrable, is distinguishable. In contrast to that case, the Union in this case is not seeking to enforce a provision which is inconsistent with the Activity's right to contract out. Accordingly, because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency primarily contends that the Arbitrator's award ordering cancellation of the procurement action is contrary to section 7106(a)(2)(B) of the Statute.

B. Analysis and Conclusions

In Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986), the Authority addressed for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work. In sum, the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action. We also held that arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the actions on specific grounds only.

Applying our decision in Blytheville AFB to this case, we conclude that the Arbitrator was not authorized either to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the action. The Arbitrator's order that the Activity cancel the procurement action is clearly deficient under section 7106(a)(2)(B) of the Statute. We also find that the Arbitrator was not authorized to sustain the challenge to the disputed procurement action and could not have properly directed reconstruction in this case. The Union essentially claimed that had it been timely provided with the prevailing wage determination, it might have been able to preclude, in accordance with procurement law and regulation, the Activity's determination to contract out. However, the Arbitrator stated that it was impossible to conclude whether the contracting out of telephone services could have occurred consistent with procurement law and regulation if the agreement had not been violated. Accordingly, his award sustaining the challenge to the procurement action is deficient.

We decided in Blytheville AFB, slip op. at 6, that an arbitrator can sustain a challenge to a procurement action and order reconstruction only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. Since the Arbitrator made no such specific finding in this case, he was not authorized to sustain the grievance to the extent that it directly challenged the procurement action, and he could not have properly directed reconstruction.

We note, however, that nothing in Blytheville AFB precluded the Arbitrator from finding, as he did, that the Activity violated the parties' collective bargaining agreement by not timely providing the Union a copy of the solicitation package. Nor was the Arbitrator precluded from sustaining the grievance to the extent of the claimed violation of the agreement and from awarding a proper and appropriate remedy for that violation. Because the Arbitrator awarded a remedy for this violation without the guidance that has now been provided by Blytheville AFB, we find that the award should be modified to provide an appropriate remedy. The Activity bargained and agreed to these provisions as part of the collective bargaining agreement. We admonish the Activity to abide by these provisions and will order a remedy accordingly.

V. DECISION

For the reasons stated above, the Arbitrator's award is modified to provide as follows:

> The grievance is sustained to the extent of the claimed violation of Article 65, Section g of the applicable collective bargaining agreement. The Activity shall cease and desist from failing to comply with the requirements of that section.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 23

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY COMMUNICATIONS
COMMAND, FORT McCLELLAN

Activity

and

Case No. 0-AR-633

LOCAL NO. 1941, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Jack Clarke filed by the Department of the Army (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute before the Arbitrator concerned management's determination to contract out telephone operator functions. The Union filed a grievance claiming that the Activity violated the parties' collective bargaining agreement by failing to provide the Union with a copy of the pertinent statement of work and other acquisition information prior to issuance of the bid solicitation. The Union alleged that this failure deprived it of any viable and meaningful opportunity to affect management's determination of whether to contract out. In particular, the Union contended that had it been timely provided with the specification of contractor wages, it might have been able to preclude the Activity's determination to contract out. The Arbitrator found that the grievance was arbitrable and that the Activity had violated the parties' agreement by not providing the Union president or her designee timely access to the statement of work involved in the commercial activities review of telephone services. In discussing a remedy, the Arbitrator stated in response to the arguments of the Union that it could not be concluded that but for the breach of the collective bargaining agreement, the contracting out of telephone services could not have properly occurred. He also rejected the argument of the Activity that the procurement action could not be cancelled. He noted that this argument presumed that contracting out was more economical, and he stated that until the agreement is complied with, the correctness of this assumption cannot be known. Accordingly, as a remedy, the Arbitrator ordered the Activity to cease contracting out the disputed functions and implementing a reduction-in-force because of the contracting out until the Activity complied with the requirements of the collective bargaining agreement. The Arbitrator further ordered the Activity to restore to their jobs any employees affected by a reduction-in-force caused by the disputed procurement action.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that by finding the grievance to be arbitrable, the award is deficient as contrary to law and regulation.

B. Analysis and Conclusions

The Authority concludes that the Agency fails to establish that by finding the grievance to be arbitrable, the award is deficient. To the extent that the grievance claimed a violation of the collective bargaining agreement, the Agency fails to establish that the matter of the Activity's compliance with the terms of the agreement was not properly grievable and arbitrable. To the extent that the grievance subjected the disputed procurement action to arbitral review, the Agency likewise fails to establish that the award is deficient. As noted, the Union ultimately contended with respect to the procurement action that had the agreement not been violated, the Activity's determination to contract out might have been precluded by applicable procurement law and regulation.

The Authority has previously indicated that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is grievable and arbitrable under the Statute and is not precluded by law or regulation. See General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236, 22 FLRA No. 84 (1986); Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986); American Federation of Government Employees, Local 1904, AFL-CIO and United States Army Communications and Electronics Materiel Readiness Command, 16 FLRA 358 (1984); American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (Proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986) (per curiam). Further, our decision in Congressional Research Employees Association and The Library of Congress, 23 FLRA No. 15 (1986), where we found a grievance challenging a procurement action on the basis of a provision of the collective bargaining agreement not to be arbitrable, is distinguishable. In contrast to that case, the Union in this case is not seeking to enforce a provision which is inconsistent with the Activity's right to contract out. Accordingly, because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency primarily contends that the Arbitrator's award ordering cancellation of the procurement action is contrary to section 7106(a)(2)(B) of the Statute.

B. Analysis and Conclusions

In Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986), the Authority addressed for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work. In sum, the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized cancel a procurement action. We also held that arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the actions on specific grounds only.

Applying our decision in Blytheville AFB to this case, we conclude that the Arbitrator was not authorized either to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the action. The Arbitrator's order that the Activity cease contracting out telephone services constitutes a cancellation of the procurement action and therefore is clearly deficient under section 7106 (a)(2)(B) of the Statute. The award directing the Activity to cease any reduction-in-force (RIF) and to reinstate any employees affected by the RIF is also deficient because it follows directly from the cancellation.

We also find that the Arbitrator was not authorized to sustain the challenge to the disputed procurement action and could not have properly directed reconstruction in this case. The Union essentially claimed that had it been timely provided with the specification of contractor wages, it might have been able to preclude, in accordance with procurement law and regulation, the Activity's determination to contract out. However, the Arbitrator specifically stated that it could not be concluded that but for the breach of the collective bargaining agreement, the contracting out of telephone services could not have occurred consistent with procurement law and regulation. Accordingly, his award sustaining the challenge to the procurement action is deficient.

We decided in Blytheville AFB, slip op. at 6, that an arbitrator can sustain a challenge to a procurement action and order reconstruction only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. Since the Arbitrator made no such specific finding in this case, he was not authorized to sustain the grievance to the extent that it directly challenged the procurement action, and he could not have properly directed reconstruction.

We note, however, that nothing in Blytheville AFB precluded the Arbitrator from finding, as he did, that the Activity violated the parties' collective bargaining agreement by not providing the Union president or her designee timely access to the statement of work for the commercial activities review of telephone services. Nor was the Arbitrator precluded from sustaining the grievance to the extent of the claimed violation of the agreement and from awarding a proper and appropriate remedy for that violation. Because the Arbitrator awarded a remedy for this violation without the guidance that has now been provided by Blytheville AFB, we find that the award should be modified to provide an appropriate remedy. The Activity bargained and agreed to these provisions as part of the collective bargaining agreement. We admonish the Activity to abide by these provisions and will order a remedy accordingly.

V. DECISION

For the reasons stated above, the Arbitrator's award is modified to provide as follows:

> The grievance is sustained to the extent of the claimed violation of Section 25.2 of the 1982 Agreement. The Activity shall cease and desist from failing to comply with the requirements of that section.

Issued, Washington, D.C., August 15, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HAWAII FEDERAL EMPLOYEES
METAL TRADES COUNCIL,
AFL-CIO

Union

and

Case No. 0-NG-1186

PEARL HARBOR NAVAL
SHIPYARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of one Union proposal.

II. Union Proposal

The Agency notified the Union on July 8, 1985 that it had decided to disestablish the Naval Occupational Safety and Health (NAVOSH) Deficiency Abatement Committee. The Union proposal which is the subject of this appeal is:

> Our proposal is to keep the NAVOSH Deficiency Abatement Committee and add equal numbers of Labor Representatives.

III. Positions of the Parties

A. Union Position

The Union argues the proposal is negotiable "regarding the impact to the unit employees." It states that a committee such as this "can make a contribution to the safety of all employees if it is given the opportunity to function with equal numbers of employees and representatives of management. This is allowed under the Executive Order 12196 of February 26, 1980, Occupational Safety Health Programs for Federal Employees." (Union Petition p. 1). Citing the Department of the Navy instruction which established the Committee, the Union notes that the function of the Committee was to periodically review safety abatement projects and to determine if additional actions were needed to assure their timely completion. The Committee was to address problems with funding, priorities or implementation of specific projects.

B. Agency Position

The Agency declared in its allegation of nonnegotiability that the proposal interferes with management's rights to assign work under section 7106(a)(2)(B) of the Statute, to determine the organization of the Shipyard under section 7106(a)(1) of the Statute, and to determine the methods and means of performing work under section 7106(b)(1) of the Statute.

The Agency's Statement of Position was untimely filed and will not be considered. Section 2424.6 of the Authority's Rules and Regulations requires that an agency file a statement of position within thirty days after receipt of a petition for review. In its Statement, dated November 29, 1985, the Agency noted that it received the petition on October 29, 1985. Therefore the Statement was filed more than thirty days after receipt of the petition and was untimely filed.

IV. Analysis

Attachments to the Union's petition for review indicate that the Shipyard Occupational Safety and Health Deficiency Abatement Program was set up by Instruction 5100.23A in 1983 under the authority of Executive Order 12196, and provided for the NAVOSH Deficiency Abatement Committee. The regulation designated as members the Shipyard Safety Director, a designee of the Production Engineering Division, and a designee of the Staff Civil Engineer Department. As noted, the duties of the committee were to periodically review deficiency abatement projects and to "address and resolve any problems with funding, priorities, or implementation of specific projects." (Instruction 5100.23A, para. 5i, April 19, 1983).

Based on these facts, the Authority finds that the Union's proposal to reestablish the committee, and to "add equal numbers" of labor representatives, is nonnegotiable on two of the grounds asserted by the Agency.

1. The proposal interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute. The duties of the Committee involve the deliberative process of the Agency in making decisions and resolving problems "with funding, priorities, or implementation of specific projects." The proposal to require Union representatives on such a committee constitutes an assignment of work to individuals not chosen by management. *See Fort Knox Teachers Association and Fort Knox Dependent Schools*, 22 FLRA No. 88 (1986) (Union Proposal 3). *See also National Federation of Federal Employees, Local 1431 and Veterans Administration Medical Center, East Orange, New Jersey*, 9 FLRA 998 (1982).

2. The proposal also interferes with management's right to determine the organization of the Shipyard under section 7106(a)(1) of the Statute. As noted, the Committee was created by a regulation to address and resolve problems in the Agency's safety and health deficiency abatement program. The decision to disestablish the Committee and redistribute its functions determines the manner in which these Agency responsibilities will be accomplished. The proposal's requirement to reverse that decision, and add Union representatives, interferes with management's decision as to the formal organizational structure by which it makes decisions. Therefore, the proposal directly interferes with management's rights under section 7106(a)(1) of the Statute, and is outside the duty to bargain. *See Veterans Administration Medical Center, East Orange, New Jersey*, 9 FLRA 998, 999 (1982).

In view of our findings that the proposal is nonnegotiable because it interferes with two management rights under section 7106(a) of the Statute, we find it unnecessary to address the Agency's unsupported additional assertion that the proposal would determine the methods and means by which work is performed under section 7106(b)(1) of the Statute and therefore is negotiable only at its election.

V. Conclusion

We conclude that the Union proposal is nonnegotiable because it interferes with management's rights to (1) assign work under section 7106(a)(2)(B) of the Statute and (2) determine the organization of the Shipyard under section 7106(a)(1) of the Statute.

VI. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C. August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 25

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2185

Union

and

Case No. 0-NG-1215

TOOELE ARMY DEPOT
TOOELE, UTAH

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of four Union proposals. The proposals all concern leave during partial closure of the Agency around the Thanksgiving and Christmas holidays. As submitted, the proposals are as follows:

> 1. Management will make every conceivable attempt to avoid forcing any employee to take annual leave or LWOP and will make every conceivable attempt to assign employees to available work for which the employee is qualified if employees do not elect to take annual leave or LWOP.
>
> 2. Pursuant to a questionnaire to be mutually agreed upon, employees will be polled as to whether they desire annual leave, LWOP or other assigned work.
>
> 3. An extremely liberal leave policy will be in effect. No employee requests for annual leave or LWOP will be denied unless an emergency exists or work demands leave no

> other alternatives. In any event, no requests for annual leave or LWOP will be denied where there are other employees who want to work and not take annual leave or LWOP and the employee is otherwise qualified to perform the work.
>
> 4. Prior to forcing any employee to take annual leave or LWOP, in the event that there are more employees desiring to work than there is work available, the following procedures will apply:
>
>   (a) work assignments amongst employees desiring to work will be given to qualified employees with the greatest seniority; and
>
>   (b) before an employee will be required to take LWOP because the employee does not have sufficient annual leave, upon request the employee will be advanced annual leave if management has any reason to believe that the employee will be able to restore advanced annual leave.

Subsequently, in its Statement of Position, the Agency stated it had no objection to Proposal 2 and that if the Union agreed to include FPM requirements concerning the granting of annual leave as part of Proposal 4(b) it would not object to that proposal either. In its Reply Brief the Union agreed with the Agency's position on Proposal 4(b). Thus, the issues concerning Proposals 2 and 4(b) are moot and will not be considered further in this decision.

II. Union Proposal 1

A. Positions of the Parties

The Agency reads the phrase that it "make every conceivable attempt to assign employees to available work" if they decline to take annual leave or leave without pay (LWOP) as requiring such assignments. It also asserts that it would be precluded from assigning available work to other employees. Therefore, it asserts that the proposal conflicts with management's reserved rights to assign employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B) of the Statute. The Agency also argues that the requirement to assign work "for which the employee is qualified" similarly interferes with management's rights because it could result in the assignment of an overqualified employee at higher pay than necessary.

The Union argues that the proposal merely deals with the impact of management's decision to partially close the Agency around the Thanksgiving and Christmas holidays. It understood that the Activity would make work available to some employees during the periods in question, and sought to avoid or lessen the impact of closure. It concedes that an agency has the right to require employees to take charged leave during such closures under current Authority case law.

B. Analysis and Conclusions

The Authority concludes that Union Proposal 1 is nonnegotiable. By requiring management to make "every conceivable attempt" to avoid requiring an employee to take annual leave (A/L) or leave without pay (LWOP), the proposal effectively could require management to forego its plan to partially close down if more employees wanted to work (rather than take A/L or LWOP) than were called for by the management plan. The second clause would have the same effect. It is undisputed that the Agency has the right to partially close during holiday periods. The same decision, under the same Army Civilian Personnel Regulation involved in this case, led the Authority to determine that an agency could require employees to take annual leave during such closings. National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah, 18 FLRA No. 38 (1985), petition for review filed sub nom. National Association of Government Employees, Local R14-62 v. FLRA, No. 85-2098 (10th Cir. July 23, 1985). Thus the proposal is outside the duty to bargain because it could result in depriving management of its rights to require employees to take leave, and ultimately prevent the closing of operations, contrary to management's rights to assign employees under section 7106(a)(2)(A) and to assign work under section 7106(a)(2)(B) of the Statute. In addition, the "every conceivable attempt" language does not limit the proposal, because we have consistently held that proposals requiring an agency to make an effort to accomplish an objective which is outside the duty to bargain are themselves nonnegotiable. Maritime/Metal Trades Council and Panama Canal Commission, 18 FLRA No. 43 (1985) (Union Proposal 5).

While intended by the Union as an arrangement for employees adversely affected by the Agency's exercise of its rights to require employees to take leave and to partially close down, we find that under the circumstances discussed above, the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. Thus, where a proposed amelioration of adverse effects of an Agency's exercise of its rights could totally eliminate the Agency's discretion to exercise its rights, such proposal amounts to "excessive interference" with the exercise of management's rights, and is not an appropriate arrangement. Federal Union of Scientists and Engineers and Department of the Navy, Naval Underwater Systems Center, 22 FLRA No. 83 (1986). See also American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183, 1188 (D.C. Cir. 1983).

The Agency also argues that the requirement to assign work "for which the employee is qualified" could result in the assignment of an overqualified employee at higher pay than necessary. Although we have already determined this proposal to be nonnegotiable, since the argument arises later in connection with other proposals, we note that this part of the proposal would not render nonnegotiable an otherwise negotiable provision. As long as the Agency can set the qualifications, there is nothing to preclude it from limiting its definition of "qualified" to those employees who are not overqualified or whose work would not require the Agency to pay a higher rate than normal for the job. Thus, management's discretion to select and assign employees based on job-related characteristics is not limited by the language of the proposal. See American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Department of Justice, (Immigration and Naturalization Service), 8 FLRA 347, 383-4 (1982).

III. Union Proposal 3

A. Positions of the Parties

The Agency argues that the proposal would nullify management's right under section 7106(a)(2)(B) of the Statute to determine when work will be performed. Further, the Agency asserts that the last sentence of the proposal would interfere with its right under the same section of the Statute to make work assignments.

The Union states that the first part of the proposal merely restates the liberal leave policy which already exists, under which management determines work demands. The second part of the proposal, embodied in the last sentence, would protect leave requests if qualified volunteers are available.

B. Analysis and Conclusions

The Authority concludes that under the facts presented, this proposal is negotiable. The Agency's right to determine when work will be performed is unaffected because there is no indication that the phrase "unless . . . work demands leave no other alternatives" is intended to restrict management's control over deciding and defining what are the demands of work. As long as management can determine what constitutes "work demands," it controls completely any decision as to scheduling or delaying all aspects of accomplishment of its mission, consistent with any decision to close during holiday periods. Further, to say that employees would not be required to take leave if qualified volunteers exist--which is essentially the point of the last sentence in the proposal--does not interfere with management's right to make work assignments, or for that matter to assign employees. So long as management can determine the qualifications for a given assignment, such a proposal constitutes a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. Thus, it merely provides that selection among equally qualified employees, as defined by management, will take into account volunteers rather than require another employee to work who prefers to take available leave. See American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 15 FLRA 545 (1984); and National Federation of Federal Employees, Local 1622 and U.S. Commissary, Fort Meade, Maryland, 16 FLRA 998 (1984) (Union Provision II).

IV. Union Proposal 4(a)

A. Positions of the Parties

The Agency regards the proposal as "nothing more than a seniority clause" (Agency Statement of Position, p. 4) which is inconsistent with management's right to assign employees and to assign work, essentially as argued in regard to the other proposals discussed above.

The Union argues, as above, that the proposal does not limit the Agency in designating numbers or types of employees or work needs, but only would require that assignments be by seniority among equally qualified employees.

B. Analysis and Conclusions

For essentially the reasons discussed above, the Authority finds that this proposal is negotiable. We have already noted that so long as a proposal does not limit management's right to define the "demands" of work, it does not interfere with management's authority to decide what work will be performed during the holiday periods. Similarly, the Agency's argument that it could not select which employee to "lay off," that is, to require to take annual leave, is rejected for the same reasons noted above regarding available volunteers. By preserving management's right to define the category and qualifications of employees to do a job, the proposal to give seniority preference to employees desiring to work rather than take forced leave is negotiable.

In sum, as long as those on the seniority list are determined to be equally qualified under criteria determined by management, the proposal is negotiable. *See Laborers International Union of North America, AFL-CIO, Local 1276 and Veterans Administration, National Cemetery Office, San Francisco, California*, 9 FLRA 703, 706-707 (1982).

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review, as it relates to Proposal 1, found to be nonnegotiable, be, and it hereby is, dismissed. IT IS FURTHER ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 3 and 4(a).*/

Issued, Washington, D.C., August 15, 1986

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1204, PRESCOTT
VETERANS ADMINISTRATION HOSPITAL

Union

and

Case No. 0-AR-1164

PRESCOTT VETERANS ADMINISTRATION
HOSPITAL

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Howard G. D'Spain filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 15, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

Case No. 0-AR-1175

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3937

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Anthony V. Sinicropi filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 15, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON. D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. 0-AR-1178

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236, LOCAL 1733

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Robert Bennett Lubic filed by the Agency on its behalf and on behalf of the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the parties have failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the exceptions are denied.

Issued, Washington, D.C., August 15, 1986

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Federal Labor Relations Authority

Washington, D.C. 20424

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 28 (August 15, 1986)

Federal Aviation Administration and Professional Airways Systems Specialists, AFL-CIO, Case No. 3-CA-30319

23 FLRA No. 31 (August 15, 1986)

Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol and American Federation of Government Employees, AFL-CIO, National Border Patrol Council, Case No. 6-CA-50383

NEGOTIABILITY CASES

23 FLRA No. 27 (August 15, 1986)

American Federation of State, County and Municipal Employees, Local 2477, AFL-CIO and Library of Congress, Case No. 0-NG-1195

23 FLRA No. 29 (August 15, 1986)

American Federation of Government Employees, AFL-CIO, Council of Prisons Locals, Local 171 and Department of Justice, Federal Prison System, Federal Correctional Institution, El Reno, Oklahoma, Case No. 0-NG-1172

23 FLRA No. 30 (August 15, 1986)

American Federation of Government Employees, AFL-CIO, Local 3186 and Department of Health and Human Services, Office of Social Security Field Operations, Philadelphia Region, Case No. 0-NG-969

*Case No. 0-NG-1116 (Order Denying Request for Reconsideration of 22 FLRA No. 51) (August 15, 1986)

National Weather Service Employees Organization, MEBA, AFL-CIO and Department of Commerce, National Weather Service

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ARBITRATION CASES

23 FLRA No. 26 (August 15, 1986)

Department of the Army, Oakland Army Base and American Federation of Government Employees, Local 1157 (Schubert, Arbitrator), Case No. 0-AR-896

23 FLRA No. 32 (August 15, 1986)

Mare Island Naval Shipyard and International Federation of Professional and Technical Engineers, Local 11, AFL-CIO-CLC (Angelo, Arbitrator), Case No. 0-AR-1105

23 FLRA No. 33 (August 18, 1986)

Wyoming Air National Guard (WANG) and National Association of Government Employees (NAGE), Local No. 14-76 (Evenson, Arbitrator), Case No. 0-AR-1117

*Case No. 0-AR-583 (Order Denying Request for Reconsideration of 21 FLRA No. 27) (August 15, 1986)

General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236

*Case No. 0-AR-927 (Order Denying Request for Reconsideration of 21 FLRA No. 54) (August 15, 1986)

General Services Administration, Region 8 and American Federation of Government Employees, AFL-CIO, Council 236

*Case No. 0-AR-1077 (Order Denying Request for Reconsideration of 22 FLRA No. 16) (August 15, 1986)

U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO

*Case No. 0-AR-994 (Order Denying Request for Reconsideration of 21 FLRA No. 51) (August 18, 1986)

Social Security Administration and American Federation of Government Employees, AFL-CIO

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

23 FLRA No. 26

Dep't of the Army, Oakland Army Base and AFGE, Local 1157 (Schubert, Arbitrator), Case No. 0-AR-896 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Modified
  Contracting Out
    Remedial Authority of Arbitrator
  Exceptions Asserted in Appeal
    Award Contrary to Law and Regulation
    Award Contrary to § 7106(a)(2)(B)
  Remedy
    Abide by Provisions of Collective Bargaining Agreement

STATUTE

7106(a)(2)(B)
7122(a)

DIGEST NOTES

The grievance concerned management's determination to contract out certain activities and alleged that the activity had violated an agency regulation pertaining to contracting out and several provisions of the parties' collective bargaining agreement. The arbitrator found that the activity had violated the parties' agreement by not providing a copy of the revised statement of work and a copy of the bid solicitation and by its failure to notify the union of certain meetings relating to the proposed procurement action. As a remedy, the arbitrator directed the activity to cancel the procurement action and to reinstate any employees removed as a result of the action to their former positions with backpay. The arbitrator also awarded the union attorney fees.

In its first exception to the arbitrator's award, the agency contended that the award was deficient as contrary to law and regulation in finding the grievance arbitrable. The union contended with respect to the procurement action that the agency had violated agency procurement regulations and that the activity's determination to contract out might have been precluded by applicable procurement law and regulation, had the parties' agreement not been violated. The Authority held that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is

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grievable and arbitrable under the Statute and is not precluded by law or regulation. Because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

In its second exception to the arbitrator's award the agency asserted that the award ordering cancellation of the procurement action was contrary to § 7106(a)(2)(B). In Blytheville AFB, 22 FLRA No. 72 (1986), the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action. Arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the action only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. The arbitrator did not make the required finding in this case, therefore he was not authorized to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the procurement action. The arbitrator's order that the activity cancel the procurement action was deficient under § 7106(a)(2)(B). The award directing the activity to reinstate with backpay any employees removed as a result of the procurement action was also deficient because it followed directly from the cancellation. Further, without an award of backpay, the arbitrator's award of reasonable attorney fees is likewise deficient. The Authority noted that nothing in Blytheville AFB prevented the arbitrator from finding, as he did, that the activity violated the parties collective bargaining agreement. Nor was the arbitrator precluded from sustaining the grievance to the extent of the claimed violation of the agreement and from awarding a proper and appropriate remedy for that violation. The Authority concluded that the award should be modified because the arbitrators remedy was designed without the guidance of Blytheville AFB, and ordered that the activity abide by the provisions of the collective bargaining agreement.

Federal Labor Relations Authority

23 FLRA No. 27

AFSME, Local 2477 and Library of Congress, Case No. 0-NG-1195 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Duty to Bargain
    - Dispute Based on Factual Issues
      - Contract Language - Zipper Clause
      - Properly Raised Under Grievance and Arbitration Procedures
  - Management Rights
    - Assign Work
      - Work time to Change Into and Out of Uniform
        - Excessive Interference
  - Subjects of Bargaining - Mandatory
    - Appropriate Arrangements
      - Uniforms
        - Adequate Type and Quantity

STATUTE

7105(a)(2)(D) and (E)
7106(a)(2)(B)
7106(b)(3)

DIGEST NOTES

Proposals which require that management provide specified types and quantities of uniforms are negotiable appropriate arrangements under § 7106(b)(3). The agency made no contention nor did it appear that the proposals would interfere with the purpose for which the uniform requirement was adopted--identification of warehouse personnel. (proposals 1 and 2)

A proposal which would allow employees ten minutes after the start and before the end of the workday to change clothes is not an appropriate arrangement within the meaning of § 7106(b)(3), because it would excessively interfere with the agency's right under § 7106(a)(2)(B) to assign work. The proposal would result in a loss to the agency of twenty minutes each workday during which it could not assign work of its choosing to those employees. This would have a significant negative impact on the agency's right to assign work. The negative impact outweighs the benefit to employees of not having to use their own time to exercise their option to change clothes at work. The agency did not prohibit employees from wearing their uniforms to and from work. It appeared that the decision whether to change clothing at work was purely a matter of individual employee preference. (proposal 3)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The agency raised a question as to its duty to bargain over certain proposals in light of contract language which it maintains amounts to a zipper clause which forecloses further bargaining on the subject. The Authority held that it only decides the negotiability of issues presented under section § 7105(a)(2)(D) or (E) of the Statute--that is: does a proposal concern conditions of employment of bargaining unit employees; does it conflict with law or Government-wide rule or regulation; or does it conflict with an agency regulation for which a compelling need exits? The parties may resolve questions of duty to bargain which are based on factual issues in other appropriate proceedings, such as grievance and arbitration procedures.

Federal Labor Relations Authority

23 FLRA No. 28

FAA and Professional Airways Systems Specialists, Case No. 3-CA-30319 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1) and (5)
Agency Violations	7118

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Reorganization
        - Procedures and Appropriate Arrangements
          - Crew Alignments
          - Position Descriptions
          - Transfer of Duties
          - Watch Schedules
      - Refusal to Bargain With Union's Designated Representative
  - Remedy
    - Bargaining Order
    - Extent of Posting Requirement
    - *Status Quo Ante* - Not Warranted
  - Waiver of Rights
    - Successor Union, Predecessor Agreement
      - Permissive Subjects of Bargaining
        - Terminable at Expiration of Agreement

DIGEST NOTES

The Authority held that the agency violated § 7116(a)(1) and (5) when it failed to notify the union's National President (its designated representative), and afford it an opportunity to bargain about procedures for implementing changes at the agency's local facilities due to a reorganization, and appropriate arrangements for employees adversely affected by the changes prior to their implementation. The parties stipulated that all of the changes were implemented without providing advance notice to the union's designated representative, or affording the union an opportunity to bargain over impact and implementation of the changes. The agency's sole defense was that its actions were in accord with the provisions of a predecessor agreement, wherein the union had waived its rights to bargain. The Authority held that the waiver of bargaining rights contained in the expired predecessor agreement was no longer binding on the union. The waiver of bargaining rights involved a permissive subject of bargaining which was binding during the life of the agreement, but was terminable by either party once the agreement expired. Management could not insist on the continuation of the waiver provision when the union notified management that it would no longer be bound by the provision and would exercise its bargaining rights.

The Authority held that a status quo ante remedy was not warranted where the agency reorganized its operations and made various changes in employees' conditions of employment without bargaining with the union's designated representative over procedures and appropriate arrangements for affected employees. The Authority noted that an order requiring management to rescind the reorganization and to restore all conditions of employment which were in effect prior to the reorganization would cause serious disruption in the agency's operations. The changes instituted by the agency related to the agency's national plan to reorganize personnel and to modernize the nation's air traffic control system over a period of twenty years.

The Authority found that the posting of a remedial unfair labor practice notice only at the facilities involved in the reorganization would best effectuate the purposes of the Statute where the unlawful conduct occurred prior to the issuance of the Authority's controlling decision on the subject [14 FLRA 644 (1984)] and there is no indication that the agency has refused to abide by the Authority's decisions or that it will continue to engage in such unlawful conduct in the future.

Federal Labor Relations Authority

23 FLRA No. 29

AFGE, Council of Prisons Locals, Local 171 and Dep't of Justice, Federal Prison System, Federal Correctional Institution, El Reno, Okla., Case No. 0-NG-1172 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Managements Rights
    Assign Work
      First Consideration For Overtime
        Does Not Prelude Assignment of Work
  Subject of Bargaining - Permissive
    Numbers, Types and Grades of Employees
      Hours of Day Shift
        Proposal Does Not Establish New Shift or Change Hours
  Overtime
    Meal Break - Overtime In Excess of 3 Hours
      Proposal Does Not Authorize Overtime For Meal Times

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(1)
7114(c)

DIGEST NOTES

A proposal which provides that first consideration for overtime work will be given to employees within an institutional department, before other qualified employees of the institution is negotiable. In disapproving the provision the agency declared that the language was negotiable only if management retained the authority to make final determinations as to the qualifications required to perform overtime work and if the provision did not preclude management from assigning work to employees in other departments on a non-overtime basis. The Authority found that the provision expressly deals with overtime work and in no way prevents management from assigning work to employees in other departments during regular duty hours. The Authority therefore, concluded that the provision did not interfere with management's rights under § 7106(a)(2)(B). (provision 1)

A proposal which states that "[t]he principal day shift hours of work will be 7:30 AM to 4:00 PM with a half hour uninterrupted lunch period," is within the duty to bargain. The Authority found that the agency made no showing that the provision established a new shift or changed the hours of the existing shift. Thus, the provision did not affect the numbers, types and grades of employees assigned to a tour of duty within the meaning of § 7106(b)(1). The provision simply described the hours of the existing principal day shift at the institution. Moreover, the provision did not prevent management from changing the hours of that shift or establishing any new shift, consistent with the rights of the union in such a situation. (provision 2)

A proposal providing that employees working three hours in excess of eight hours shall be given the opportunity to purchase a meal or time off to obtain a meal, concerns a negotiable subject of bargaining. The union specifically interpreted the provision as not authorizing overtime for meal times and acknowledged that overtime compensation is a matter subject to law, Comptroller General decisions, and other provisions of the parties' agreement. Given this interpretation, which the agency did not refute, the Authority concluded that the provision was negotiable. (provision 3)

Federal Labor Relations Authority

23 FLRA No. 30

AFGE, Local 3186 and HHS, Office of Social Security Field Operations, Philadelphia Region, Case No. 0-NG-969 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions For Review
    - Proposal Inconsistent With Government-Wide Regulations
      - FPM Chapter 335, Subchapt. 1-4, Requirement 4
  - Management Rights
    - Assign Employees
      - Recall Employees Based on Seniority
    - Assign Work
      - Part-Time Employees
        - Reduced Workload
    - Fill Vacancies
      - Convert Part-time Employees to Full-Time
    - Hire
      - Recall Employees Based on Seniority
    - Make Selections
      - Convert Part-time Employees to Full-Time
      - Recall Employees Based on Seniority
  - Subjects of Bargaining - Mandatory
    - Appropriate Arrangements
      - Convert Part-time Employees to Full-Time
- 5 CFR § 731.201 and 731.202

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2))A), (B) and (C)
7106(b)(1), (2) and)3)
7117(a)(1)

DIGEST NOTES

A proposal which provides that part-time employees who are restricted to a tour of duty of less than 40 hours will be assigned to a reduced workload, interferes with management's right under § 7106(a)(2)(B). The proposal prevents management from making work assignments in circumstances where employees work less than full-time, irrespective of the agency's immediate needs. The proposal would directly interfere with management's right to assign work and does not constitute a negotiable procedure within the meaning of § 7106(b)(2). The Authority also found that even assuming that the proposal was intended to ameliorate an adverse effect perceived by the assignment of a full workload to permanent part-time employees who are now restricted by the agency to working only the hours of their established part-time tour of duty, the proposed amelioration would expressly preclude the agency from assigning a certain amount of work at all in the circumstances described in the proposal. Such a proposed amelioration, would excessively interfere with management's right to assign work and therefore does not constitute an appropriate arrangement under § 7106(b)(3). (proposal 1)

A proposal which provides that temporary employees, who were terminated without personal fault, will be recalled on the basis of their length of service, interferes with management's rights to hire and assign employees under § 7106(a)(2)(A) and management's right to make selections under § 7106(a)(2)(C). There was nothing in the record to indicate that once allocations became available management could elect to not recall temporary employees and utilize such allocations for permanent positions instead or to elect to accomplish its work without any increase in staff. The proposal would thus, absolutely eliminate the agency's discretion concerning the filling of positions and directly interfere with the agency's rights to hire and select and as a result, it does not constitute a negotiable procedure within the meaning of § 7106(b)(2). In addition, by mandating the recall of temporary employees the proposal would constitute an excessive interference with the enumerated management rights and therefore, is not an appropriate arrangement under § 7106(b)(3). (proposal 2)

A proposal which provides that temporary employees, who were terminated without personal fault, will be recalled on the basis of their length of service, is outside the duty to bargain, under § 7117(a)(1), because it is inconsistent with a government-wide regulation. Requirement 4 of subchapter 1-4, chapter 335 of the Federal Personal Manual, permits agencies to fill positions by making selections from any appropriate source. The proposal would require the agency to select for vacancies only temporary employees who have been separated from employment. It would therefore, prevent the agency from making selections from any appropriate source. (proposal 2)

A proposal providing that part-time employees will be converted "at the earliest opportunity," upon request, to full-time positions, constitutes a negotiable appropriate arrangement under § 7106(b)(3). The proposal was intended as an arrangement for part-time employees who previously worked a full-time schedule but who because of funding problems were restricted to a part-time schedule. Such employees were adversely affected by management's right to reduce its hours.

The proposal would apply only after management determines to fill a vacant full-time position and would not violate management's right to determine the number of employees under § 7106(a)(1). Nothing in the record indicated that management would be unable to determine the qualifications of the part-time employee for the full-time position. The Authority found that the proposal would not be negotiable as a procedure because it directly interfered with management's rights under § 7106(a)(2)(C).

A proposal found to be an appropriate arrangement and providing that part-time employees will be converted "at the earliest opportunity," upon request, to full-time positions, was nevertheless outside the duty to bargain under § 7117(a)(1). The proposal was inconsistent with FPM Chapter 335, subchapt. 1-4, Requirement 4, a Government-wide regulation, which would permit agencies to fill positions by making selections from any appropriate source. The proposal would require the agency to select only permanent part-time employees for permanent full-time vacancies which it decided to fill.

23 FLRA No. 31

Federal Labor Relations Authority

DOJ, INS, U.S. Border Patrol and AFGE, National Border Patrol Council, Case No. 6-CA-50383 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1), (5) and (8)
Agency Violations	7118

Refusal to Negotiate
  Information
    Availability of Data
      Activity Does Not Have "Possession" of Data
      Best Determined During Compliance Stage of Proceeding
Remedy
  Provide Data Within Activity's Possession

DIGEST NOTES

The Authority found, in agreement with the Judge, that the activity violated § 7116(a)(1), (5) and (8) by failing and refusing to furnish the union with data described in its request for information. The activity excepted to the Judge's remedy contending that certain of the data do not exist. It also argued that the other documents sought were useless without the corresponding data alleged to be unavailable. The activity requested that the Judge's order be modified to require it to provide the data requested only for the period for which it possessed information. The record indicated that the information was maintained at the activity's sector headquarters. The Authority concluded that it is not an unfair labor practice to fail to produce documents that do not exist. Consequently, while the union was entitled to the requested data in the possession of the activity for the period in question, the activity could not be held accountable for that data it no longer possessed. The Authority ruled that the availability of the data involved could best be determined during the compliance stage of the proceeding. It therefore modified the Judge's Order to require the activity to supply whatever of the requested data it had in its possession. The Authority stated that the General Counsel, during the compliance stage of this proceeding, will determine what data is in fact available.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

23 FLRA No. 32

Mare Island Naval Shipyard and Int'l Federation of Professional and Technical Engineers, Local 11 (Angelo, Arbitrator), Case No. 0-AR-1105 (Decided August 15, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Award Set Aide
  Exceptions Asserted in Appeal
    Award Contrary to § 7106(a)(2)(A) and (B)
  Performance Appraisal
    Scope of Review
      Arbitrator May Not Conduct Independent Evaluation

STATUTE

7106(a)(2)(A) and (B)
7122(a)

DIGEST NOTES

The arbitrator ruled, in his initial award, that the grievant's performance had been improperly rated "marginal" under three critical elements in her annual appraisal. As a remedy he voided the appraisal and ordered the grievant's performance reevaluated under those elements. He found particularly that the rating was based only on events during two months of the twelve-month appraisal period and ordered that the agency consider the grievant's performance under another supervisor earlier in the appraisal period. The arbitrator also retained jurisdiction to resolve disputes regarding the remedy. In reevaluating the grievant, the activity stated that both of her supervisors for the period met and reconsidered the grievant's performance. They then determined that her performance under two of the elements in question was "marginal;" that performance under the third element was "satisfactory;" and that the overall rating was "marginal." Pursuant to his retained jurisdiction, the arbitrator "refined" his initial award and determined that the "marginal" ratings on the reevaluation were not supported or justified and directed that the grievant's performance be rated "satisfactory" on the elements rated "marginal" and that the overall rating be reevaluated accordingly.

In its exception the agency contended that the arbitrator's "refinement" of his initial award, directing that the grievant's performance under two disputed elements be reevaluated as satisfactory, was contrary to § 7106(a)(2)(A) and (B). In

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

resolving disputes pertaining to performance appraisal matters, an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his/her performance appraisal by management's application of the established performance standards. An arbitrator may sustain the grievance on finding that management applied the standards in violation of law, regulation or an appropriate provision of the parties' agreement. In sustaining the grievance, the arbitrator as a remedy may direct that the grievant's work product be properly evaluated by management or, where appropriate, that the grievant's work product as appraised by management be granted the rating to which entitled under the established elements and standards. The arbitrator may not conduct an independent evaluation of an employee's performance under the elements and standards established by management and may not substitute his or her own judgment for that of management as to what the employee's evaluation and rating should be. The Authority found the award was deficient by directing that the grievant's performance be rated "satisfactory" under certain elements and that the grievant's overall rating be reevaluated accordingly. The arbitrator independently evaluated the grievant's performance and substituted his judgment for that of management as to what the grievant's performance evaluation and rating under the established standards of the critical elements should have been.

Federal Labor Relations Authority

23 FLRA No. 33

Wyoming Air National Guard
and NAGE, Local No. 14-76
(Evenson, Arbitrator), Case
No. 0-AR-1117 (Decided
August 18, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(1) and (b)(1)
Exceptions Asserted in Appeal	7122(a)
Award Contrary to § 7106(a)(1)	
Internal Security Practices	
Uniform Requirement - National Guard Technicians	
Mission	
Uniform Requirement - National Guard Technicians	

DIGEST NOTES

The agency notified the union that on the expiration of the parties' collective bargaining agreement, it was electing to no longer be bound by provisions of the agreement which provide civilian technicians the option of wearing either the appropriate military uniform or "standard civilian attire . . . approved by the Adjutant General," when performing their technician duties. The agency also notified the union of the effective date of its anticipated practice. The effective was allegedly the expiration date of the parties' agreement. A grievance was submitted to arbitration disputing that the agreement expired on the date specified by the agency. The arbitrator noted that Authority precedent provides that the requirement that civilian technicians wear the military uniform is a permissive subject of bargaining under § 7106(b)(1) and that on expiration of the agreement, the agency could require the wearing of the military uniform. The arbitrator, however, determined that the agreement had not expired on the date specified by the agency and that the agency had violated the agreement by requiring the wearing of the military uniform beginning on that date. The arbitrator sustained the grievance and ordered the agency to comply with the collective bargaining agreement until it expired.

In its exception the agency contended that the arbitrator's award was contrary to § 7106(a)(1) and argued that the wearing of the military uniform by civilian technicians while performing technician duties is necessary to carry out the mission of the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

agency. The agency also maintained that it had the right under § 7106(a)(1) to require the wearing of the military uniform as part of its internal security practices. In addressing the bargaining obligation with respect to the requirement of civilian technicians to wear the military uniform, the Authority has held that the requirement constitutes a method and means of performing work within the meaning of § 7106(b)(1) and consequently is a permissive subject of bargaining. The issue in this case, was whether the arbitrator's award, permitting until the expiration of the agreement civilian technicians the option of wearing standard civilian attire that has been approved by the Adjutant General, interfered with management's right to determine internal security practices. The Authority held that the agency failed to establish that the arbitrator's award was contrary to § 7106(a)(1) and failed to demonstrate in what manner the award prevents the agency from protecting its property from loss, destruction, or disclosure. Likewise, the agency failed to demonstrate in what manner the award interfered with management right to determine the mission of the agency. The exception was therefore, denied.

23 FLRA No. 26

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
OAKLAND ARMY BASE

Activity

and Case No. 0-AR-896

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1157

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Robert C. Schubert filed by the Department of the Army (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.*/

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed in this case challenging management's determination to contract out certain activities. The grievance alleged that the Activity had violated an agency regulation pertaining to contracting out and several provisions of the parties' collective bargaining agreement. The Union argued that it was deprived of an opportunity to affect the decision of whether to contract out. The Union claimed that if it had been permitted to participate in the procurement process as required by the agreement, it could have precluded the Activity's determination to contract out. The Arbitrator found that the Activity violated the agreement by its failure to provide the Union with a copy of the revised statement of work and a copy of the bid solicitation and by its failure to notify the Union of certain meetings relating to the proposed procurement action. With respect to a remedy, the Arbitrator rejected the Activity's argument that to cancel the procurement action the Union had to establish that but for the violations of the agreement, the decision of whether to contract out would have been different. The Arbitrator stated that it was difficult to prove that the violations actually changed the result. Instead, he determined that it was sufficient that the Union had established that it was more likely than not that the decision to contract out would have been different if the Activity had not violated the agreement. The Arbitrator therefore sustained the grievance and, as a remedy, directed the Activity to cancel the procurement action and to reinstate any employees removed as a result of the action to their former positions with backpay. The Arbitrator also awarded the Union attorney fees.

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*/ The Agency also requested a stay of the Arbitrator's award which request the Authority granted. The Union filed an opposition to the Agency's exceptions and stay request. The Union subsequently filed a request for oral argument concerning the Authority's Order granting the Agency's request for a stay of the award. Because no basis is presented for reconsidering, by oral argument or otherwise, the Authority's Order granting the stay, the Union's request is denied.

III. FIRST EXCEPTION

A. Contentions

In its first exception, the Agency contends that by finding the grievance to be arbitrable, the award is deficient as contrary to law and regulation.

B. Analysis and Conclusions

The Authority concludes that the Agency fails to establish that by finding the grievance to be arbitrable, the award is deficient. To the extent that the grievance claimed a violation of the collective bargaining agreement, the Agency fails to establish that the matter of the Activity's compliance with the terms of the agreement was not properly grievable and arbitrable. To the extent that the grievance subjected the disputed procurement action to arbitral review, the Agency likewise fails to establish that the award is deficient. As noted, the Union contended in its grievance that in deciding to contract out the Activity had violated agency procurement regulations. Primarily, the Union also contended that had the agreement not been violated, the Activity's determination to contract out would have been precluded by applicable procurement law and regulation.

The Authority has previously indicated that a grievance claiming that a procurement action was not in accordance with applicable procurement law and regulation is grievable and arbitrable under the Statute and is not precluded by law or regulation. *See General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236*, 22 FLRA No. 84 (1986); *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840*, 22 FLRA No. 72 (1986); *American Federation of Government Employees, Local 1904, AFL-CIO and United States Army Communications and Electronics Materiel Readiness Command*, 16 FLRA 358 (1984); *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA 3 (1932) (Proposal 1), *enforced sub nom. EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed*, 106 S. Ct. 1678 (1986) (per curiam). Further, our decision in *Congressional Research Employees Association and The Library of Congress*, 23 FLRA No. 15 (1986), where we found a grievance challenging a procurement action on the basis of a provision of the collective bargaining agreement not to be arbitrable, is distinguishable. In contrast to that case, the Union in this case is not seeking to enforce a provision which is inconsistent with the Activity's right to contract out. Accordingly, because the grievance challenged the propriety under procurement law and regulation of the disputed procurement action, the grievance was arbitrable.

IV. SECOND EXCEPTION

A. Contentions

In its second exception, the Agency primarily contends that the Arbitrator's award ordering cancellation of the procurement action is contrary to section 7106(a)(2)(B) of the Statute.

B. Analysis and Conclusions

In *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840*, 22 FLRA No. 72 (1986), the Authority addressed for the first time the remedial authority of an arbitrator in resolving grievances disputing determinations by agencies to contract out agency work. In sum, the Authority held that under the Statute and procurement law and regulation, arbitrators are not authorized to cancel a procurement action. We also held that arbitrators are authorized to sustain grievances challenging a decision to contract out and direct agencies to reconstruct the actions on specific grounds only.

Applying our decision in Blytheville AFB to this case, we conclude that the Arbitrator was not authorized either to cancel the procurement action or to sustain the grievance to the extent that it directly challenged the action. The Arbitrator's order that the Activity cancel the procurement action is clearly deficient under section 7106(a)(2)(B) of the Statute. The Arbitrator's order that the Activity reinstate with backpay any employees removed as a result of the procurement action is also deficient because it follows directly from the cancellation. See Naval Air Station, Whiting Field and American Federation of Government Employees, Local Union No. 1954, 22 FLRA No. 102 (1986). Similarly, without an award of backpay, the Arbitrator's award of reasonable attorney fees is likewise deficient. See U.S. Army Missile Command, Redstone Arsenal, Alabama and Local 1858, American Federation of Government Employees, AFL-CIO, 18 FLRA No. 50 (1985).

We also find that the Arbitrator was not authorized to sustain the challenge to the disputed procurement action and could not have properly directed reconstruction in this case. The Union essentially claimed that had the agreement not been violated, it might have been able to preclude, in accordance with procurement law and regulation, the Activity's determination to contract out. However, the Arbitrator stated that it was difficult to prove that but for the violations of the collective bargaining agreement, the decision to contract out could not have properly occurred and that it was sufficient to conclude that more likely than not the decision to contract out would have been precluded. Accordingly, his award sustaining the challenge to the procurement action is deficient.

We decided in Blytheville AFB, slip op. at 6, that an arbitrator can sustain a challenge to a procurement action and order reconstruction only on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. Since the Arbitrator made no such specific finding in this case, he was not authorized to sustain the grievance to the extent that it directly challenged the procurement action, and he could not have properly directed reconstruction.

We note, however, that nothing in *Blytheville AFB* precluded the Arbitrator from finding, as he did, that the Activity violated the agreement by its failure to provide the Union with a copy of the revised statement of work and a copy of the bid solicitation and by its failure to notify the Union of certain meetings relating to the proposed procurement action. Nor was the Arbitrator precluded from sustaining the grievance to the extent of the claimed violations of the agreement and from awarding a proper and appropriate remedy for that violation. Because the Arbitrator awarded a remedy for this violation without the guidance that has now been provided by *Blytheville AFB*, we find that the award should be modified to provide an appropriate remedy. The Activity bargained and agreed to these provisions as part of the collective bargaining agreement. We admonish the Activity to abide by these provisions and will order a remedy accordingly.

V. DECISION

For the reasons stated above, the Arbitrator's award is modified to provide as follows:

> The grievance is sustained to the extent of the claimed violations of Article XXIX of the applicable collective bargaining agreement. The Activity shall cease and desist from failing to comply with the requirements of that article.

Issued, Washington, D.C. August 15, 1986.

Henry B. Frazier III

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 27

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2477, AFL-CIO

Union

and

Case No. O-NG-1195

LIBRARY OF CONGRESS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three proposals. The Union made the proposals in response to an Agency decision to require warehouse personnel to wear uniforms. We hold that Union Proposals 1 and 2 are within the duty to bargain[1] and that Union Proposal 3 is nonnegotiable.

Union Proposal 1

> Each employee will receive 5 complete sets of clothing including long and short sleeve shirts.

Union Proposal 2

> Each employee will receive a jacket.

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[1] In finding these proposals negotiable, we make no judgments as to their merits.

Union Proposal 3

> Staff will be allowed 10 minutes after the start and before the end of each workday to change clothes.

II. Positions of the Parties

The Agency asserts that it imposed the uniform requirement to promote quick identification of warehouse personnel for security purposes. It contends that it has no obligation to bargain over Union Proposals 1 and 2 because of a "zipper clause" in the parties' contract. It contends that it has no obligation to bargain over Union Proposal 3 because it interferes with the Agency's right under section 7106(a)(2)(B) to assign work.

The Union argues that the contract language relied upon by the Agency does not foreclose bargaining on Union Proposals 1 and 2. It also argues that Union Proposals 1, 2 and 3 are appropriate arrangements for employees adversely affected by the Agency's requirement that they wear uniforms.

III. Analysis

A. Effect of Question Concerning Interpretation of Contract Language on the Negotiability of Proposals 1 and 2

The Agency raises a question as to its duty to bargain over Proposals 1 and 2 in light of contract language which it maintains amounts to a zipper clause which forecloses further bargaining on the subject of requiring employees to wear uniforms. This is the only ground raised by the Agency in support of its allegation that these two proposals are nonnegotiable. In a negotiability appeal the Authority decides only the negotiability issues presented under section 7105(a)(2)(D) or (E) of the Statute--that is: does a proposal concern conditions of employment of bargaining unit employees; does it conflict with law or Government-wide rule or regulation; or does it conflict with an agency regulation for which a compelling need exists? The parties may resolve questions of duty to bargain which are based on factual issues in other appropriate proceedings, such as grievance and arbitration procedures. See, for example, American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 at 306, n. 6 (1984).

B. Negotiability of Union Proposals 1 and 2 under Section 7105(a)(2)(E) of the Statute

The Union's contention that Union Proposals 1 and 2 are appropriate arrangements for employees adversely affected by the Agency's decision to require them to wear uniforms is persuasive. The Agency makes no contention and it does not otherwise appear that these proposals would interfere with the purpose for which the uniform requirement was adopted--identification of warehouse personnel. The Union's assertion that the proposals are for the purpose of assuring that the Agency provide employees with an adequate type and quantity of uniform is convincing and uncontroverted. These proposals are, therefore, to the same effect as Proposals B and C in *American Federation of Government Employees, Local 217 and Veterans Administration Medical Center, Augusta, Georgia*, 21 FLRA No. 13 (1986), which we found negotiable under section 7106(b)(3) of the Statute. We see no basis for a different conclusion here. Because Proposals 1 and 2 do not interfere at all with the purpose for which the Agency has adopted the uniform requirement, it is not necessary to apply any test for determining whether there is "excessive interference" with any management right[2] under section 7106(b)(3). *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA No. 4 (1986).

C. Negotiability of Union Proposal 3

Union Proposal 3 directly interferes with the Agency's right under section 7106(a)(2)(B) to assign work. It is materially identical to Union Proposal 1 in *American Federation of Government Employees, Local 2094, AFL-CIO and*

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[2] We have found that under some circumstances a requirement that employees wear uniforms was an exercise of the right to determine internal security under section 7106(a)(1), and that a proposal that employees have an option not to wear the uniform was nonnegotiable. *Veterans Administration Medical Center, Augusta, Georgia*, 21 FLRA No. 13. We have found under other circumstances that a requirement that employees wear a uniform was an exercise of the right to determine methods and means of performing work under section 7106(b)(1). *Division of Military and Naval Affairs, State of New York, Albany, New York and New York Council, Association of Civilian Technicians*, 15 FLRA 288 (1984), *affirmed sub nom. New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502 (2d Cir. 1985), *cert. denied*, 1065 S.Ct. 137 (1985).

Veterans Administration Medical Center, New York, New York, 19 FLRA No. 120 (1985). Based on the reasoning set forth in that case, we arrive at the above conclusion in this case.

The issue, then, is whether the proposal here which is intended as an appropriate arrangement interferes to an excessive degree with the exercise of the right to assign work.[3] The Union states that the purpose of Union Proposal 3 is to facilitate employees' ability to wear their own clothes, as opposed to the uniform, to and from work. It asserts that this would reduce the adverse effects on employees of the uniform requirement but offers no explanation of the assertion. We accept for purposes of this decision, without deciding, that this uniform requirement has an adverse effect on employees. We believe that the pivotal questions we must address in deciding whether there is an excessive interference with management's right are:

1) Whether and how the proposal would address or compensate for the adverse effects; and

2) whether the negative impact of the proposal on management's rights is disproportionate to the benefits to be derived.

In addressing the first question, it is significant to note that the Agency does not prohibit employees from wearing their uniforms to and from work. It appears that the decision whether to change clothing at work is purely a matter of individual employee preference. Given this, we conclude that the thrust of the proposal is to eliminate the need for those employees who prefer changing at work to use their own, nonwork time.

In addressing the second question, we note that the proposal would result in a loss to the Agency of twenty minutes each work day during which it could not assign work of its choosing to those employees. This would have a significant negative impact on its right to assign work. We believe that this negative impact outweighs the benefit to employees in not having to use their own time to exercise their option to change clothes at work. We conclude that the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3) because it would excessively interfere with the Agency's right under section 7106(a)(2)(B) to assign work.

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[3] See Kansas Army National Guard, 21 FLRA No. 4 for a discussion of this standard.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1 and 2. IT IS FURTHER ORDERED that the Union's petition for review as to Union Proposal 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 28

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION

Respondent

and Case No. 3-CA-30319

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority based on a stipulation of facts by the parties under section 2429.1(a) of the Authority's Rules and Regulations. The parties have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent, the General Counsel and the Charging Party.

The General Counsel alleges in its complaint that the Federal Aviation Administration (the Respondent or FAA) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) in two respects: first, by implementing changes in working conditions without affording the Professional Airways Systems Specialists, AFL-CIO (PASS or the Union) an opportunity to negotiate over the impact and implementation of those changes; and, second, by refusing to negotiate with the Union's designated representatives concerning the changes. In this regard, the General Counsel alleges that the Respondent committed separate violations at six of its Airway Facilities Sectors (AFS) and/or Air Route Traffic Control Centers (ARTCC) in several different cities: Auburn, Washington; Nashua, New Hampshire; Pittsburgh, Pennsylvania; Houston, Texas; Seattle, Washington; and Albany, New York.

II. Background

On December 31, 1981, PASS was certified as the exclusive representative of a nationwide unit of the Respondent's employees. The unit included, but was not limited to, the Respondent's nonprofessional employees at its Airway Facilities operation. This nationwide unit was previously represented by the Federal Aviation Science and Technological Association (FASTA). On April 14, 1983, PASS was certified as the exclusive representative for nationwide consolidated units of the Respondent's professional and nonprofessional employees.

The Respondent and FASTA had negotiated an agreement which became effective in 1977 for a two-year period and was automatically renewed by its terms for specified periods until its expiration by notice from PASS. By letter to the Respondent's Administrator dated May 28, 1982, PASS' National President stated that he had received "persistent reports of local and regional FAA management proposals to make changes in conditions of employment within the unit," that "any prior bargaining authority given to any PASS representative other than [himself was] . . . revoked with respect to the national unit," and that he should be "notified of all proposed changes in conditions of employment of bargaining unit members . . . ." By letter dated May 16, 1983, PASS' National President again advised the Respondent's Administrator that notices involving changes in conditions of employment of unit employees should be directed to him.

III. Analysis of the Agency's Obligation to Bargain

The Respondent asserts that its bargaining obligation on the changes in working conditions was limited to consultation by virtue of provisions in the FASTA agreement which, in its view, constitute a clear and unequivocal waiver of the Union's right under the Statute to negotiate over the impact and implementation of those changes in working conditions. The Respondent maintains that this waiver is binding on PASS. Further, the Respondent contends that, under the FASTA agreement, it was only required to, and did in fact, notify the local Union representatives concerning the proposed changes and afford such representatives an opportunity to consult on the changes prior to their implementation. We disagree.

The Authority previously considered and ruled on this issue in Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington, and Federal Aviation Administration, Washington, D.C., 14 FLRA 644 (1984), a case also involving the FAA, PASS, and the same FASTA agreement as involved here. We held that the waiver of bargaining rights contained in the FASTA agreement involved a permissive subject of bargaining, which was binding during the life of the agreement, but was terminable by either party once the agreement expired. We found that management could not insist upon the continuation of the waiver provision contained in the expired agreement when PASS notified management that it would no longer be bound by the provision, and would exercise its bargaining rights. See also Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA 100 (1984); and Federal Aviation Administration, Washington, D.C., 17 FLRA 142 (1985).

The rationale set forth in the three decisions applies equally here. The Authority finds that, once the Union notified the Respondent that it elected to terminate the waiver provision of the expired agreement by letter dated May 28, 1982, the Respondent could no longer continue the practice developed under the provision so as to preclude bargaining over procedures and appropriate arrangements for employees adversely affected by the changes. Further, based on the rationale in Department of Transportation, Federal Aviation Administration, San Diego, California, 15 FLRA 407 (1984), the Authority finds that, once the Union exercised its statutory right to designate a new representative to receive notice and to bargain on the matters involved here by letters dated May 28, 1982, and May 16, 1983, the Respondent could no longer continue the practice developed under the expired agreement.

IV. Changes Giving Rise to the Duty to Bargain by Agency Location

A. Auburn, Washington (AFS, ARTCC)

In May of 1982, the Respondent notified PASS' Midwest Region and Western Region Vice Presidents of its proposal to implement the "Discrete Function Concept" which would reorganize the organizational structure of three of its Air Route Traffic Control Centers and Airway Facilities Sectors, including the Auburn facilities in the Respondent's Northwest Mountain Region and requested comments on the proposal before June 25, 1982. By letter dated June 11, 1982, PASS' Western Region Vice President notified the Respondent's Northwest Region Chief that the only person authorized to bargain for the Union was PASS' National President. On August 13, 1982, the Respondent's Auburn Sector Manager notified PASS' local representative that the "Discrete Function Concept" would be implemented at Auburn on October 31, 1982. On September 29, 1982, the Auburn managers met with PASS' local representatives, offering to consult as to the facility reorganization. By memorandum dated September 30, 1982, PASS' local representative informed the Auburn Sector Manager that PASS demanded the right to negotiate as to the impact and implementation of any changes in working conditions. No such opportunity was afforded, and the Respondent implemented the reorganization on or about October 31, 1982.

As a result of the Respondent's implementation of the "Discrete Function Concept" at its Auburn facilities, several changes occurred in the working conditions of its bargaining unit employees: (1) unit employees who desired to take annual leave were required to notify their unit supervisor at least 24 hours in advance; (2) unit employees were required to sign a log upon reporting to work; (3) new basic watch schedules of employees in the Radar/Communications and the Radar Data Processing units were established; and (4) new holiday schedule guidelines were established for unit employees. Also, by memorandum dated October 18, 1982, unit employees were notified that the prior practice of excusing personnel from holiday work, by crew rather than by name, had also been changed. The memorandum stated that, as of November 1, 1982, "each unit's holiday work schedule will be equalbility [sic] derived and posted 21 days prior by the respective unit's supervisor consistent with the [FASTA] agreement."

B. Nashua, New Hampshire (AFS), and Boston, Massachusetts (ARTCC)

On August 31, 1982, the Respondent's Nashua AFS/ARTCC Sector Manager informed PASS' local representative of a proposed reorganization involving the establishment of new watch schedules and position description changes for Radar GS-12 and Radar Microwave Link (RML) - TRACON GS-12 Electronic Technician positions. By letter to the Respondent's Nashua AFS/ARTCC Assistant Manager dated September 1, 1982, PASS' local representative requested negotiations on the proposed reorganization announced on August 31, and designated the Union's National President as its negotiator. On September 19, 1982, the National President advised the Respondent's Nashua AFS/ARTCC Sector Manager of the Union's desire to negotiate over the proposed reorganization. On October 1, 1982, the Respondent's Nashua AFS/ARTCC Acting Sector Manager declined to negotiate, but offered instead to consult over the proposed new watch schedules and position descriptions.

The change in position descriptions was implemented on October 26, 1982. Under the new position descriptions, some technicians' responsibilities with regard to the Radar Microwave Link System were reduced from primary to secondary. The new position descriptions contained a new provision requiring technicians to climb towers of various heights to service aviation equipment. At the Nashua facility, there are two towers, each about 150 feet in height. None of the affected bargaining unit employees had been previously required to climb towers and none has had training for performing such tasks. As of the date of the parties' stipulation, the Respondent had not yet required these employees to perform this new responsibility.

On January 5, 1983, the Respondent's Nashua AFS Manager notified PASS' local representative orally that implementation of the new watch schedules would take effect on April 17, 1983. On February 7 and 24, 1983, PASS' National President reiterated the Union's demand for negotiations over the proposed change in watch schedules. The Respondent again declined to negotiate, and implemented the new watch schedule on May 1, 1983. Prior to implementation of the new watch schedules, the bargaining unit employees all worked on the same 24-hour-per-day, five-crew-rotation watch schedule. Under the new watch schedules, employees now work on either a five-crew or four-crew rotation schedule for 16 hours each day.

C. Pittsburgh, Pennsylvania (AFS), Greater Pittsburgh International Airport

On March 9, 1982, the Respondent's Pittsburgh AFS Manager notified unit employees of a proposed reorganization of the Pittsburgh facility. The proposed reorganization would replace the existing five-crew organization with a separate NAVAIDS Unit and a three-crew Radar/ARTS/ Communications group. The NAVAIDS Unit would have a unit supervisor and the Radar/ARTS/Communications technicians would work a 24-hour shift with supervision by three operation supervisors who would rotate 16 hours a day. On the same date, PASS' local representative spoke to the Respondent's Pittsburgh AFS Manager and indicated that the Union had some concerns about the reorganization.

On August 10, 1982, the Respondent's Airway Facilities Division Manager, Eastern Region, issued a memorandum to all Sector personnel explaining the proposed reorganization and establishing an implementation date of September 7, 1982. On August 15 and September 7, 1982, PASS' National President contacted the Respondent's Airway Facilities Division Manager, Eastern Region, and requested negotiations regarding the proposed reorganization. The Division Manager declined to negotiate, and the reorganization was implemented on September 7, 1982.

As a result of the reorganization, unit employees assigned to the mid-shift (2330-0730 hours) were left without an on-duty supervisor. As explained in the Respondent's memorandum, these employees became "responsible for coordinating and carrying out overall Airway Facilities operations at the greater Pitt Hub during the mid-shift exactly as the Operations Supervisor does during the day and evening shift. . . ." (Emphasis supplied.) This responsibility included "a number of other coordinating and consulting type functions that extended beyond their parochial technical skill area insofar as is reasonable to expect based on formalization training, experience and certification requirements." Several of the new "coordinating and consulting type functions" included: (1) consulting with air traffic control officials and giving "best counsel and judgment" concerning overall Airway Facility operations and facilities; (2) notifying the appropriate first-level supervisor, the assistant manager, or manager, of urgent operational matters, such as accidents or unexpected absences of duty personnel; (3) assuring that appropriate entries are made in the watch log; and (4) not leaving duty stations unless properly relieved.

D. Houston, Texas (AFS), and Houston (ARTCC)

On July 19, 1982, the Respondent's Houston AFS/ARTCC Manager (the Manager) held discussions with PASS' local representative regarding a proposed reorganization at the Houston facilities, including proposed changes in crew alignments and employee watch schedules. During these conversations, the Manager informed PASS' local representative that the planned reorganization would entail a new seven-crew watch schedule. In conjunction with these discussions, PASS' local representative submitted specific comments and views for consideration by the Manager. On October 18, 1982, PASS' local representative submitted three watch schedules for consideration by the Manager. On December 14, 1982, the Manager informed PASS' local representative that he rejected PASS' proposed schedules. On December 23, 1982, the Manager notified PASS' local representative that the Union representative's views had been considered in the development of the new watch schedules, but that an alternative schedule had been adopted, which would be posted on December 24, 1982, and implemented following a 90-day posting period.

On January 13 and 17, 1983, PASS's National President contacted the Manager and requested an opportunity to bargain over the changes which would result from the reorganization. The Manager did not agree to negotiate and the reorganization was implemented on March 27, 1983.

Prior to the seven-crew reorganization, work crew realignments, and watch schedule changes, the Houston facilities' unit employees were assigned to one of five work crews, with each work crew having the same duties and responsibilities. Under the five-crew arrangement, unit employees worked under a rotating watch schedule. Under the new seven-crew concept, unit employees were assigned either to one of seven work "crews" or to one of five work "units." Employees assigned to the work "units" have primary responsibility for the repair and maintenance of the Houston facilities' critical function aviation equipment. Employees assigned to the work "crews" have secondary responsibility over critical function equipment. If a work "crew" employee discovers a malfunction in a piece of aviation equipment, he must call in an employee from a work "unit" to do the repair work. The resulting repair work is done chiefly by the work "unit," with assistance from the work "crew." Formerly, there was no distinction among employees as to the servicing and repair of equipment. There are no provisions for the rotation of unit employees between the work "crews" and work "units." Also, employees assigned to "crews" have lesser technical training requirements, that is, they are no longer required to attend the FAA Academy in Oklahoma for periodic training. In addition, as a result of the work crew realignments, unit employees' watch schedules changed to a seven-crew rotating schedule.

E. Seattle, Washington (AFS)

On October 22, 1982, the Respondent's Supervisor of the RAD/ARTS Communication Unit at the Seattle facility met with Electronic Technicians to discuss the transfer of Maintenance Mechanic duties to Electronic Technicians. PASS' local representative attended this meeting. On October 26, 1982, a meeting of managers and Maintenance Mechanics was held to develop recommendations on the distribution of Maintenance Mechanic duties. A PASS local representative also attended this meeting. The Respondent implemented the transfer of certain Maintenance Mechanic job tasks to Electronic Technicians in October and November of 1982.

The transferred Maintenance Mechanic tasks involved preventive maintenance checks on mechanical equipment. Preventive maintenance checks, depending on the type of equipment, were performed monthly, every six weeks, or biannually. In addition, the Seattle AFS Electronic Technicians became responsible for updating the Respondent's Handbooks and Preventive maintenance charts. Prior to October of 1982, the Maintenance Mechanics had primary responsibility for performing monthly preventive maintenance checks on Seattle AFS equipment; Electronic Technicians were sometimes required to perform these monthly checks.

F. Albany, New York, and Albany Air Traffic Control Tower (AFS)

On September 21, 1982, the Respondent's Chief of the NAVCOM Unit at its Albany AFS posted proposed watch schedules for certain bargaining unit employees and notified PASS' alternate local representative of the proposed changes. Those changes would reduce the existing watch schedule from a four-man rotation to a three-man rotation. Upon receiving notification of the proposed changes, PASS' alternate local representative asked the Respondent's NAVCOM Chief whether two developmental unit employees would be added to the proposed three-man watch schedules. The NAVCOM Chief responded that the two developmental unit employees would be placed on an administrative work week schedule (for example, 8:00 a.m to 4:30 p.m.) and would not be added to the proposed three-man watch schedule because they were not yet fully trained.

By memorandum to the Respondent's Albany AFS Manager dated November 22, 1982, PASS' local representative requested bargaining over the proposed new watch schedules. The

Respondent's Manager declined to negotiate. Subsequently, PASS' National President contacted the Respondent's Albany Assistant Sector Manager and requested bargaining; the latter also declined to negotiate. The new three-man watch schedule was implemented on January 1, 1983.

V. Conclusion as to the Duty to Bargain at the Agency Locations

The parties stipulated that the changes discussed above in Part IV, as to all of the agency's locations, were implemented by the Respondent without providing advance notice to the National President of the Union, its designated representative, or affording the Union an opportunity to negotiate over the impact and implementation of the changes. The Respondent's sole defense is that its actions were in accord with the provisions of the FASTA agreement. Since the waiver of bargaining rights contained in the expired FASTA agreement was no longer binding on PASS and the Respondent, we find that the Respondent's failure to notify the National President, and afford PASS an opportunity to negotiate about procedures for implementing the changes at the agency's facilities listed in Part IV, and appropriate arrangements for unit employees adversely affected by the changes prior to their implementation, constitutes a violation of section 7116(a)(1) and (5) of the Statute. See also United States Department of Transportation, Federal Aviation Administration, 18 FLRA No. 8 (1985); United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 62 (1985).*/

VI. The Remedy

The General Counsel and PASS request a status quo ante order to remedy the unfair labor practices by the Respondent. In our view, such a measure is not warranted here. We have balanced the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy, and taken into consideration the various factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982), in making this determination. We also note that PASS and the Respondent acknowledge that the changes instituted by the Respondent related to the FAA's national plan to reorganize personnel, and to modernize the nation's air traffic control system over a period of twenty years. In our view, an order to rescind the changes involved in this case, and to restore all conditions of employment which were in effect prior to such reorganization, would result in substantial disruption of the Respondent's operations and likely interfere with the Respondent's efforts to improve the national air traffic control system. We find it sufficient to effectuate the purposes and policies of the Statute to order the Respondent to bargain, upon request, about the procedures and appropriate arrangements for unit employees adversely affected by the changes involved here. See, for example, Department of Transportation, Federal Aviation Administration, 19 FLRA No. 61 (1985).

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*/ It is clear from the parties' stipulation and the General Counsel's brief that the alleged violations as to all locations involve only the refusal by the Respondent to afford the Union an opportunity to bargain concerning the impact and implementation of the changes involved in this case.

As we stated recently in issuing a prospective bargaining order and rejecting a union's contention that a status quo ante remedy should be granted under circumstances where the potential disruption to the agency's operations was substantial:

> A prospective bargaining order is neither inadequate nor inherently restrictive of the parties' right to address the effects on unit employees of changes already made. . . . Rather, it allows the parties the flexibility to bargain freely with regard to how past actions may have affected any given employee. Bargaining which explores such effects may itself reveal situations that call for retroactive remedial action, about which the parties are free to agree.

Environmental Protection Agency, 21 FLRA No. 98 (1986), slip op. at 3-4.

With regard to the General Counsel's and PASS' requests that the remedy be nationwide in scope, the Authority finds that a posting of the remedial unfair labor practice notice at the respective facilities where the violations occurred will effectuate the purposes and policies of the Statute. This is consistent with our findings in similar cases involving FAA's unlawful insistence on a waiver of PASS' statutory rights. See Federal Aviation Administration, Northwest Mountain Region; Department of Transportation, Federal Aviation Administration, Los Angeles, California; Federal Aviation Administration, Washington, D.C.; United States Department of Transportation, Federal Aviation Administration, 18 FLRA No. 8 (1985); Department of Transportation, Federal Aviation Administration, 19 FLRA No. 61 (1985); and United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 116 (1985). The unlawful conduct in the this case occurred before the issuance of the Authority's decision on the central issue in Federal Aviation Administration, Northwest Mountain Region. Since there is no indication that the FAA has refused to abide by the Authority's decision in that case or in the other related cases, or that it will continue to engage in such unlawful conduct in the future, the Authority finds no basis for ordering a different posting requirement than that ordered below.

ORDER

Under section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority orders that the Federal Aviation Administration, Washington, D.C., must do the following:

1. Cease and desist from:

(a) Any further implementation of the reorganizations at the Airway Facilities Sector and Air Route Traffic Control Center in Auburn, Washington, the Airway Facilities Sector in Nashua, New Hampshire, and the Air Route Traffic Control Center in Boston, Massachusetts, the Airway Facilities Sector in Pittsburgh, Pennsylvania, and the Airway Facilities Sector and Air Route Traffic Control Center in Houston, Texas; the transfer of Maintenance Mechanic Duties to Electronic Technicians at the Airway Facilities Sector in Seattle, Washington; and the change in watch schedules at the NAVCOM Unit Airway Facilities Sector in Albany, New York; without first notifying the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of its employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation of the reorganizations, transfers of job duties, and changes in watch schedules, and on appropriate arrangements for employees adversely affected by such changes.

(b) Failing to give notice of any planned reorganizations, transfers of job duties, or changes in watch schedules to the designated representatives of the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of its employees, for the purposes of collective bargaining, to the extent consonant with law and regulation.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of its employees, and to the extent consonant with law and regulation, bargain over the procedures to be observed in implementing the reorganization at the Airway Facilities Sector and Air Route Traffic Control Center in Auburn, Washington, the Airway Facilities Sector in Nashua, New Hampshire, the Air Route Traffic Control Center in Boston, Massachusetts, the Airway Facilities Sector in Pittsburgh, Pennsylvania, and the Airway Facilities Sector and Air Route Traffic Control Center in Houston, Texas; the transfer of Maintenance Mechanic duties to Electronic Technicians at the Airway Facilities Sector in Seattle, Washington; and the change in watch schedules at the NAVCOM Unit Airway Facilities Sector in Albany, New York, and on appropriate arrangements for employees adversely affected by such changes.

(b) Post at its facilities at the Airway Facilities Sector and Air Route Traffic Control Center in Auburn, Washington, the Airway Facilities Sector in Nashua, New Hampshire, and the Air Route Traffic Control Center in Boston, Massachusetts, the Airway Facilities Sector in Pittsburgh, Pennsylvania, the Airway Facilities Sector and Air Route Traffic Control Center in Houston, Texas, the Airway Facilities Sector in Seattle, Washington, and the NAVCOM Unit Airway Facilities Sector in Albany, New York, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Such forms shall be signed by an appropriate official of each respective facility, and shall be posted and maintained for 60 consecutive days after posting, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C. August 15, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[23 FLRA No. 28]

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT further implement the reorganizations at the Airway Facilities Sector and Air Route Traffic Control Center in Auburn, Washington, the Airway Facilities Sector in Nashua, New Hampshire, and the Air Route Traffic Control Center in Boston, Massachusetts, the Airway Facilities Sector in Pittsburgh, Pennsylvania, and the Airway Facilities Sector and Air Route Traffic Control Center in Houston, Texas; the transfer of Maintenance Mechanic duties to Electronic Technicians at the Airway Facilities Sector in Seattle, Washington; and the change in watch schedules at the NAVCOM Unit Airway Facilities Sector in Albany, New York; without first notifying the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of our employees, and affording it an opportunity to negotiate on the procedures to be observed in any further implementation of the reorganizations, transfers of job duties and changes in watch schedules, and on appropriate arrangements for employees adversely affected by such changes.

WE WILL NOT fail to give notice of any planned reorganizations, transfers of job duties, or changes in watch schedules to the designated representatives of the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of our employees, for the purpose of collective bargaining, to the extent consonant with law and regulation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the Professional Airways Systems Specialists, AFL-CIO, the exclusive representative of our employees, and to the extent consonant with law and regulation, bargain over the procedures to be observed in implementing any such changes, and on appropriate arrangements for employees adversely affected by such changes.

____
(Activity)

Dated:_______________ By:__________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., 7th Floor, (P.O. Box 33758), Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL OF
PRISONS LOCALS, LOCAL 171

Union

and

Case No. O-NG-1172

DEPARTMENT OF JUSTICE, FEDERAL
PRISON SYSTEM, FEDERAL CORRECTIONAL
INSTITUTION, EL RENO, OKLAHOMA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority on a petition for review of negotiability issues filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The petition seeks review of the disapproval of a number of provisions in the parties' local supplemental agreement during review of that agreement by the Agency head pursuant to section 7114(c) of the Statute.

II. Procedural Issues

The Agency argues that the Union's petition for review was untimely filed and that it is otherwise procedurally defective because the Union did not serve a copy of the petition on the Agency head and did not attach a copy of management's declaration of negotiability to the petition filed with the Authority. The Agency moves that the petition be dismissed on those procedural grounds. The Authority has determined, however, that the Union's petition was timely filed under the Authority's Rules and Regulations and that any other procedural deficiencies were corrected by the Union upon notification and within the time provided by the Authority for such corrective action. Accordingly, the Agency's motion to dismiss the appeal is denied.

In addition, the Authority will not consider the Union's petition regarding Article 18, Section E of the parties' agreement since the Agency states that it did not disapprove that provision. Likewise, the Authority will not consider the Union's petition regarding Article 27, Section A since the Union withdrew its petition for review as to that provision.

III. Provision 1

Article 18 - Assignment and Hours of Work

> Section C: Any institutional department finding it necessary to pay overtime will give first consideration for overtime work to employees within the department, then to other qualified employees of the institution.

A. Positions of the Parties

In its disapproval of the provision, the Agency declared that the language was negotiable only if management retained the authority to make final determinations as to the qualifications required to perform overtime work and if the provision did not preclude management from assigning work to employees in other departments on a non-overtime basis. In its petition for review, the Union states that the provision allows management to unilaterally determine the qualifications needed to perform work and to assign work to any employee, regardless of department, consistent with the "first consideration" for overtime work requirement of the provision. The Union further argues that the provision does not pertain to non-overtime work and, therefore, that it does not preclude management from acting in any way with respect to non-overtime work assignments. In its statement of position concerning the Union's petition, the Agency acknowledges that, in view of the Union's interpretation of the disputed provision, its objection to the provision based on the Agency's concern for ensuring management's right to determine qualifications for performing work is now moot. However, the Agency continues to maintain that it is not clear whether the provision is intended to preclude management from assigning work to employees in other departments during regular duty hours. The Agency argues that, if the provision is so intended, then it is nonnegotiable because it would interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute.

B. Analysis and Conclusions

The agreement provision disapproved by the Agency head expressly deals with overtime work. Moreover, as clearly and unequivocally interpreted by the Union, which interpretation is consistent with the plain language of the provision, the provision in no manner prevents management from assigning work to employees in other departments during regular duty hours. The Authority therefore concludes that the provision does not interfere with management's rights under section 7106(a)(2)(B) of the Statute and that it is within the duty to bargain.

IV. Provision 2

> Article 18 - Assignment and Hours of Work
>
> Section H: The principal day shift hours of work will be 7:30 AM to 4:00 PM with a half hour uninterrupted lunch period.

A. Positions of the Parties

The Agency's position essentially is that the provision concerns a permissive subject of bargaining under section 7106(b)(1) of the Statute and that the parties' National Controlling Agreement prohibits local supplemental bargaining on such permissive subjects. In support of its position, the Agency relies on the Authority's decision in Department of the Air Force, Lowry Air Force Base, Colorado, 16 FLRA 1104 (1984), and argues that since the provision concerns the hours of the day shift, the shift when most of the institution's offices are open and business and activities are conducted, the provision would have the effect of determining the numbers, types and grades of employees assigned to a tour of duty, a matter covered by section 7106(b)(1), which is negotiable only at management's election. The Agency also states that if the provision simply requires the Union to be informed of any proposed change in existing day shift hours and given an opportunity to bargain on the impact and implementation of such a change, the provision is negotiable.

The Union argues that the provision simply describes the principal day-shift hours at the institution; that it does not establish a shift or tour of duty within the meaning of section 7106(b)(1) of the Statute; that it does not limit management from conducting any business on any shift; and that it does not preclude the employer from adjusting the shift or establishing a new one so long as the rights of the exclusive representative are respected. The Union therefore maintains that there is no section 7106(b)(1) issue presented by the provision and that the Authority's decision in Lowry is not applicable in this case. Moreover, the Union argues that even if the provision concerns a permissive subject of bargaining under section 7106(b)(1), since the local parties bargained and agreed upon the provision, management was thereafter precluded from asserting any section 7106(b)(1) arguments as a basis for disapproving the provision during review of the agreement under section 7114(c) of the Statute.

B. Analysis and Conclusions

The Authority finds that the Agency has made no showing that the disputed provision establishes a new shift or changes the hours of an existing shift. Thus, the Agency has failed to establish that the provision affects the numbers, types and grades of employees assigned to a tour of duty within the meaning of section 7106(b)(1) of the Statute. The provision, as interpreted by the Union, simply describes the hours of the existing principal day shift at the institution. Moreover, the provision does not prevent management from changing the hours of that shift or establishing any new shift, consistent of course with the rights of the Union in such a situation. The Authority therefore concludes that the provision is within the duty to bargain. Consequently, it is irrelevant whether or not the parties' Master Agreement prohibits local supplemental agreements on permissive subjects of bargaining.

V. Provision 3

> Article 18 - Assignment and Hours of Work
>
> Section I: The employer agrees that when an employee works three (3) hours in excess of eight hours, he/she, shall be given the opportunity to purchase a meal or time off to obtain a meal.

A. Positions of the Parties

In its disapproval notice, the Agency stated that this provision would be appropriate if the local parties agreed that the time spent away from work obtaining and eating a meal is not compensable as overtime. In its petition for review, the Union maintains that the provision does not provide authorization to approve or deny overtime. The Union further maintains that circumstances may or may not warrant overtime in a particular situation, but that overtime compensation determinations are subject to other provisions of the parties' agreement and governing laws and decisions of the Comptroller General. In its statement of position regarding the Union's petition, the Agency states that since the Union appears to recognize that the provision cannot authorize overtime pay for meal times and that overtime is subject to law and Comptroller General decisions, the issue "appears to be moot." Agency Statement at 8. However, the Agency did not rescind its disapproval of the provision.

B. Analysis and Conclusions

The Union has specifically interpreted the disputed provision as not authorizing overtime for meal times and acknowledged that overtime compensation is a matter subject to law, Comptroller General decisions and other provisions of the parties' agreement. Given that interpretation, which the Agency does not refute and which is consistent with the plain language of the provision, the Authority concludes that the provision is within the duty to bargain.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the

Agency rescind its disapproval of the provisions of the local parties' agreement numbered 1, 2 and 3 above.*/

Issued, Washington, D.C., August 15, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The Agency acknowledged that its disapproval of Provisions 1 and 3 might be moot. As discussed in our decision, the Union's clear and unequivocal statements of intent concerning these provisions show that the Agency's claims are baseless. Any disagreement over these provisions should have been resolved bilaterally. In the future, we urge the Agency to act in a more positive manner, so as not to burden the Union and the Authority with the resolution of unnecessary disputes.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3186

Union

and

Case No. O-NG-969

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF SOCIAL SECURITY FIELD
OPERATIONS, PHILADELPHIA REGION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The petition concerns the negotiability of three proposals submitted in response to the Agency's implementation of a reduction-in-force action involving the separation from employment of temporary employees and a new policy whereby it restricted permanent, part-time employees to work within their established tours of duty.

II. Union Proposal 1

> Permanent part-time employees who are restricted to a tour of duty of less than forty hours per week will be assigned to a reduced workload.

A. Positions of the Parties

The Agency contends that because this proposal would require management to assign a reduced workload to positions in the bargaining unit, it directly interferes with management's right, under section 7106(a)(2)(B) of the Statute, to assign work. The Agency also contends that the proposal interferes with management's right, under section 7106(b)(1) of the Statute, to establish a new shift or tour of duty.

The Union argues that, under applicable Authority precedent, this proposal is within the duty to bargain because it contains general non-quantitative language which provides, at most, a procedure or an arrangement by which a management right is exercised.

B. Analysis

This proposal was submitted in response to management's new policy of restricting part-time employees from working beyond their part-time tours of duty. Prior to management's decision, part-time employees could work up to 40 hours per week. As a result of the change, these employees are now precluded from working up to 40 hours per week.

The Union's explanation that the intent of the proposal is merely for management to give "consideration" to the reduction of full-time workload assignments is contrary to the explicit language of the proposal. That is, the proposal is not limited to considering the reduction of work assignments, but instead would mandate that management reduce work assignments in circumstances where employees work less than full-time hours.

The Agency has provided no support for its claim that this proposal interferes with its right to establish tours of duty under section 7106(b)(1). Thus, such contention cannot be sustained. However, this proposal is to the same effect as Proposal V found nonnegotiable in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508 (1981). Proposal V in that case required the agency to refrain from assigning cases to employees "when the caseload is unmanageable." The Authority reasoned that the proposal imposed a precondition on the assignment of cases to employees and under some circumstances, and irrespective of the agency's immediate needs, prevented the agency from making case assignments. Thus, the Authority concluded the proposal was inconsistent with management's right to assign work under section 7106(a)(2)(B) of the Statute. Based on the reasons expressed in Internal Revenue Service this proposal, which precludes management from making work assignments in circumstances where employees work less than full-time, is also inconsistent with management's right to assign work under section 7106(a)(2)(B). See also National Federation of Federal Employees, Local 1622 and U.S. Commissary, Fort Meade, Maryland, 16 FLRA 998 (1984) (Provision 1). Since this proposal would directly interfere with management's right to assign work it does not constitute a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982).

We turn now to the question of whether this proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute and apply the tests set out in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986). Here, the Union has not identified any adverse effect which would result solely from the assignment of work to the employees in question. That is, there is no indication that these employees are expected to perform the assigned work in a manner that is inconsistent with their being restricted to working less than 40 hours per week. But, even assuming that the proposal was intended to ameliorate an adverse effect perceived by the assignment of a full workload to permanent part-time employees who are now restricted to working only the hours of their established part-time tour of duty, the proposed amelioration would expressly preclude the Agency from assigning a certain amount of work at all in these circumstances. Such a proposed amelioration, which totally abrogates the exercise of a management right, would excessively interfere with management's right to assign work and therefore does not constitute an appropriate arrangement within the meaning of section 7106(b)(3). See American Federation of Government Employees, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183, 1188 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 7 FLRA 91 (1981).

C. Conclusion

This proposal violates management's right, under section 7106(a)(2)(B), to assign work and does not constitute a negotiable procedure under section 7106(b)(2) or an appropriate arrangement under section 7106(b)(3) of the Statute.

III. Union Proposal 2

> Temporary employees will be recalled based on their length of service with the Social Security Administration.

A. Positions of the Parties

The Agency contends that because the proposal requires management to recall separated employees based on seniority, it interferes with management's discretion to hire under section 7106(a)(2)(A) of the Statute and to make selections for appointment under section 7106(a)(2)(C) of the Statute. The Agency further contends that because the proposal requires management to rehire employees without taking into account their actions while not employed, it interferes with Government-wide regulations concerning "suitability" set out at 5 CFR §§ 731.201 and 731.202.

The Union contends that the proposal is within the duty to bargain because it is a procedure or an arrangement by which a management right is exercised.

B. Analysis

This proposal applies to temporary employees who were terminated without personal fault. According to the Union it would require that these former employees "will be rehired when allocations become available based on their length of service with the Agency." The Union also indicates that management would be able to determine the continued suitability for employment of employees rehired according to this proposal. Consequently, contrary to the Agency's claim, this proposal does not violate 5 CFR 731.202. However, there is nothing in the record to indicate that once allocations became available management could elect to not recall temporary employees and utilize such allocations for permanent positions instead or to elect to accomplish its work without any increase in staff, permanent or temporary. Thus, this proposal is distinguishable from the proposal found to be an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute in National Association of Government Employees, Local R14-87 and

Department of the Army, Kansas Army National Guard, Topeka, Kansas, 21 FLRA No. 48 (1986). The proposal in the Topeka case required management to return employees to their former positions at their former duty stations only if and when such positions were vacant and only then if the agency decided to fill them. No question was raised in that case as to whether the employees possessed the qualifications for the vacant positions since the employees in question were merely returning to positions they would still occupy but for their reassignment as a result of a RIF. Further, the proposal specifically preserved the agency's right to elect to fill or not fill vacant positions. Unlike the proposal in the Topeka case this proposal would absolutely eliminate the Agency's discretion concerning the filling of positions. Thus, this proposal directly interferes with the Agency's rights to hire and select and as a result, it does not constitute a negotiable procedure within the meaning of section 7106(b)(2) of the Statute. See American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). In addition, by mandating the recall of temporary employees this proposal would constitute an excessive interference with management's right to hire and assign employees under section 7106(a)(2)(A) of the Statute and with management's right, under section 7106(a)(2)(C), to make selections in filling positions. It is not, therefore, an appropriate arrangement under section 7106(b)(3) of the Statute. See also National Association of Government Employees, Local R14-87 and Department of the Army, Kansas Army National Guard, 21 FLRA No. 105 (1986) (Proposal 2).

Even assuming that this proposal does not constitute an excessive interference with management's rights, it is outside the duty to bargain under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation, that is, requirement 4 of subchapter 1-4, chapter 335 of the Federal Personnel Manual (FPM), which permits agencies to fill positions by making selections from any appropriate source. This proposal would require the Agency to select for vacancies only temporary employees who have been separated from employment. By so doing, it would prevent the Agency from making selections from any appropriate source. Thus, this proposal violates Requirement 4 of subchapter 1-4, Chapter 335 of the FPM, a

Government-wide regulation, and on that basis is outside the duty to bargain. See American Federation of Government Employees, AFL-CIO, Local 2677 and Department of Health and Human Services, Office of Community Services, 21 FLRA No. 22 (1986), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 2677 v. FLRA, No. 86-1287 (D.C. Cir. May 19, 1986); American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO and Department of Justice, 21 FLRA No. 121 (1986) (First disputed sentence).

C. Conclusion

Based on the foregoing analysis, this proposal does not constitute either a negotiable procedure under section 7106(b)(2) or an appropriate arrangement under section 7106(b)(3) of the Statute. We also hold that this proposal conflicts with FPM chapter 335, subchapter 1-4, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute.

III. Union Proposal 3

> Permanent part-time employees will be converted at the earliest opportunity, upon request, to permanent full-time positions.

A. Positions of the Parties

The Agency contends that because this proposal requires management to convert part-time employees to full-time status upon their request, it interferes with management's right to hire under section 7106(a)(2)(A) of the Statute. The Agency further contends that the proposal interferes with management's right to determine the number of employees of the Agency under section 7106(a)(1).

The Union argues that this proposal is within the duty to bargain because it contains general non-quantitative language which provides for reasonable application and is, at most, a procedure or arrangement by which a management right is exercised. Furthermore, according to the Union, the term, "at the earliest opportunity," refers to, "when either a full-time position is vacated by another employee or when the employer determines that the workload justifies the establishment of a full-time position."

B. Analysis

1. Appropriate arrangements within the meaning of section 7106(b)(3) of the Statute

This proposal was intended as an arrangement for part-time employees who previously worked a full-time schedule but who because of funding problems are now restricted to working only the hours of their part-time schedule. Clearly, such employees are adversely affected by management's right to reduce their hours. In this circumstance, then, this proposal mandates that such part-time employees upon their request will be converted to, or in other words, selected for, permanent full-time positions at the earliest opportunity. While the term "earliest opportunity" is not defined in the proposal, the Union states it is intended to mean when "a full-time position is vacated by another employee and available or when the employer determines the workload justifies the establishment of a full-time position." Thus, in our opinion, this proposal would apply only after management determines to fill a vacant full-time position. Interpreted in this manner the proposal would not violate management's right to determine the number of employees under section 7106(a)(1) of the Statute. Further, there is nothing in the record which indicates that management would be unable to determine the qualifications of the part-time employee for the full-time position. In fact, it appears that but for the funding restrictions which resulted in part-time employees being limited to working only a part-time schedule those part-time employees would have been performing the duties of such full-time positions.

The Authority finds that this proposal has the same effect as the proposal in the Authority's Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, 14 FLRA 801 (1984), affirmed in the Authority's Decision and Order on Motion for Reconsideration (July 11, 1985), petition for review filed, No. 85-1562 (D.C. Cir. Sept. 6, 1985). In that case the Authority reaffirmed its prior decision that a proposal requiring the Agency to select available qualified repromotion eligible employees when filling vacancies in the bargaining unit directly interfered with management's rights under section 7106(a)(2)(C) of the Statute. Thus, the proposal in this case also directly interferes with the Agency's rights under section 7106(a)(2)(C) and thereby does not constitute a negotiable procedure under section 7106(b)(2) of the Statute. See

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), enforced sub nom. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). The Authority also concluded in the Decision and Order on Remand that the proposal constituted a negotiable appropriate arrangement under section 7106(b)(3) of the Statute notwithstanding its limitation on management's discretion to determine the relative qualifications of repromotion eligibles. Accordingly, the Authority finds, for the reasons stated more fully in that decision, that the proposal here does not excessively interfere with management's rights and, therefore, constitutes a negotiable appropriate arrangement under section 7106(b)(3) of the Statute.

2. Inconsistent with Government-wide Rule or Regulation

The Authority also concluded in its Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census that while the proposal constituted an appropriate arrangement under section 7106(b)(3), it nevertheless was outside the duty to bargain under section 7117(a)(1) of the Statute because it was inconsistent with a Government-wide regulation, that is, Requirement 4 of subchapter 1-4, chapter 335 of the FPM, which would permit agencies to fill positions by making selections from any appropriate source. The proposal would require the Agency to select only permanent part-time employees for permanent full-time vacancies which it has decided to fill. It would, therefore, have the same effect as the proposal in AFGE, Local 2782 and Bureau of the Census, that is, it would prevent the Agency from making selections from any appropriate source. Thus, for the reasons stated more fully in our Decision and Order on Remand in AFGE, Local 2782 and Bureau of the Census, this proposal violates Requirement 4 of subchapter 1-4, chapter 335 of the FPM, a Government-wide regulation, and is outside the duty to bargain. See also Department of Health and Human Services, Office of Community Services; Department of Justice.

C. Conclusion

We find that this proposal would directly interfere with the Agency's rights under section 7106(a)(2)(C) of the Statute and therefore does not constitute a negotiable procedure under section 7106(b)(2) of the Statute. We also find that the proposal would not excessively interfere with management's rights and, thus, that it constitutes an appropriate arrangement for employees adversely affected by the exercise of such rights, within the meaning of section 7106(b)(3) of the Statute. However, we also hold, based upon the analysis provided in our Decision and Order on Remand in *AFGE, Local 2782 and Bureau of the Census*, 14 FLRA 801 (1984), affirmed in the Authority's Decision and Order on Motion for Reconsideration (July 11, 1985), *petition for review filed*, No. 85-1562 (D.C. Cir. September 6, 1985), that this proposal conflicts with FPM chapter 335, subchapter 1-4, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION
AND NATURALIZATION SERVICE
UNITED STATES BORDER PATROL

Respondent

and

Case No. 6-CA-50383

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO
NATIONAL BORDER PATROL COUNCIL

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions and a supporting brief limited to the Judge's recommended remedy. The General Counsel filed an opposition to the Respondent's exceptions and a motion to strike portions of such exceptions.*/

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the

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*/ The General Counsel's motion to strike is directed to the Respondent's contention that certain requested data, the denial of which forms the basis of the complaint in this case, is unavailable. In view of our disposition of this case, it is unnecessary to rule on this motion.

Authority has reviewed the rulings of the Judge reached at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommended Order as modified below.

In agreement with the Judge, the Authority finds that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to furnish the American Federation of Government Employees, AFL-CIO, National Border Patrol Council (AFGE) with the data described in its March 5, 1985 request for information. The Respondent excepts to the remedy contending that certain of the data, namely the Daily Assignment and Equipment Logs (logs) for the eighteen month period requested by the AFGE do not exist. The Respondent contends that these logs are only kept for a thirty day period and then destroyed. Logs covering the period for April 14, 1985 through April 30, 1985 have been retained only because the Respondent's Counsel requested them at the beginning of the hearing. The Respondent also argues that the other documents sought are useless without the corresponding logs. The Respondent asks that the Order be modified to require it to provide the data requested only for the two week period for which it possesses the logs.

Contrary to the Respondent's argument, the record indicates that the logs are maintained at Border Patrol sector headquarters in El Paso, Texas in a file folder for each fiscal year for each particular Border Patrol station. The Authority has addressed the availability of records in the past and has held that it is not an unfair labor practice to fail to produce documents that do not exist. Army and Air Force Exchange Service (AAFES), Lowry Air Force Base Exchange, Ft. Carson, Colorado, 13 FLRA 392 (1983). Consequently, while AFGE is entitled to the requested data in the possession of the Respondent for the period in question, the Respondent cannot be held accountable for that data it no longer possesses. In the Authority's view, the availability of the data involved can best be determined during the compliance stage of this proceeding. We shall therefore modify the Order to require the Respondent to supply whatever of the requested data it has in its possession. During the compliance stage of this proceeding, the General Counsel will determine what data is in fact available.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol shall:

1. Cease and desist from:

(a) Failing and refusing to furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of its employees, the available data requested in a letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of its employees, the available data requested in a letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

(b) Post at its Dallas, Texas and Lordsburg, New Mexico facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Immigration and Naturalization

Service, Southern Regional Office, Dallas, Texas, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where Notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 15, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 31)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of our employees, the available data requested in a letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of our employees, the available data requested in a letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

____
(Activity)

Dated:____________________ By:________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

(23 FLRA No. 31)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF JUSTICE, UNITED STATES
IMMIGRATION AND NATURALIZATION
SERVICE, UNITED STATES BORDER PATROL

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL BORDER
PATROL COUNCIL

Charging Party

Case No. 6-CA-50383

Shirley A. Epperson, Esquire
For the Respondent

Christopher J. Ivits, Esquire
John M. Bates, Esquire
For the General Counsel

Mr. Robert J. Marren
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint alleged that since on or about March 14, 1985, the Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol (Respondent) has failed and refused to comply with the provisions of Section 7114(b)(4) of the Statute by refusing to furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Charging Party or Union) certain information relating to a possible grievance concerning alleged irregularities in the Respondent's use of administratively uncontrollable overtime (AUO) as such overtime pertains to bargaining unit members employed by the Respondent as Border Patrol Agents at Respondent's Lordsburg, New Mexico Border Patrol Station. It was further alleged that such conduct violated Sections 7116(a)(1), (5) and (8) of the Statute.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record, including exhibits, relevant evidence adduced at the hearing, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Duties of Bargaining Unit Members

With certain exceptions the union is the exclusive representative for all of Respondent's nonprofessional personnel assigned to Border Patrol Sectors. Included among these bargaining unit employees is a group of Border Patrol agents assigned to the Lordsburg, New Mexico Border Patrol Station.[1] The Station is responsible for patrolling distances up to 80 miles north and south of the Station, and 45 miles west of the Station (Tr. 21). Approximately one and one half hours of driving time is consumed when agents are assigned to work locations 80 miles north or south of the Station, and about 45 minutes of travel is involved if assigned to locations 45 miles west of the Station (Tr. 22-23).

Agent duties relate primarily to apprehending aliens who have entered the United States illegally. This objective is pursued through various work activities designed to accomplish the objective. Agents are assigned line watch (patrolling the border), city patrol (visiting local communities in the Lordsburg area of operations), farm and ranch check (visiting local farms and ranches), traffic observation (patrolling area highways and roads), and industry check (visiting lumber camps in the Lordsburg area) (Tr. 20-21).

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[1] It was established that since the beginning of fiscal year 1984 this group has included approximately 15 bargaining unit members. As of the date of the hearing there were 9 Lordsburg Border Patrol Agents assigned to work out of the Lordsburg Station (Tr. 19).

Agents report to the Lordsburg station prior to the commencement of their work shifts in order to check the Daily Assignment and Equipment Log to ascertain their duties (Tr. 21; G.C. Exh. No. 8). Assignments are generally posted three to four days in advance so that agents will know what they will be doing (Tr. 23). Work assignments are rotated. As a result each bargaining unit member is affected by any change in work practices (Tr. 23, 30). Agents spend time at the beginning and end of their shifts performing administrative duties (Tr. 21-22).

Agents Subject to Laws and Regulations Relating to AUO

Border Patrol Agents are subject to laws and regulations relating to AUO. These are reflected in the provisions of 5 U.S.C. § 5545(c)(2) and 5 C.F.R. § 550.151 - 550.154. Section 5545(c)(2) of Title 5 provides:

> (c) The head of an agency, with the approval of the Office of Personnel Management, may provide that --
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position.

Under the quoted provision and implementing regulations, AUO is earned by agents as a result of supervisory direction and/or by reason of an agent recognizing, without supervision, circumstances which require an agent to remain on duty (Tr. 24-25, 88).

Compensation for regular overtime work (as distinct from AUO), is payable in accordance with the provisions of 5 U.S.C. § 5542. The Comptroller General has ruled that time involved in travel between headquarters and Border Patrol check points, and in performing ministerial duties at headquarters, may qualify as authorized or approved regular overtime (as distinct from AUO), when it is duly authorized in advance and is scheduled to recur on successive days or after specified intervals, as distinguished from situations where schedules are made on a day-to-day or hour-to-hour basis, and where the amount of overtime varies with no discernible pattern (G.C. Exh. No. 3). This ruling held that it was improper to characterize such duly authorized or approved overtime as AUO, but that compensation for such directed overtime work should be paid in accordance with the provisions of 5 U.S.C. § 5542, and not 5 U.S.C. § 5545(c)(2).

Respondent Changes Practice Concerning AUO[2]

The record established that in the past, employees had been permitted to find justification for AUO during travel time spent in returning to the Lordsburg Station. Employees did this by endeavoring to locate illegal aliens while driving back to the Lordsburg Station at the end of a shift (Tr. 51). This sometimes involved seeking out violations on the highway, checking culverts for trails, and by using binoculars to observe criminal activity (Tr. 89-91). In such cases agents had been allowed to use their own discretion and then claim AUO to process illegal aliens apprehended.

The Respondent changed this practice by withdrawing the privilege of working AUO based upon criminal activity observed on return trips, or based on criminal activity arising outside of work areas specifically assigned (Tr. 51). Agents were told that AUO could only be based upon activity arising out of areas specifically assigned by the Respondent (Tr. 102). The Union received information that the change in practice outlined had continued for a three-year period (Tr. 35-36).

Respondent's administration of the AUO policy outlined led to a series of corrective actions initiated by Respondent to bring agents into compliance with Lordsburg Station operational directives governing the use of AUO (Tr. 27). Certain bargaining unit employees were of the opinion that administration of this AUO policy was not in accordance with law and regulations governing AUO, particularly with respect to Respondent's refusal to recognize agent discretion to claim AUO in appropriate cases. It was further contended that employees receiving corrective actions might be adversely affected from a career standpoint. It was felt that such employees might unjustifiably be considered insubordinate or uncooperative (Tr. 28, 94-95).

Bargaining Unit Members Apprise Union of Perceived Irregularities in Administration of AUO

In February of 1985, a Lordsburg Border Patrol Agent complained to the Union that agents were being assigned AUO in violation of law (Tr. 23, 78, 93-94). This was followed up by the Union in discussions with other bargaining unit employees (Tr. 29, 78). Some employees felt that they were being improperly denied AUO in some instances, and that in others they were being improperly denied a higher rate of pay associated with directed overtime work (Tr. 28-29). A portion of the dissatisfaction expressed stemmed from the belief that the Respondent was not complying with the cited Comptroller General decision with respect to the assignment of AUO for overtime specifically authorized in advance, and scheduled to recur on successive days, or after specified intervals (Tr. 24, 31, 56-57; G.C. Exh. No. 3).

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[2] The complaint does not base any element of the unfair labor practice alleged upon a unilateral change in the terms and conditions of employment.

On the basis of the foregoing, the Union envisioned the possibility of Respondent authorizing or permitting the abuse of AUO in situations wherein AUO was claimed for travel and administrative work specifically approved in advance, and scheduled to recur on successive days (Tr. 44-45, 46-49, 67-68, 78-79, 87-88). It was also felt that Respondent might be improperly denying AUO in situations involving otherwise appropriate AUO work generated during the course of an agent's return to the Lordsburg Station (Tr. 50-52, 58-59, 68-69). The Union determined that proof relating to the abuse of AUO, if available, could be used as the basis for a possible grievance alleging failure on the part of the Respondent to pay bargaining unit employees proper amounts for regular directed overtime work in accordance with the provisions of law, regulation, decisions of the Comptroller General, and the collective bargaining agreement (Tr. 31-32).[3] It was also felt that there might be a basis for the filing of a grievance based on the issuance of corrective actions without legal justification. The Union also saw the possibility of bringing about discontinuance of certain practices, and the possibility of backpay awards (Tr. 76-77).

The Union sought the proof needed to establish a grievance or grievances of the type outlined by submitting a request for information to the Respondent on March 5, 1985 (G.C. Exh. No. 5). The request, in the form of a letter to the Associate Regional Commissioner, Management, Immigration and Naturalization Service, Dallas, Texas, identified specific Lordsburg Station records for fiscal year 1984, and continuing to the date of the request, a period of approximately 18 months.[4] Records identified included unsanitized copies of:

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[3] Article 27 of the agreement relates to overtime other than AUO, and Article 4, § B of the agreement makes it clear that the parties intended that "existing or future laws and the regulations of appropriate authorities" would be applicable in the administration of all matters covered by the agreement (G.C. Exh. No. 4).

[4] The Union was advised that illegal practices had continued over a three-year period. However, it was felt that records for an eighteen-month period would provide an adequate basis for either substantiating or disproving employee claims. It was also concluded that the lesser period would facilitate resolution of the issue presented to the Union by bargaining unit employees (Tr. 35-36).

1. Form I-213's (Record of Deportable Alien)
2. Form I-50's (Border Patrol Activity and Time Report)
3. Daily Assignment and Equipment Logs
4. Memoranda submitted by Lordsburg personnel in response to "AUO and shift assignments."

The information was described as being necessary to "adequately represent bargaining unit employees from the Lordsburg Border Patrol Station concerning AUO and Shift assignment [sic] . . . ." The request referenced the definition of "grievance" set out in Section 7103(a)(9) of the Statute, and the duty of an agency to furnish information described in Section 7114(b)(4) of the Statute. It was further noted that the information was needed to permit the Union to "properly research this matter."

The record established that although the request was not specifically limited to documents pertaining to work activity of employee members of the bargaining unit, the Respondent understood from prior practice that such requests related only to documents pertaining to bargaining unit members, and that in this instance such a limited request was being made (Tr. 37-38). This factual showing was not contradicted by the Respondent. It is therefore determined that the Union and Respondent understood the request to be inapplicable to documents relating to the work activity of employees who were not members of the bargaining unit.

By memoranda dated March 14, 1985, the Respondent denied the request on the ground that the subject matter involved was not negotiable, that no change in procedures was being proposed by the Respondent, that there was no expectation of bargaining, and lastly that "the material requested does not appear to be relevant or necessary for any authorized representational duty." (G.C. Exh. No. 9).

The Union replied on or about March 21, 1985, and explained that the material was needed to research complaints made by personnel at the Lordsburg Station (G.C. Exh. No. 10). Again, the statutory definition of "grievance" was referenced, and the earlier March 5th request was resubmitted in its entirety with the clarification.

The record disclosed the following facts concerning the data requested:

1. Form I-213's (Record of Deportable Alien). This form provides details relating to the apprehension of deportable aliens, such as location of apprehension, date and hour of apprehension, identity of Border Patrol Agent involved, and a narrative discussion of the event (G.C. Exh. No. 6; Tr. 38, 62-63).

2. Form I-50's (Border Patrol Activity and Time Report). This form reflects hours worked by Border Patrol Agents; duties performed during the hours worked; AUO credited and the specific hours associated with AUO; and the duties performed during AUO (G.C. Exh. No. 7; Tr. 38-39, 62).

3. Daily Assignment and Equipment Logs - These documents reflect assigned duties and areas wherein duties were scheduled to be performed, together with the hours of duty which specific employees were assigned to work (G.C. Exh. No. 8; Tr. 39-40, 62).

4. Memoranda submitted by Lordsburg personnel in response to "AUO and shift assignments." G.C. Exh. No. 11, an exhibit introduced to illustrate data in this category, reflects details of an agent's response to Respondent's refusal to allow AUO because of Respondent's policy relating to AUO.[5] Such documents would necessarily serve to expose available details of information relating to the Respondent's implementation of AUO policy.

The record revealed that the Union would have been able to reconstruct any irregularities in the payment of regular overtime, and/or the administration of AUO under existing law, by examining and correlating information reflected in the documents described (Tr. 62-63, 65-67).

The record also included an uncontradicted showing that the information sought was normally maintained by the Respondent in the regular course of business; that it was reasonably available; that production would not be unduly burdensome (Tr. 70-74); and that the data sought did not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. Post-hearing argument of counsel concerning the burdensome nature of the request was not supported by the evidence pertaining to this factual issue. Respondent's counsel also argued in her post-hearing brief that Daily Assignment and Equipment Logs were maintained for a 30-day period only. However, the record did not establish that the logs sought herein were not in fact, entirely or in part, available.[6]

Discussion and Conclusions

Section 7114(b)(4) of the Statute provides in pertinent part:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation --

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[5] Respondent's Argument to the contrary notwithstanding, this document was not introduced to establish a basis or support for a specific grievance, but merely to illustrate the nature of documents in this category.

[6] Evidence concerning these elements would ordinarily fall within the purview of Respondent's special knowledge relating to the data sought.

. . . .

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . ."

Section 7114(b)(4) language mandating production of data reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining includes data necessary to enable a union to fulfill representational responsibilities relating to the effective evaluation and processing of grievances. U.S. Equal Employment Opportunity Commission, Washington, D.C., 20 FLRA 357 (1985); U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251, 253 (1982); Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982).

In a recent decision, Farmers Home Administration, Finance Office, St. Louis, Missouri, 19 FLRA 195 (1985), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir. August 6, 1985), the Authority, relying on its prior decision in Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA No. 92 (1985), petition for review filed sub. nom. American Federation of Government Employees, Local 1345 v. FLRA, No. 85-1378 (D.C. Cir. June 21, 1985)(hereinafter AAFES), held that the disclosure of data sought pursuant to Section 7114(b)(4) requires a case by case determination as to whether the data has been requested, whether it is normally maintained, whether it is reasonably available, whether it is necessary to enable the exclusive representative to fulfill its representational obligations, and also a determination that disclosure of the data sought would not be prohibited by law, including the Privacy Act.[7]

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[7] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (codified as amended at 5 U.S.C. § 552a (1982)).

In this case the record shows that the data sought was requested by the Union, that it was sought specifically for the purpose of researching bargaining unit employee complaints concerning possible grievances outlined herein, that the request was refused by the Respondent, that the data was normally maintained by the Respondent, that the data was reasonably available, and that it did not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

The record also reflected that the data was necessary for the purpose of evaluating possible bargaining unit employee grievances relating to alleged failure on the part of the Respondent to pay employees for directed overtime work and relating to alleged improper denial of AUO associated with duties performed by bargaining unit employees. Such data was also necessary for the purpose of determining whether a basis existed for grieving certain corrective actions initiated by the Respondent against bargaining unit employees for the purpose of implementing AUO policy and procedures.[8]

Denial of access to the data effectively precluded the evaluation of possible grievances based upon the theories outlined, as it clearly appeared that only through a perusal and analysis of the documents requested would the Union be in a position to determine whether a basis for alleged irregularities existed in fact.

In large measure Respondent's defenses relate to issues more appropriately interposed during the course of any grievances filed, and do not, for the most part, relate to the fundamental issue of whether or not the data sought is subject to the provisions of Section 7114(b)(4). Respondent argues at length that no evidentiary basis exists to support a grievance, even though the entire purpose of the request was designed to aid the Union effort to determine whether an evidentiary basis for grievances could be developed. That is, Respondent appears to argue that there is little or no chance of the Union filing a successful grievance; that it is unlikely that helpful evidence would be uncovered; or that Respondent's position on factual and legal issues would be sustained in the event grievances were filed. In the context of the circumstances presented in this case, all of these unsupported contentions were speculative in nature, and did not provide a basis for concluding that the documents were not necessary.

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[8] Respondent argues that AUO is not addressed in the collective bargaining agreement and that as a result would not be a grievable matter under the terms of the grievance procedure set out in the collective bargaining agreement. However, this defense was not established with respect to each of the theories advanced by the Union as possible grounds for a grievance. Moreover, it is noted that the term "grievance" is broadly defined in Section 7103(a)(9) of the Statute as: "any complaint-- (A) by any employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by any employee, labor organization, or agency concerning-- (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment . . . ."

Without passing upon the Union's grievance theories, it is sufficient to note that the Union has at least an arguable basis for examining the data on behalf of bargaining unit employees. The demand is not frivolous in nature, and the documents sought are needed to evaluate complaints in the light of existing law and regulations pertaining to directed overtime and AUO. It is not necessary that the Union establish that a grievance will be successfully presented, or that the data sought will produce evidence to establish a grievance. It is sufficient if the record establishes that examination of data is necessary in order to intelligently evaluate the possibility of initiating a viable grievance. On the basis of the factual picture presented it is conceivable that data requested will establish the viability of one or more of the grievance theories advanced by the Union.

As noted the record must reflect a determination that disclosure of the data sought would not be prohibited by law, including the Privacy Act.[9] The record herein does not reflect any indication that disclosure would be prohibited by law.

Arguably the provisions of the Privacy Act would be relevant here unless one of the specific Privacy Act exceptions is applicable. The only possible exception applicable in this case is the one set forth in 5 U.S.C. § 552a(b)(2). This exception permits disclosure of Privacy Act - protected information to the extent such information is "required" to be released under the Freedom of Information Act (FOIA).[10] The FOIA provides that all records must be disclosed upon request unless subject to a specific FOIA exemption.[11] Under exemption 5 U.S.C. § 552(b)(6) of the FOIA, an agency is allowed to withhold personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy. In such cases, the Federal courts and the Authority apply a balancing test to be determined whether disclosure would result in a clearly unwarranted invasion of Privacy.[12]

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[9] Respondent's counsel notes in her post-hearing brief that the documents would have to be reviewed to determine whether disclosure would be prohibited by the Privacy Act; but there is no contention that disclosure in this case would violate the Privacy Act, nor was there any showing that disclosure in this case would generate such a result.

[10] Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (1982)).

[11] 5 U.S.C. § 552(a)-(b) (1982).

Applying the test outlined it is determined that it is necessary for the Union to know whether or not the Respondent's AUO policies are being implemented in a manner which contravenes existing statutes and regulations. This knowledge is needed in order to process employee complaints relating to the matter. The Union would not be in a position to apprise bargaining unit members of their rights concerning the issues posed without pursuing the inquiry suggested by the information request submitted to the Respondent. The data is necessary for the purpose of enabling the Union to determine whether a grievance or grievances should be filed on behalf of bargaining unit employees.

The record developed reflects that the information sought would be relatively innocuous. In view of the Union's need for the data to pursue its representational duties, compared to the limited intrusion, if any, on the privacy of the employees involved, it is determined that disclosure of the data would not result in a clearly unwarranted invasion of such employees' privacy.

On the basis of the foregoing it is determined that the Respondent violated Sections 7116 (a)(1), (5) and (8) of the Statute by failing to furnish the Union with data described in the Union's March 5, 1985, request for information. Having found that the Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to Section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of its employees, data requested in letter dated

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[12] See Farmers Home Administration, Finance Office, St. Louis, Missouri, supra; and U.S. Equal Employment Opportunity Commission, Washington, D.C., supra, and relevant authorities cited therein.

March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of its employees, data requested in letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, By Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

(b) Post at its Dallas, Texas and Lordsburg, New Mexico facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where Notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: January 28, 1986
Washington, D.C.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of our employees, the data requested in letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice President, National Border Patrol Council, for the purpose of enabling the National Border Patrol Council to perform representational duties relating to the evaluation and processing of grievances.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish to the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of our employees, the data requested in letter dated March 5, 1985, addressed to the Associate Regional Commissioner for Management, Immigration and Naturalization Service, Southern Regional Office, Dallas, Texas, by Robert J. Marren, Vice-President, National Border Patrol Council.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARE ISLAND NAVAL SHIPYARD

Activity

and

Case No. 0-AR-1105

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 11, AFL-CIO-CLC

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Thomas Angelo filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

In his initial award the Arbitrator ruled that the grievant's performance had been improperly rated as "marginal" under critical elements 3, 5, and 7 in her annual performance appraisal. As a remedy the Arbitrator voided the appraisal and ordered the grievant's performance under those elements reevaluated. In particular, he ordered her performance under elements 3 and 5 reevaluated because he determined that the rating was based only on events during two months of the twelve-month appraisal period and did not properly consider her performance under another supervisor earlier in the appraisal period. The Arbitrator also retained jurisdiction to resolve any disputes regarding the remedy. According to the Activity, in reevaluating the grievant's performance under the three elements, both of her supervisors for the period met and reconsidered her performance for the entire appraisal period after which it was determined that her performance under elements 3 and 5 was "marginal;" that her performance under element 7 was "satisfactory;" and that her overall rating was "marginal." Subsequently, pursuant to his retained jurisdiction, the Arbitrator "refine[d]" his initial award. In his "refinemen[t]" he determined that the "marginal" ratings on reevaluation under elements 3 and 5 were not "sufficient[ly] support[ed]" or "justifi[ed]." On this basis he directed that the grievant's performance be rated "satisfactory" under elements 3 and 5 and that the grievant's overall rating be reevaluated accordingly.

III. EXCEPTION

The Agency contends that the Arbitrator's refinement of his award to direct that the grievant's performance under the two disputed elements be reevaluated as satisfactory is contrary to section 7106(a)(2)(A) and (B) of the Statute. The Agency argues that by directing that the grievant be rated satisfactory, the Arbitrator improperly conducted an independent evaluation of the grievant's performance and improperly substituted his judgment for that of management as to what the grievant's evaluation and rating should be.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency. The Authority in a number of recent decisions has discussed in detail the role of an arbitrator in resolving disputes pertaining to performance appraisal matters. See, for example, Veterans Administration Hospital, Bath, New York and American Federation of Government Employees, Local 491, 22 FLRA No. 103 (1986). The Authority has found that an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his or her performance appraisal by management's application of the established performance standards. An arbitrator may sustain the grievance on finding that management applied the standards in violation of law, regulation or an appropriate provision of the parties' collective bargaining agreement. In sustaining the grievance, the arbitrator as a remedy may direct that the grievant's work product be properly evaluated by management or, where appropriate, that the grievant's work product as appraised by management be granted the rating to which entitled under the established elements and standards. The Authority, however, has cautioned that the arbitrator may not conduct an independent evaluation of an employee's performance under the elements and standards established by management and may not substitute his or her own judgment for that of management as to what that employee's evaluation and rating should be.

In this case we find that the award is deficient by directing that the grievant's performance be rated "satisfactory" under elements 3 and 5 and that the grievant's overall rating be reevaluated accordingly. In directing these ratings the Arbitrator has not merely and appropriately granted the grievant's work product as appraised by management the rating to which entitled under the established standards. Instead, the Arbitrator rejected as not sufficiently supported or justified management's reevaluation of the grievant's performance and directed that her performance be evaluated as "satisfactory." The Arbitrator independently evaluated the grievant's performance and substituted his judgment for that of management as to what the grievant's performance evaluation and rating under the established standards of elements 3 and 5 should have been. Consequently, the award, as refined, is contrary to section 7106(a)(2)(A) and (B) of the Statute. *See General Services Administration, Region 10 and American Federation of Government Employees, Council 236*, 22 FLRA No. 8 (1986); *Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760*, 21 FLRA No. 86 (1986).

V. DECISION

Accordingly, the award, as refined, is set aside.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 33

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WYOMING AIR NATIONAL GUARD
(WANG)

Agency

and

Case No. 0-AR-1117

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (NAGE), LOCAL NO. 14-76

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator James A. Evenson filed on behalf of the Agency by the Departments of the Army and the Air Force, National Guard Bureau under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.*/

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case arose when prior to the expiration of the parties' collective bargaining agreement the Agency notified the Union that on expiration of the agreement, it was electing no longer to be bound by the practice embodied in Article XXIX, Section 1 of the agreement relating to the wearing of the military uniform by civilian technicians. The Agency also notified the Union that beginning on a specified date, which constituted the Agency's determination as to when the agreement expired, civilian technicians would be required in accordance with agency regulation to wear the military uniform while performing technician duties. Article XXIX, Section 1 of the agreement provided that technicians had the option while performing their technician duties of wearing either the appropriate military uniform or "standard civilian attire . . . . approved by the Adjutant General." A grievance was filed and submitted to arbitration essentially disputing that the agreement expired on the date specified by the Agency.

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*/ In its opposition the Union contends that the National Guard Bureau lacks standing to file an exception to the award because the Bureau was not a party to the arbitration. However, the Authority finds that the exception was properly filed by the Bureau on behalf of the Wyoming Air National Guard. See U.S. Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 1917, 20 FLRA No. 41 (1985).

In resolving the grievance the Arbitrator noted that consistent with the decisions of the Authority, the parties agreed that the requirement that civilian technicians wear the military uniform is a permissive subject of bargaining under section 7106(b)(1) of the Statute and that on expiration of the parties' collective bargaining agreement, the Agency at that time could require the wearing of the military uniform. In agreement with the Union, however, he determined that the agreement had not expired on the date specified by the Agency and that the Agency had violated the agreement by requiring the wearing of the military uniform beginning on that date. Accordingly, as his award, the Arbitrator sustained the grievance and ordered the Agency to comply with the terms of the collective bargaining agreement until the agreement expired.

III. EXCEPTION

The Agency contends that the award is contrary to section 7106(a)(1) of the Statute. Specifically, the Agency argues that the wearing of the military uniform by civilian technicians while performing technician duties is necessary to carry out the mission of the Agency and for purposes of internal security. Although the Agency concedes that the decisions of the Authority have only found the uniform-wearing requirement to be a permissive subject of bargaining, the Agency maintains that it has the right under section 7106(a)(1) to require the wearing of the military uniform as part of its internal security practices. In support of this position, the Agency states that since airplanes of the Puerto Rico National Guard have been destroyed, the wearing of the military uniform by all civilian technicians is a reasonable security practice and precaution. Accordingly, the Agency concludes that the award is deficient by enforcing the provision of the agreement which grants civilian technicians the option of wearing standard civilian attire.

IV. ANALYSIS AND CONCLUSIONS

As recognized by the parties and by the Arbitrator, all decisions of the Authority after its decision and order on remand in Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA 288 (1984), aff'd sub nom. New York Council, Association of Civilian Technicians v. FLRA, 757 F.2d 502 (2d Cir.), cert. denied, 106 S. Ct. 137 (1985), addressing the bargaining obligation with respect to the requirement of civilian technicians to wear the military uniform have decided that the requirement constitutes a method and means of performing work within the meaning of section 7106(b)(1) of the Statute and consequently is a permissive subject of bargaining. Although the Authority has been presented with the issue of whether the uniform-wearing requirement constituted a matter of internal security, the Authority determined that it was not necessary to decide the issue. Adjutant General, State of Ohio, Ohio Air National Guard, Worthington, Ohio, 21 FLRA No. 124 (1986).

In order to resolve the Agency's exception in this case, it is necessary to determine whether the Arbitrator's award interferes with management's right to determine its internal security practices. We find solely in the circumstances of this case that the Agency fails to establish that the Arbitrator's award is contrary to section 7106(a)(1) of the Statute. As noted, the Arbitrator's award merely permits, until the expiration of the agreement (which may already have occurred), civilian technicians of the Wyoming Air National Guard the option of wearing standard civilian attire that has been approved by the Adjutant General. The Agency in its exception and supporting arguments fails to demonstrate in what manner this award prevents the Agency from protecting its property from loss, destruction, or disclosure. See National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983, 985-87 (1982), remanded as to other matters sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 82-2225 (D.C. Cir. Jan. 19, 1984). Likewise, the Agency fails to demonstrate in what manner the award interferes with management's right to determine the mission of the Agency. Thus, no basis is provided for finding the award deficient.

V. DECISION

Accordingly, the Agency's exception is denied.

Issued, Washington, D.C., August 18, 1986.

L Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 27]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. 0-AR-583
(21 FLRA No. 27)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of March 27, 1986, modifying the Arbitrator's award in the case.[1] The Union filed an opposition to the Agency's request.[2]

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[1] The Agency also filed a request for a stay of the Authority's decision, a request for oral argument, and a request that this case be consolidated with *General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236*, 21 FLRA No. 24 (1986), in which the Agency is seeking reconsideration of the Authority's decision of March 25, 1986. The Agency's request for reconsideration in 21 FLRA No. 24 has been dismissed as untimely filed. Therefore, its request for consolidation is dismissed as moot.

[2] In its opposition, the Union contends, among other things, that the Agency's request is untimely. However, the Authority has determined that under sections 2429.17, 2429.21 and 2429.22 of the Authority's Rules and Regulations, the Agency's request is timely.

The Arbitrator's award in this case predated the U.S. Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) (BATF). The Arbitrator concluded that the "Employer is required to pay travel and per diem for labor relations activities as set forth in the parties' agreement." Award at 21. This conclusion was based on the Arbitrator's finding that the Agency's contractual obligation was "identical to its statutory obligation." Award at 20.

The Agency filed exceptions to the award, and we denied those exceptions in 21 FLRA No. 27 (1986). We modified the Arbitrator's award only to specifically provide that the Agency could determine the propriety of individual requests for payment under applicable provisions of the Federal Travel Regulations.

In its request for reconsideration, the Agency argues that the Authority (1) disregarded the findings and conclusions of the Arbitrator, as described by the Agency; (2) disregarded the issues raised by the Agency in its exceptions; and (3) misinterpreted the parties' collective bargaining agreement, the Travel Expense Act and its implementing regulations, the Statute, and the BATF decision.

Section 2429.17 of the Authority's Rules and Regulations provides that a party requesting reconsideration of an Authority decision must establish "extraordinary circumstances" for doing so. In this case, we conclude that the Agency has not established any extraordinary circumstances for its request. Accordingly, we will deny the request.

We fully discussed the Agency's exceptions in our original decision. In addition, as evidenced by our modification of the Arbitrator's award, we fully considered applicable laws and regulations, including the Travel Expense Act and its implementing regulations. The Agency's assertions concerning these matters provide no basis for reconsideration.

As for the findings and conclusions of the Arbitrator, the Agency maintains that "the agreement GSA entered into was contingent upon whether GSA was obligated to pay these expenses under the Statute." Request for Reconsideration at 8 (Emphasis in original). An examination of the arbitration award in dispute reveals that this is precisely the position the Agency took before the Arbitrator. Award at 13-17. The Arbitrator found not only that the Agency was *statutorily obligated* to pay travel and per diem expenses, the Arbitrator also found that the Agency was *contractually obligated* to pay travel and per diem expenses. In fact, as noted above, the Arbitrator found that the Agency's "contractual obligation is identical to its statutory obligation." Award at 20. The Arbitrator expressly rejected the Agency's arguments that it was not obligated to pay these expenses.

As we concluded in our original decision in this case, the Arbitrator's award of travel and per diem expenses in this case, as modified, is not inconsistent with law or regulation. Our decision in this case is consistent with our approach in unfair labor practice cases where the parties' dispute concerns their intent in executing agreements providing for the payment of travel and per diem expenses. *See Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina*, 22 FLRA No. 28 (1986).

There is a contractual basis for the Arbitrator's award in this case, and the award is not inconsistent with law or regulation. We will not, therefore, reconsider our decision or further modify the award.

Accordingly, the Agency's request for reconsideration is denied.[3]

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] The Agency's requests for oral argument and for a stay of the Authority's decision are likewise denied.

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 22 FLRA No. 16]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

Case No. 0-AR-1077
(22 FLRA No. 16)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of June 13, 1986, modifying the Arbitrator's award in the case.*/

In resolving the grievances at arbitration, the Arbitrator determined that by denying official time and travel and per diem expenses for union officials for representational purposes, the Agency violated the parties' collective bargaining agreement. As his award, the Arbitrator sustained the individual grievances and awarded reimbursement for the wrongfully denied official time as well as travel and per diem expenses. In its exceptions to the award, the Agency contended, among other things, that the award violated law by ordering payment of compensation to those grievants who had 100 per cent of their duty time approved for Union representational activities. The Authority held that the Agency had failed to establish that the awards of compensation for time spent performing representational activities on nonduty time which the Arbitrator ruled should have been performed on official time were contrary to law and consequently denied the Agency's exception. In its request for reconsideration, the Agency essentially argues that the portion of the Arbitrator's award which directs payment to union official Reiter, who had 100 per cent of her duty time approved for representational activities, is illegal.

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*/ The Agency also filed a request for a stay of the Authority's decision and a motion that the Authority submit to the Comptroller General a question concerning the legality of paying union official Reiter, who had 100 per cent of her duty time approved for representational activities, for work performed outside her basic workweek. However, the Agency's requests are not warranted and are denied.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Agency's request for reconsideration is denied.

Issued, Washington, D.C., August 15, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 54]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
REGION 8

Activity

and

Case No. 0-AR-927
(21 FLRA No. 54)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 236

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of April 22, 1986, denying the Agency's exceptions.1/ The Union filed an opposition to the Agency's request.2/

1/ The Agency also filed a request for a stay of the Authority's decision and a request for oral argument. However, oral argument is not warranted and no basis is provided for a stay of the Authority's decision. The Agency further requests that this matter be consolidated with its requests for reconsideration of the Authority's decisions in General Services Administration and American Federation of Government Employees, Council 236, 21 FLRA No. 24 (1986), and General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236, 21 FLRA No. 27 (1986). However, the Agency's request for reconsideration in 21 FLRA No. 24 has been dismissed as untimely filed and consolidation of this matter with the request for reconsideration in 21 FLRA No. 27 is not warranted. Accordingly, these requests are denied.

2/ In its opposition, the Union contends, among other things, that the Agency's request is untimely. However, the Authority has determined that under sections 2429.17, 2429.21 and 2429.22 of the Authority's Rules and Regulations, the Agency's request is timely.

In his award, the Arbitrator determined that the parties had negotiated and agreed upon the payment of travel and per diem expenses for union representatives engaged in representational activities. Accordingly, the Arbitrator directed that the union representative be reimbursed for her reasonable and necessary travel and per diem expenses for the representational functions involved upon submission of an expense report. In its exceptions to the award, the Agency argued that the award was contrary to section 7131(a) and (d) of the Statute and the Travel Expense Act, 5 U.S.C. § 5701, and failed to draw its essence from the collective bargaining agreement. The Authority rejected the Agency's arguments and concluded that the award was not deficient as alleged. In its request for reconsideration, the Agency essentially argues that the Authority misinterpreted the parties' collective bargaining agreement, the Statute, and the Travel Expense Act and disregarded the issues raised by the Agency in its exceptions.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Agency's request for reconsideration is denied.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Union

and

Case No. O-NG-1116
(22 FLRA No. 51)

DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE

Agency

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority on a request filed by the Union seeking reconsideration of the Authority's decision of July 10, 1986.

We found that the Union's proposal, which was intended to provide its negotiators travel and per diem expenses, was similar to one found negotiable in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986). For the following reason, however, we held that it was outside the duty to bargain. Under the Agency's interpretation of the proposal, it was not a demand to negotiate the Agency's determination of whether the payment of travel and per diem was in the "primary interest" of the Government, the determination required by the Comptroller General in 46 Comp. Gen. 21 (1966). The Agency's interpretation was uncontroverted. The Union did not make use of the opportunities afforded parties in accordance with the Authority's Rules and Regulations to develop a record in support of its position. First, it did not state that the proposal was intended as a demand to negotiate the Agency's determination of whether the payment of travel and per diem was in the primary interest of the Government. Second, it specifically waived its right to file a response to the Agency's contentions. In its request for reconsideration the Union states, in essence, that it did not rebut the Agency's interpretation because the intent of its proposal was apparent on its face.

Section 2429.17 of the Authority's Rules and Regulations provides that a party which can establish "extraordinary circumstances" may request reconsideration of an Authority decision. In this case, however, the Union has not established "extraordinary circumstances" within the meaning of the Authority's regulation. The Authority has consistently held that the parties bear the burden for creating a record upon which the Authority can make its decision. *See, for example, National Federation of Federal Employees, Local 17 and U.S. Army Corps of Engineers, Portland District,* 19 FLRA No. 18 (1985). When an agency makes a contention as to the meaning of a disputed bargaining proposal, the union acts at its own peril if it assumes that the Authority will find the contention meritless on its face. Such an assumption is inconsistent with the statutory appeal process as set forth in 5 U.S.C. § 7117(c) and Subpart A of Part 2424 of the Authority's Rules and Regulations by which the union is given a fair opportunity to rebut the agency's contentions.

Consequently, the Authority concludes that the Union has failed to establish the existence of extraordinary circumstances. Accordingly, IT IS ORDERED that the Union's request for reconsideration be, and it hereby is, denied.

Issued, Washington, D.C., August 15, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 21 FLRA No. 51]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-994
(21 FLRA No. 51)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of April 21, 1986, modifying the Arbitrator's award.[1] The Union filed an opposition to the Agency's request.[2]

In his award, the Arbitrator determined that the parties had negotiated and agreed upon the payment of the travel and per diem expenses of union negotiators and, by its failure to do so, the Agency had violated the parties' collective bargaining agreement. Accordingly, the Arbitrator ordered the Agency to reimburse union negotiators for travel and per diem expenses incurred retroactive to the date the Agency ceased making such payments. In its exceptions to the award the Agency contended that the award was incomplete, failed to draw its essence from the collective bargaining agreement, based on a nonfact and violated law. Specifically, the Agency contended that the award was contrary to section 7131(a) and (d) of the Statute and the Travel Expense Act, 5 U.S.C. § 5701.

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[1] The Agency also requested a stay of the Authority's decision.

[2] In its opposition, the Union contends that the Agency's request was untimely filed. However, the Authority has determined that under sections 2429.17 and 2429.22 of the Authority's Rules and Regulations, the Agency's request was timely filed.

The Authority rejected the Agency's arguments, but modified that portion of the award directing the reimbursement of travel and per diem expenses to ensure consistency with the applicable requirements of the Federal Travel Regulations, 41 CFR part 101-7. In its request for reconsideration the Agency essentially argues that the Authority erred in its interpretation of the Travel Expense Act and the Federal Travel Regulations as well as the decision of the United States Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983).

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the Agency's request for reconsideration does not raise any arguments not previously considered and correctly decided by the Authority. The arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter. See General Services Administration and American Federation of Government Employees, AFL-CIO, Council 236, 21 FLRA No. 27 (1986), request for reconsideration denied, Aug. 15, 1986 and General Services Administration, Region 8 and American Federation of Government Employees, AFL-CIO, Council 236, 21 FLRA No. 54 (1986), request for reconsideration denied, Aug. 15, 1986.

Accordingly, the Agency's request for reconsideration is denied.[3/]

Issued, Washington, D.C., August 18, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ The Agency's request for a stay is likewise denied.

9/case 390

Federal Labor Relations Authority

Washington, D.C. 20424

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NUMBER 390 REPORT OF CASE DECISIONS September 9, 1986

UNFAIR LABOR PRACTICE CASES

23 FLRA No. 37 (August 19, 1986)

Veterans Administration, West Los Angeles Medical Center Los Angeles, California, Case Nos. 8-CA-40223 and 8-CA-40224

23 FLRA No. 38 (August 19, 1986)

U.S. Department of Health and Human Services, Social Security Administration, Field Operations, New York Region, Case No, 2-CA-40376

NEGOTIABILITY CASES

23 FLRA No. 34 (August 19, 1986)

National Association of Government Employees, Local R1-25 and Veterans Administration Medical Center, Brockton, Massachusetts, Case No. 0-NG-1120

23 FLRA No. 36 (August 19, 1986)

National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, Case No. 0-NG-1228

ARBITRATION CASE

23 FLRA No. 35 (August 19, 1986)

Warner Robins Air Logistics Center Warner Robins, Georgia and American Federation of Government Employees, Local 987 (Williams, Arbitrator), Case No. 0-AR-1068

3.F 31/21-3:

Federal Labor Relations Authority

23 FLRA No. 34

NAGE, Local R1-25 and VA Medical Center, Brockton, Mass., Case No. 0-NG-1120
(Decided August 19, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Compensation
    "Left-Over" Coffee for Employee Consumption
      Does Not Amount to "Seeking Compensation"
    Subsidization of Food for Employees
      5 U.S.C. § 5536
        Not Interpreted as Absolute Prohibition
  Conditions of Employment
    "Left-Over" Coffee for Employee Consumption
      No Relationship Between Matter and Working Conditions
  Conditions for Review
    Proposal Conflicts with 5 U.S.C. § 5536
      Matter Does Not Amount to "Seeking Compensation"
42 Comp. Gen. 149 (1962)
53 Comp. Gen. 71 (1973)

STATUTE

7105(a)(2)(E)

DIGEST NOTES

A proposal that the agency reverse its decision to discontinue a practice of making left-over coffee, which had been provided for consumption by patients, available to employees does not concern the working conditions of unit employees and is not within the duty to bargain. The union provided no specific information as to how the disposal of the coffee is related to the work situation of employees or the employment relationship. There were no details as to whether the consumption of the coffee occurred when employees were on-duty or whether consumption was tied to their status as employees as opposed to being a privilege afforded to any member of the public present at the facility at the time the surplus coffee was available. Absent demonstration of a relationship between the matter proposed and working conditions, the Authority concluded that there was no basis for rejecting the agency's contention that the proposal does not concern conditions of employment.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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A proposal which is limited to addressing the disposition of brewed coffee which otherwise would be thrown away does not amount to seeking compensation which is prohibited by 5 U.S.C. § 5536. The agency contended that 5 U.S.C. § 5536, as interpreted by the Comptroller General, prohibits an agency from providing "free food" to employees while they are at their official duty station. The Authority found that the Comptroller General ruled that appropriated funds could not be used to reimburse an agency official for carry-out food he had purchased for employees who were unable to leave an office. The Comptroller General interpreted 5 U.S.C. § 5536 as prohibiting providing employees with compensation--that is, free food--over and above that which was allowed by law. The Authority, however, concluded that the issue in this case involved the use of surplus coffee which was procured for an authorized purpose--feeding patients--as opposed to involving an outlay of appropriated funds for the purpose of feeding employees. Therefore, the Comptroller General decision, cited by the agency, was not applicable in this case. The Authority noted that the Comptroller General has not interpreted 5 U.S.C. § 5536 as an absolute prohibition on agency subsidization of food for employees.

Federal Labor Relations Authority

23 FLRA No. 35

Warner Robbins Air Logistics Center, Warner Robins, Ga. and AFGE, Local 987 (Williams, Arbitrator), Case No. 0-AR-1068 (Decided August 19, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Arbitration
  Exceptions Asserted in Appeal — 7122(a)
    Award Contrary to 29 U.S.C. § 201 *et seq*.
  Overtime
    Representational Activity
      Employee Must Already Be In Overtime Status
Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.
5 CFR § 551.401(a) and 551.424(b)

DIGEST NOTES

The grievance concerns the scheduling of a grievance procedure meeting involving a separate dispute. The meeting was scheduled in advance for a specific day to commence at the beginning of the aggrieved employee's work shift. The union representative assigned to represent the employee was scheduled for the earlier shift on the day of the meeting. Consequently, he requested that the time of the meeting and the aggrieved employee's worked shift be changed to coincide with his work shift or that he be paid overtime for the time spent attending the meeting. The activity refused and the meeting was held with the union representative attending after his workday had ended. The union representative filed the grievance in this case on the issue of whether the refusal to reschedule the meeting violated the collective bargaining agreement and, if not, whether the union representative should have been paid overtime compensation for the time attending the meeting. The arbitrator determined that it was not unreasonable for the activity to maintain the meeting schedule to accommodate the assigned work shift of the aggrieved employee. He also noted that the meeting was scheduled after the regular workday of management representatives as well as union representatives. He determined that the union representative was not entitled to overtime compensation for the time attending the meeting and, accordingly, denied the grievance.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exception the union contended that the award was contrary to the Fair Labor Standards Act (FLSA), and 5 CFR part 551, subpart D. The union argued that the time spent by the union representative at the meeting constituted "hours of work" for purposes of entitlement to overtime compensation because the meeting was primarily for the benefit of the activity and was directed and controlled by the activity. The Authority concluded that the union failed to establish that the award denying entitlement to overtime compensation was contrary to the FLSA and implementing regulations. For the purposes of the FLSA, "hours of work" is defined as "all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency." Official time granted an employee by an agency to perform representational functions during the hours when the employee is otherwise in a duty status shall be considered hours of work. The key to whether time spent performing representational functions outside regular working hours is overtime work is that the employee representative must already have been in an overtime duty status at the direction of the agency at the time an event arises which calls for the performance of representational functions. The Authority, therefore found, in this case, that the union representative was not entitled to overtime compensation under FLSA. The activities of the grievant cannot be considered primarily for the benefit of the activity; his responsibilities during the grievance meeting were to represent the employee who had filed the grievance. Additionally, because the grievant was not already in an overtime duty status at the direction of the activity at the time of the grievance meeting, there was no entitlement to overtime compensation under 5 CFR § 551.424(b).

Federal Labor Relations Authority

23 FLRA No. 36

NTEU and Dep't of Treasury,
IRS, Case No. 0-NG-1228
(Decided August 19, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Negotiability	
Management Rights	7105(a)(2)(E)
Assign Work	7106(a)(2)(A) and (B)
Subjects of Bargaining - Mandatory	7106(b)(3)
Appropriate Arrangements	
Administrative Time to Review Job-Related Material	
Benefit Outweighs Burden on Management Rights	

DIGEST NOTES

A proposal which would require management to give employees who are returning to their regular jobs after a detail a reasonable amount of time to become familiar with job-related material issued while they were on detail, directly interferes with management's right to assign work under § 7106(a)(2)(B). The provision would require management to give priority to this aspect of employees' jobs over other assigned duties. In establishing such a priority among work assignments the provision required management to assign one type of work to employees to the exclusion of other duties which management may determine have a higher priority. The Authority further found, however, that the provision was within the duty to bargain, as an appropriate arrangement under § 7106(b)(3), because it did not excessively interfere with management's rights. The burden imposed by the provision on management's right to assign work, was found to be insubstantial compared to the benefit to employees--and, derivatively, to management--afforded by the provision.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 37

Federal Labor Relations Authority

VA, West Los Angeles Medical Center, Los Angeles, Calif. and AFGE, Local 1061, Case Nos. 8-CA-40223 and 8-CA-40224 (Decided August 19, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Dress Code
      - Duty Hours
- Discipline
  - Insubordination
    - Unlawful Rule Does Not Excuse Refusal to Follow Orders
- Remedy
  - MSPB Actions Do Not Prevent Authority from Remedying Violation
  - Rescind Change in Duty Hours
  - Rescind Disciplinary Actions Except Actions Re Insubordination
  - Rescind Dress Code
  - Status Quo Ante

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The Authority adopted the Judge's findings and conclusions that the activity violated § 7116(a)(1) and (5) by unilaterally changing the duty hours and dress code of certain employees without bargaining with the union. The activity filed exceptions to the Judge's status quo ante remedy with regard to the both the duty hours and the dress code. As to the remedy pertaining to duty hours, the Authority concluded that the decision to change starting and quitting times constitutes a negotiable condition of employment. Therefore, agency management was obligated to bargain concerning the decision to change duty hours, prior to making the change. Where management makes a unilateral change regarding a negotiable condition of employment, such as duty hours, effectuation of the purposes and policies of the Statute requires the imposition of status quo ante remedies, absent special circumstances, in order not to render meaningless the mutual obligation to negotiate concerning changes in conditions of employment. The fact that there had been a turnover in personnel in the area affected by the change did not alter the Authority's result.

The Authority concluded, consistent with the Judge's findings, that the activity violated § 7116(a)(1) and (5) when it unilaterally changed the employees' dress code. The Judge ordered that the change be rescinded. He further ordered, the rescission of any disciplinary actions initiated as a result of the dress code, including removal of all references to such disciplinary actions from the personnel files of employees involved. The Authority found, in reviewing the activity's exceptions to the Judge's remedy, that the discipline at issue was based in part on insubordination. While the activity's unilateral implementation of the dress code was unlawful, a refusal by an agency to negotiate in good faith does not excuse an employee's insubordination. Procedures exist to remedy breaches of bargaining obligations, and the union pursued them in this case. Self help -- that is, disobeying supervisory instructions -- cannot be condoned if the purposes and policies of the Statute are to be met. The Authority, therefore, modified the Judge's remedy and ordered the rescission of all disciplinary actions initiated as a result of the dress code, except for those actions involving insubordination.

The Authority held, with regard to possible remedial conflict between actions taken by the Merit Systems Protection Board (MSPB) and the Authority, that "when an issue is properly raised as an unfair labor practice under § 7116, nothing therein would prevent the Authority from remedying any violation found" despite the possible conflict with actions by the MSPB.

Federal Labor Relations Authority

23 FLRA No. 38

HHS, SSA, Field Operations, New York Region and AFGE, Local 2369, Case No. 2-CA-40376 (Decided August 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(a)(1) and (8)
Agency Violations	7118
Failure to Comply with FSLMR Statute § 7122(b)	7122(b)
Remedy	
Reconsider Disciplinary Action Absent Reliance on Prior Reprimand	
Remove Reference to Discipline From Employees Personnel File	

DIGEST NOTES

The Authority found, in agreement with the Judge, that the activity violated § 7116(a)(1) and (8) when it unlawfully failed to comply with an arbitration award. The grievance concerned the reprimand of an employee for improper conduct. While the award was pending, the activity proposed to and did suspend the grievant for a series of events that occurred subsequent to the initial reprimand. The suspension, characterized as "progressive discipline," was based in part on the reprimand. The arbitrator later found that the reprimand was not for just cause and ordered that the reprimand be expunged from the grievant's personnel file and that the reprimand "not be used against the grievant in any fashion." No exceptions were filed to the arbitrator's award. The Judge found that the activity violated § 7116(a)(1) and (8) by failing to comply with the award. The Judge noted that all references to the reprimand had been expunged from the employee's personnel file, but that the violation occurred because the activity based other disciplinary action, in part, upon the earlier reprimand. He found that the employee would not have been suspended but for the reliance and that such reliance was contrary to the arbitrator's award that the reprimand not be used against the employee "in any other proceeding." The Judge, therefore, ordered the activity to revise the disciplinary actions to the extent required by law and regulation, and to rescind the suspension. The activity excepted arguing that the Judge erred because it had removed all references to the reprimand from the employee's personnel file and had thus complied with the award. The Authority found that the arbitrator's award stated that the employee's reprimand "may not be used against the grievant in any other proceeding [and] . . . it may not be used against him in any fashion." The activity acknowledged that the reprimand was one of the reasons for the suspension. The activity, therefore, unlawfully failed to honor the arbitrator's award. The Authority did not find, however, that compliance with the award required rescission of the suspension. It concluded, that in order for the activity to comply with the award it must remove all references to the reprimand incident in any disciplinary action taken against the employee, including the notice of suspension involved herein. Further the suspension itself must be reconsidered, having first removed all reference to or reliance on the reprimand. If upon reconsideration, the activity concludes, that the suspension should stand despite the "progressive discipline" reference in the suspension notice and the requirements of the parties' collective agreement, law and/or regulation, it may reaffirm the suspension. The Judge's order was modified accordingly.

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23 FLRA No. 34

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-25

Union

and

Case No. 0-NG-1120

VETERANS ADMINISTRATION
MEDICAL CENTER
BROCKTON, MASSACHUSETTS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of one Union proposal. The Union made the proposal in response to Agency action in discontinuing a practice of making left-over coffee, which had been provided for consumption by patients, available to employees. When informed of the Agency's plans to terminate its practice of allowing employees to drink the surplus coffee, the Union proposed that the practice not be discontinued. Based on the following, we find that the Union's proposal is not negotiable.

II. Procedural Issue

The Agency argues that the petition should be dismissed because a copy was not served upon it within 15 days of its allegation of nonnegotiability. This contention is rejected. Under established Authority practice, the Union was allocated time to correct the deficiency in its filing and serve the Agency with a copy of the petition. The Union did take the necessary action within the allotted time.

III. Positions of the Parties

The Agency argues that what is at issue is the disposal of coffee leftover from patients' meals, a matter that is not part of the employer-employee relationship and therefore does not involve a condition of employment. The Agency also contends that providing "free food" amounts to additional compensation of employees--something which is prohibited by 5 U.S.C. § 5536.[1] As an extension of this argument it asserts that, because compensation is specifically provided for by Federal statute, the matter does not concern a condition of employment.

The Union did not file a response to the Agency's statement of position. However, in its petition it argues that there is no compelling reason for discontinuing the practice of allowing employees to drink left-over coffee which would otherwise be thrown away.

IV. Analysis

A. The Record Does Not Establish That the Proposal Concerns Conditions of Employment

In Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986), the Authority identified as one of the factors which it considers in determining whether a proposal concerns conditions of employment:

> The nature and extent of the effect of the matter proposed to be bargained on working conditions of unit employees.

In applying the above factor to this case, we find that there is insufficient basis for concluding that the matter, in fact, concerns working conditions. The Union has provided no specific information as to how the disposal of the coffee is related to the work situation of employees or the employment relationship.[2/] For example, there are no details as to whether consumption of the coffee occurred when employees were on-duty or off-duty or whether consumption was tied to their status as employees as opposed to being a privilege afforded to any member of the public present at the facility at the time the surplus coffee was available. Absent the demonstration of a relationship between the matter proposed and working conditions, we have no basis for rejecting the Agency's contention that the proposal does not concern conditions of employment. Therefore, we find that the proposal is not within the duty to bargain. See National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983) (Union Proposals 3 and 4), in which the Authority determined that, in the absence of any showing in the record that proposals concerning recycling discarded paper products were related to unit employees' work situation or employment relationship, those proposals did not concern conditions of employment and were outside the duty to bargain.

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[1] 5 U.S.C. § 5536 provides as follows:

> § 5536. Extra pay for extra services prohibited
>
> An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.

B. The Record Does Not Establish That the Proposal Conflicts with 5 U.S.C. § 5536

The Agency contends that 5 U.S.C. § 5536 as interpreted by the Comptroller General prohibits an agency from providing "free food" to employees while they are at their official duty station. In 42 Comp. Gen. 149 (1962), the Comptroller General ruled that appropriated funds could not be used to reimburse an agency official for carry-out food he had purchased for employees who were unable to leave an office. The Comptroller General denied the claim based on, among other reasons, his interpretation that 5 U.S.C. § 5536 prohibited providing employees with compensation--in that case "free food"--over and above that which was allowed by law.

In our view, the circumstances involved in this case are significantly different from those involved in the

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[2/] The parties to a case are responsible for creating the record upon which we will resolve negotiability disputes. National Association of Federal Employees, Local 7 and U.S. Army Corps of Engineers, Portland District, 19 FLRA No. 18, n. 4 (1985); National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886 (D.C. Cir. 1982). A party failing to assume this burden acts at its peril.

Comptroller Gereral decision relied upon by the Agency. In this case, the issue involves use of surplus coffee which was procured for an authorized purpose--feeding patients--as opposed to involving an outlay of appropriated funds for the purpose of feeding employees. Given this difference, we conclude that the Comptroller General's decision is not applicable to this case. Additionally, we note that the Comptroller General has not interpreted 5 U.S.C. § 5536 as an absolute prohibition on agency subsidization of food for employees. See, for example, 53 Comp. Gen. 71 (1973), in which a situation "involving danger to human life and the destruction of Federal property" justified government purchase of employees' meals at headquarters. Also in some circumstances, the Comptroller General has permitted the expenditure of agency funds to subsidize operation of an employees' cafeteria. Unpublished Decision of the Comptroller General, B-169141, November 17, 1970. We do not conclude that a proposal which is limited to addressing the disposition of brewed coffee which otherwise would be thrown away amounts to seeking compensation which is prohibited under 5 U.S.C. § 5536. Because we do not view this issue as governed by that statutory provision, we reject the Agency's contention that the proposal concerns a matter which is specifically provided for by Federal statute.

V. Conclusion

Because the record does not demonstrate that the proposal concerns a matter which is a condition of employment, we conclude that the Agency has no duty to bargain over it.

VI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., August 19, 1986.

J. C. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 35

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WARNER ROBINS AIR LOGISTICS CENTER
WARNER ROBINS, GEORGIA

Activity

and

Case No. 0-AR-1068

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Cary J. Williams filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the scheduling of a grievance procedure meeting involving a separate dispute. The meeting under step 2 of the negotiated grievance procedure for that dispute was scheduled in advance for a specific day to commence at the beginning of the aggrieved employee's work shift. The union representative assigned to represent the employee was scheduled for the earlier shift on the day of the meeting. Consequently, he requested that the time of the meeting and the aggrieved employee's work shift be changed to coincide with his work shift or that he be paid overtime compensation for the time spent attending the meeting. The Activity refused and the meeting was held with the union representative attending after his workday had ended. The union representative filed the grievance in this case that was submitted to arbitration on the issue of whether the refusal to reschedule the meeting violated the collective bargaining agreement and, if not, whether the union representative should have been paid overtime compensation for the time attending the meeting. The

Arbitrator determined that it was not unreasonable for the Activity to maintain the meeting schedule to accommodate the assigned work shift of the aggrieved employee. He also noted that the meeting was scheduled after the regular workday of management representatives as well as the union representative. He determined that the representative was not entitled to overtime compensation for the time attending the meeting and, accordingly, denied the grievance.

III. EXCEPTION

The Union contends that the award is contrary to the provisions of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 201 et seq. and 5 CFR part 551, subpart D. The Union argues that the time spent by the union representative at the meeting constituted "hours of work" for purposes of entitlement to overtime compensation because the meeting was primarily for the benefit of the Activity and was directed and controlled by the Activity.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the Union fails to establish that the award denying entitlement to overtime compensation is contrary to FLSA and implementing regulations. In NTEU v. Gregg, No. 83-546 (D.D.C. Sept. 28, 1983), the court addressed the issue of whether Federal employees engaged in collective bargaining were entitled to overtime compensation for weekend negotiations when they were not otherwise in a duty status. The employees asserted that the failure to pay them overtime compensation for the weekend negotiations violated FLSA. Specifically, they argued that they were entitled to overtime compensation for having worked longer than 40 hours during a single workweek. 29 U.S.C. § 207(a). The court noted that for purposes of FLSA, "hours of work" is defined as "all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency." 5 CFR § 551.401(a). The court further noted that "official time" granted an employee by an agency to perform representational functions during the hours when the employee is otherwise in a duty status shall be considered hours of work. 5 CFR § 551.424(b). The court explained that the key to whether time spent performing representational functions outside regular working hours is overtime work is that the employee representative must already have been in an overtime duty status at the direction of the agency at the time an event arises which calls for the performance of representational functions. Gregg, slip op. at 7, 11. Under these provisions the court concluded that the employees were not entitled to overtime compensation under FLSA. The court ruled that the activities in which the employees were engaged on the weekend "cannot be considered primarily for the benefit of the agency." To the court, their responsibilities during these negotiations were to represent on behalf of the union the employees in the bargaining unit in collective bargaining negotiations with the employing agency; they were in no way charged with any other responsibilities. Slip op. at 5. The court also ruled that because the employees were not already in an overtime duty status on the weekend in question, there was no entitlement to overtime compensation under 5 CFR § 551.424(b). As stated by the court, the employees' participation in the negotiations was not required by the agency, but was required because of their role as officers and negotiators for the union. Slip op. at 7.

Applying NTEU v. Gregg to this case, we find that the union representative was not entitled to overtime compensation under FLSA. The activities of the grievant cannot be considered primarily for the benefit of the Activity; his responsibilities during the grievance meeting were to represent the employee who had filed the grievance. Additionally, because the grievant in this case was not already in an overtime duty status at the direction of the Activity at the time of the grievance meeting in dispute, there was no entitlement to overtime compensation under 5 CFR § 551.424(b). His participation was not required by the Activity, but was required by his assignment to the case by the local union president. Therefore, no basis is provided for finding the award deficient.

V. DECISION

Accordingly, the Union's exception is denied.

Issued, Washington, D.C., August 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 36)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION

Union

and

Case No. 0-NG-1228

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the underscored sentence of a single provision disapproved upon review by the Agency head under section 7114(c).

II. Provision

> 5. Upon returning to duties once performed, employees participating in a rotation policy may request refresher training. Employees will also receive a reasonable amount of administrative time to become familiar with all relevant IRM changes, management memorandum, etc., that have been issued while performing other duties.[1]

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[1] In its Statement of Position the Agency indicated that this is the express language of the proposal. The Union in its initial submission apparently had used the phrase "official time" instead of "administrative time." The Union's Response to the Agency's Statement of Position did not challenge the Agency's presentation of the proposal and thus the Authority has considered the proposal as stated above.

III. Positions of the Parties

The Agency concedes that employees are required as a part of their jobs to familiarize themselves with the kinds of Agency directives, regulations and memoranda referred to in the provision. Agency Statement of Position at 3. The Agency argues nevertheless that the provision would violate management's right to assign work because it would require management to give employees time to review such materials without regard to whether there are other work assignments which management has determined should take priority.

The Union contends that the provision does not interfere with management's right to assign work. The Union also argues that the provision is an appropriate arrangement under section 7106(b)(3) because, even if it does interfere with management's rights, that interference is not excessive.

IV. Analysis and Conclusion

A. Whether the Provision Violates Management's Right to Assign Work

The provision would require management to give employees who are returning to their regular jobs after a detail a reasonable amount of time to become familiar with job-related materials issued while they were on detail. The provision would thus require management to give priority to this aspect of employees' jobs over other assigned duties. In establishing such a priority among work assignments the provision has the same effect as the first paragraph of Union Proposal I in American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 4 FLRA 384, 385-86 (1980). Like that proposal, the provision here requires management to assign one type of work to employees to the exclusion of other duties which management may determine have a higher priority. For the reasons stated in U.S. Marshals Service, we find that the provision directly interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute. In reaching this conclusion, we find, contrary to the Union's claim (Union Response to Agency Statement of Position at 7), that neither the language of the provision itself, nor of the agreement of which it is a part (Attachment 1 to Union Petition for Review), contains an "opt out" clause which permits management to deny employee requests for a reasonable amount of time where there is "just cause".

B. Whether the Provision Constitutes an "Appropriate Arrangement" under Section 7106(b)(3)

Even though we have found that the provision interferes with management's rights, we need not conclude that it is nonnegotiable if we also find that it is an "appropriate arrangement for employees adversely affected" by the exercise of management's rights. For the following reasons we find, in agreement with the Union, that the provision is within the duty to bargain because it does not excessively interfere with management's rights. See National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

The proposal is clearly intended to be an "arrangement" for employees adversely affected by the exercise of management's right to assign employees under section 7106(a)(2)(A). As the Agency acknowledges, employees are required to be familiar with all job-related directives, regulations, and memoranda. When employees are assigned away from their regular positions to entirely different jobs, they are not able--nor do they need--to study those materials. Upon return to their regular positions, employees will be handicapped in the performance of their duties if they are unfamiliar with instructions issued during their absence. The provision attempts to mitigate against that consequence by providing employees a "reasonable" amount of time to become acquainted with such job-related material.

The remaining issue is whether the burden placed on management's right to assign work by requiring that employees be permitted a reasonable amount of time, at the possible expense of other duties, is excessive compared to the benefit to employees in having such time. We conclude that the benefits of the provision to employees--and to management--outweigh its effect on management's right to determine work priorities.

As we have said elsewhere, management's right to assign work is reserved in the Statute in order to protect, among other things, management's ability to manage its workload. American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 29 (1986). The impact of the disputed provision on this management interest is insignificant. The provision provides for the assignment of tasks which are already a part of an employee's job responsibilities. It does not, therefore, require management to sacrifice employee worktime to activities or purposes which are unrelated to the accomplishment of the Agency's workload. Moreover, the provision does not prevent management from requiring employees to perform any part of their jobs. It would simply require management to afford employees time to prepare to do those tasks which involve job-related materials issued in their absence. At most it would merely delay the start of work by employees on those other tasks. And since the provision does not require management to grant employees an unlimited amount of time, but only so much as is reasonably necessary to become familiar with relevant materials--a matter regarding which management thus retains some discretion--any such delay would not be unduly burdensome on management's ability to accomplish its work.

If employees did not have the time permitted by the provision, they would face the difficult task of performing the duties of their positions without having reviewed all the information necessary to perform those duties in accordance with current requirements. A reasonably foreseeable consequence of this situation is that employees will not perform as well as might otherwise be expected: they will not complete work as quickly or they will make more mistakes, for example--all of which would detrimentally affect their performance evaluations, particularly in comparison with those employees who had not been detailed. This situation is not one for which employees are responsible, since the decision to detail is solely a matter of management discretion.

Employees' job performance would likely be enhanced if time was provided to become familiar with the current requirements of their jobs upon return from a detail. Management's interest in getting the best quality work product as quickly as possible would be enhanced also. In this manner, the provision would contribute to, rather than detract from, the achievement of a more effective and efficient workforce.

Taking all of these factors into account, we find that the burden imposed by the provision on management's right to assign work is insubstantial compared to the benefit to employees--and, derivatively, to management--afforded by the provision. We conclude, therefore, that the provision does not excessively interfere with management's right to assign work and is a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute. See also American

Federation of Government Employees, Local 3231 and Social Security Administration, 22 FLRA No. 92 (1986) (Union Proposal 3).

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall rescind its disapproval of the disputed provision.2/

Issued, Washington, D.C., August 19, 1986.

J L Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

2/ In finding that the provision is within the duty to bargain, the Authority makes no judgment as to the merits of the provision.

23 FLRA No. 37

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
WEST LOS ANGELES MEDICAL CENTER
LOS ANGELES, CALIFORNIA

Respondent

and

Case Nos. 8-CA-40223
8-CA-40224

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1061, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on limited exceptions to the attached Administrative Law Judge's Decision filed by the Veterans Administration, West Los Angeles Medical Center (Respondent). The Judge found that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally changing the duty hours and dress code of certain employees without bargaining with the American Federation of Government Employees, Local 1061, AFL-CIO (Union). The Respondent's exceptions were limited to the Judge's *status quo ante* remedy with regard to both duty hours and dress code.

II. Facts

The facts, more fully set forth in the Judge's Decision, indicate that on March 1, 1984, the Respondent's Building Management Service Chief (Chief) implemented a new dress code for its housekeeping aides that eliminated a past practice of wearing, among other things, sweaters and jackets without first notifying the Union and bargaining on the matter. Also, on April 29, 1984, the Respondent's Chief implemented a change in the work hours of its housekeeping aides by changing their duty hours from a 6:00 a.m. to 2:30 p.m. shift to a 7:00 a.m. to 3:30 p.m. shift. This change was made despite the Union's request to bargain.

III. Administrative Law Judge's Decision

The Judge found that the Respondent changed established conditions of employment by unilaterally implementing a new dress code and unilaterally changing duty hours of unit employees without providing the Union with notice and the opportunity to bargain, thereby violating section 7116(a)(1) and (5) of the Statute. In making his finding that the change in duty hours was negotiable, the Judge found no evidence that such change was determinative of the numbers, types or grades of employees assigned to the tours of duty, so as to be negotiable solely at the election of the agency.

The Judge found that a status quo ante remedy was appropriate with regard to both duty hours and the dress code and ordered the Respondent to rescind such changes, including the prohibition against wearing jackets and sweaters. He further ordered a recision of any disciplinary actions initiated as a result of the dress code, including removal of all reference to such disciplinary actions from the personnel files of the employees involved.

IV. Positions of the Parties

The Respondent excepts to the Judge's status quo ante remedy that would rescind disciplinary actions initiated as a result of the dress code. It argues that the MSPB decision in Roger Howard v. Veterans Administration, Dec. No. SF07528411043 (December 11, 1984), rejects the contention that disciplinary actions must be rescinded because they are based on policy later determined to be invalid. The U.S. Court of Appeals for the Federal Circuit found that despite a disagreement over the dress code, the unit employee was not free of his duty to follow his superiors' orders.[1] To find otherwise, the Respondent argues, could unreasonably prevent agencies from carrying out their missions. The Respondent also notes that three unit employees were disciplined based in part on the employees' insubordination over their refusal to obey their supervisors' orders to comply with the dress code, and requests that the Judge's remedy to rescind disciplinary action initiated as a result of the dress code be deleted.

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[1] Howard v. Veterans Administration, No. 85-2128 (Fed. Cir. Nov. 19, 1985), slip op. at 2.

Additionally, the Respondent excepts to the Judge's status quo ante remedy to restore duty hours, which it argues is meaningless due to substantial turnover in personnel who were affected by the change in hours.

The General Counsel filed an answering brief to the Respondent's exceptions in which it agreed with the Judge's findings and recommended remedy.

V. Analysis

A. The Judge's Findings that the Respondent violated section 7116(a)(1) and (5) of the Statute.

We have reviewed the findings and conclusions of the Judge with regard to the violations of section 7116(a)(1) and (5) of the Statute alleged in the complaint and adopt his findings, conclusions and recommendations for the reasons he stated. In so finding, we note that no exceptions were filed as to the Judge's finding of a violation.

B. The Judge's Recommended Remedy

With regard to Respondent's argument concerning the impact of the MSPB decision, we previously found with regard to a possible remedial conflict between actions taken by the MSPB and the Authority that "when an issue is properly raised as an unfair labor practice under section 7116, nothing therein would prevent the Authority from remedying any violation found." Department of the Air Force, Air Force Systems Command, Electronic Systems Division, 14 FLRA 390 (1984).

While we are not bound by the MSPB decision, we conclude that in the circumstances of this case it is relevant to the determination of an appropriate remedy. The discipline at issue was based, in part, on insubordination. While the Respondent's unilateral implementation of the dress code was unlawful, a refusal by an agency to negotiate in good faith does not excuse an employee's insubordination in these circumstances. Procedures exist to remedy breaches of bargaining obligations, and the Union pursued them in this case. Self help -- that is, disobeying supervisory instructions -- cannot be condoned if the purposes and policies of the Statute are to be met. Accordingly, the order is modified to rescind all disciplinary actions initiated as a result of the dress code, except for those actions involving insubordination.

As to that part of the remedy pertaining to the change in duty hours, we have previously found that the decision to change starting and quitting times constitutes a negotiable condition of employment.[2] Therefore, agency management was obligated to bargain concerning the decision to change the starting and quitting times of the duty hours in question prior to making any change. The Authority has previously determined in similar cases where management made a unilateral change regarding a negotiable term and condition of employment, such as duty hours, that effectuation of the purposes and policies of the Statute requires the imposition of status quo ante remedies, absent special circumstances, in order not to render meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment.[3]

The Respondent excepts to this part of the remedy on the basis that only nine of the affected employees are still with the portion of the agency affected by the change, and that, therefore, a status quo ante remedy would disrupt agency operations. The Respondent does not argue, however, that the number of positions in the unit changed, but only that there was a turnover in personnel. In these circumstances we find no merit to the Respondent's argument that a status quo ante remedy is unwarranted.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record, and adopts the Judge's findings, conclusions and recommended Order as modified above.

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[2] United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 89 (1985); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 674 (1984) and Department of Transportation, Federal Aviation Administration, Washington, D.C., and its Chicago Airways Facilities Sector, 16 FLRA 479 (1984).

[3] See, for example, Long Beach Naval Shipyard, Long Beach, California, 17 FLRA 511 (1985). More generally, the Authority has wide discretion to fashion remedies under section 7105(g)(3) and section 7118(a)(7) of the Statute, including status quo ante remedies where appropriate. See also United States Department of Transportation, Federal Aviation Administration, 19 FLRA No. 89 (1985) and U.S. Immigration and Naturalization Service, 16 FLRA 1007 (1984), in which stated status quo ante remedies are generally found appropriate in circumstances where agency decisions to change conditions of employment were within the duty to bargain.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration, West Los Angeles Medical Center, Los Angeles, California shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in duty hours and dress code in the Building Management Service without first notifying the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of its employees, and providing it with an opportunity to negotiate concerning the above changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the change in duty hours implemented on April 29, 1984, and restore the previously existing duty hours of 6:00 a.m. to 2:30 p.m.

(b) Rescind the dress code, including the prohibition against wearing jackets and sweaters, implemented on March 1, 1984, and rescind all disciplinary actions initiated as a result of the dress code, except those actions involving insubordination, and remove all reference to such disciplinary actions, except those involving insubordination, from the personnel files of those employees involved.

(c) Notify and, upon request, negotiate with the American Federation of Government Employees, Local 1061, AFL-CIO, or any other exclusive representative of the employees in the Building Management Service, concerning any further change in duty hours and dress code.

(d) Post at its facility at the Veterans Administration, West Los Angeles Medical Center, Los Angeles, California copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration, West Los Angeles Medical Center, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region VIII, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 37)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally institute changes in duty hours and dress code in the Building Management Service without first notifying the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of our employees, and providing it with an opportunity to negotiate concerning the above changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the change in duty hours implemented on April 29, 1984, and restore the previously existing duty hours of 6 a.m. to 2:30 p.m.

WE WILL rescind the dress code, including the prohibition against the wearing of sweaters and jackets, which was implemented on March 1, 1984, and rescind all disciplinary actions initiated as a result of the dress code, except those actions involving insubordination, and remove all reference to such disciplinary actions, except those involving insubordination, from the personnel files of those employees involved.

WE WILL notify and, upon request, negotiate with the American Federation of Government Employees, Local 1061, AFL-CIO, or any other exclusive representative of the employees in the Building Management Service, concerning any further change in duty hours and dress code.

____
(Activity)

Dated:_______________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, CA 90071 and whose telephone number is: (818) 894-3805.

(23 FLRA No. 37)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION
WEST LOS ANGELES MEDICAL CENTER
LOS ANGELES, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1061, AFL-CIO

Charging Party

. . . .

Case Nos. 8-CA-40223
8-CA-40224

Marco Gomez, Esq.
and
Jean Parson
For the Respondent

Cecile O'Conner, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

The Consolidated Complaint alleges that Respondent engaged in unfair labor practices within the meaning of Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by unilaterally changing the duty hours of certain day shift personnel and by unilaterally implementing changes in the employees' dress code, including a prohibition against wearing sweaters. The Consolidated Complaint also alleges that the Veterans Administration West Los Angeles Medical Center, Los Angeles, California (herein called Respondent) unilaterally instituted the above changes without first notifying the American Federation of Government Employees, Local 1061, AFL-CIO (herein called the Union) and providing it an opportunity to bargain over the changes or their impact and implementation.

Respondent filed an Answer denying the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observations of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

A. Background

Respondent's West Los Angeles facility, is made up of several divisions including the General Medical Hospital, also known as Wadsworth, and the Brentwood facility, also known as North of Wilshire, where neuropsychiatric patients are housed.

In operating the facility, forty to fifty different services are utilized, and each service has a chief. The service involved in this matter is Building Management Service (herein called the Service). It employs, among others, male and female housekeeping aides who clean, service, and maintain the hospital. The Service employees were, at all times material herein, represented by the Union.

At all times material in this matter, John F. Fitzgerald was the chief of the Service. In that position he was management's point of contact for negotiations in that particular service. Fitzgerald's newness in the position is shown by his having joined Respondent, in that capacity, only in December 1983. However, Fitzgerald served in a similar position at the Long Beach V.A. Hospital and was experienced in dealing with unions. Despite assertions to the contrary, the Union traditionally bargained directly with the various service chiefs concerning changes in working conditions and the personnel staff's attendance at those negotiations is the sole responsibility of management. Rhea Butler, Union President, Edward Farrell, Union Treasurer and Nathaniel Scott, the Union Chief Steward and the only one of these three actively employed by Respondent participated in meetings or negotiations in this matter. Butler without dispute had authority to negotiate and enter agreements on the Union's behalf.

B. Uniforms

Respondent supplies its female housekeeping aides with uniforms which are short sleeved, linen-type, aqua dress uniforms or aqua tops and trousers. Similarly, its male housekeeping aides are supplied with and wear lightweight uniforms which consist of light grey shirts and dark grey trousers. Inasmuch as Respondent issues only one type of lightweight fabric uniform there is no winter or wool uniform. It undisputed that for anywhere from 7 to 14 years the housekeeping aides, both male and female, have worn personal attire together with the regular uniform. Such apparel was particularly worn during the Southern California winter months, which loosely termed are November to February. This extra apparel consisted of many different styles and hues of sweaters and jackets, either over or under their uniforms. Some individuals even wore jackets on a year round basis. In addition, employees wore hats such as baseball-type caps with bills and knit caps. With regard to how the uniforms were worn, male employees uniform shirts was worn either inside or outside of the dark grey trousers. Besides caps the aides wore hairnets, headbands and sweatbands while they worked.

Testimony reveals that the caps and other headgear protected the employees' skin, hair, and eyes from workplace dust, debris, powerful cleaning solutions such as strippers, and the elements in general. Likewise sweaters and jackets protected the employees from the chill of early morning and from cold winter days and an alleged inefficient hospital heating system. The housekeeping aides duties often require that they travel between buildings in order to perform their work and consequently they are exposed to weather conditions. In such circumstances, it appears sensible for aides to wear some outer garments in order to protect themselves from outside weather conditions. Respondent, however, did not issue jackets, sweaters, hats or any other outer garments for weather protection. Instead, the aides supplied their own outer garments. It is uncontroverted that this practice of supplying their own sweaters, caps and other garments to keep warm was regular, open, notorious and condoned by Respondent over a lengthy period of years. Prior to March 1, 1984, there is no evidence that employees were subject to discipline because they wore items of their own apparel such as sweaters or caps. Furthermore, the record is void of any evidence which would establish that any of this personal clothing impeded any individual's job performance. Finally, the record does not suggest that the running of the Service was interfered with or disrupted because the employees wore jackets, sweaters, hats, headbands, sweatbands, or the square tail of a males shirt was worn outside of his trousers. It suggests only that the cosmetics of Service personnel did not meet the approval of its new Chief, Mr. Fitzgerald.

C. Change of Shift

While the majority of the employees work a regularly scheduled 7 a.m. to 3:30 p.m. shift, the housekeeping aides at the Brentwood psychiatric patient facility worked a 6 a.m. to 2:30 p.m. schedule. The Brentwood hours had been in effect for a number of years prior to April 29, 1984. A change in the Brentwood tour of duty had been previously proposed by a prior Service Chief, Sara Hammond. Allegedly because it is easier for the housekeeping aides to clean when the full staff is not on board at 6 a.m. the Union was able to throttle that proposal and the tour remained at 6 a.m. to 2:30 p.m. when Fitzgerald arrived on the scene.

D. Arrival of New Building Management Chief

As already noted, in December 1983 Mr. Fitzgerald assumed the Chiefs' position and decided to initiate some changes in his service by imposing a dress code and instituting task lists. Again it is noted that while Fitzgerald was new in this position, he was an experienced Service Chief who had previously dealt with unions, including some of the Union officials involved herein. In view of this, I find much of Fitzgerald's testimony hard to believe. Consistent with his decision he distributed lists, which were minute increment breakdowns of tasks such as: mop hallway "A" - 8:10 to 8:15; empty trash in hallway "B" - 8:20 to 8:25, without prior notice to or bargaining with the Union. As the record disclosed, the lists generated controversy and complaints because of employees fears of negative evaluations and disciplinary actions based on what might be considered arbitrary time standards if the lists were enforced.

Employee Patty Burr sent a copy of the task list to the Union. Butler called Fitzgerald and raised the point that disciplinary actions and poor evaluations might occur as a result of the lists. Fitzgerald allegedly insisted that the lists were only guidelines. Fitzgerald's assurance did not alleviate the Union's concerns and, as a result, Union representatives Butler, Scott and Farrell, met with him in his office on January 10, 1984. Again, Butler and Farrell asserted that the task lists were negotiable because of their potential disciplinary use. Fitzgerald insisted that he would not negotiate because the lists were only guidelines.

During the meeting, the three Union officials also raised an issue concerning Fitzgerald's denying Scott leave to attend physical therapy sessions which were a course of treatment necessary to correct an on-the-job injury. Subsequent to Fitzgerald's arrival, the chief steward received, in swift succession, an admonishment, a reprimand and a proposed suspension because of his requests for leave without pay, on Friday, in order to see his doctor. Fitzgerald claimed that the physician's statement, regarding Scott's injury, was not sufficient.

According to Butler and Farrell, Fitzgerald took the initiative in stating that he also wanted to change the tour of duty for the twenty-nine Brentwood facility housekeepers from 6 a.m. to 2:30 p.m. and conform it to the 7 a.m. to 3:30 p.m. dayshift. The Union informed him that it had previously negotiated the Brentwood tour with other Service Chiefs and the shift had remained at 6 a.m. to 2:30 p.m. Fitzgerald, therefore raised another topic by discussing the possibility of a dress code which would ban hats. He stated it was his idea and privilege. The Union argued that if the dress code was to become a fact, it wanted to negotiate.

Fitzgerald claims that the parties did not meet in January 1984 and discuss the dress code, the tour of duty or the task list. However, he admits that he distributed the task lists in December 1983, without negotiating the impact and that the lists caused controversy and employee complaints. Since the Union filed an unfair labor practice charge regarding those lists and Fitzgerald was Chief, his testimony that the

Union never met with him on the subject, or in January 1984 creates consistencies which must be resolved against him.

Fitzgerald also asserts that the dress code was never discussed. However, Fitzgerald testified that shortly after his arrival he decided to implement a dress code. In fact, an original dress code memorandum was distributed to the Union which was dated December 27, 1983. In addition, Butler and Fe[illegible] testified that even prior to January 10, 1984, there were rumors that Fitzgerald was going to implement a dress code. Clearly the dress code had by early January 1984 became an issue which it would not be unreasonable to assume that the Union would raise at its first opportunity. Based on the record inconsistencies, I do not credit Fitzgerald.

Shortly thereafter, on February 1, 1984, Butler received a January 30, 1984, route slip from Nina Jean Parson, Labor-Management Relations Specialist. The memorandum stated, "(a)ttached is the proposed memorandum to all Building Management Service Employees regarding adherence to the prescribed uniform. This is being forwarded in accordance with Article VI of the negotiated agreement." The memorandum was a dress code for Service employees which prohibited the wearing of headbands, hats, nets, and sweatbands, unless required. It recommended replacing tennis or other soft sole shoes with oxford shoes. The dress code also mandated that male employees wear their shirts buttoned and tucked into their trousers. The memorandum was dated December 27, 1983, and signed by Fitzgerald. There had never been a similar dress code in the Service. Neither the route slip nor the memorandum set forth an implementation date for the code. Similarly, the dress code memorandum made no mention of any prohibition on either jackets or sweaters.

On February 9, 1984, the Union received a route slip dated February 7, 1984, from Labor Relations Specialist Parson which indicated that the attached proposal to change an existing tour of duty was forwarded in accordance with Article VI of the local negotiated agreement. Parson admitted however, that the notices which the Personnel office forwards to the Union do not specify Article 6 of either the Master Agreement or the Local Agreement. The notice does not indicate there is a 15 day response time. Further, there is no indication as to whom the Union should contact. Butler testified that the Master Agreement supercedes the Local Agreement.[1] The route slip covers two attachments. The first was a

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[1] According to Respondent the applicable provisions are Article 6, section 6 of the Master Agreement, and Article VI, section 2 of the Local Agreement. Article 6, section 6 of the Master Agreement read as follows:

> Section 6 - Notification of Changes in Conditions of Employment

(continued)

January 26, 1984 memorandum, signed by Fitzgerald, which stated that Service employees on the 6 a.m. to 2:30 p.m. shift would be changed to the 7 a.m. to 3:30 p.m. shift effective February 10, 1984. The second was a roster of some of the twenty-five affected employees including Nathaniel Scott and Roger Howard who are assigned to the Brentwood facility.

Upon receipt of the tour of duty change on February 9, 1984, Butler stated that she immediately contacted Fitzgerald and requested to negotiate. Both mutually agreed to a meeting on February 28, 1984, at 11 a.m. According to Butler, who I credit, she informed Fitzgerald that the appointment was to negotiate three items; the tour, the task list and the

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1/ (continued)

> The Agency shall notify the appropriate union official prior to changing conditions of employment which affect bargaining unit employees. The notification will be adequate with sufficient information to provide the Union an opportunity to exercise their full rights to bargain as appropriate prior to implementation. Notification will be in writing when the changes are significant.

Article VI, section 2 of the Local Agreement reads:

> Section 2. The Employer agrees to refer any proposed changes in personnel policies, practices or other policies, programs or procedures affecting the working conditions of unit employees to the Union at least fifteen (15) calendar days prior to anticipated implementation. The Union agrees that it will respond as soon as practicable and if it does not respond within fifteen (15) calendar days, the Employer will be free to proceed with implementation. This time limit may be extended upon request and mutual agreement of the parties. If the Union notifies the Employer within fifteen (15) calendar days that it does not concur in the proposed change(s), the parties agree to meet promptly and bargain concerning the matter. (Emphasis added).

Based on these articles Respondent asserts that it is the obligation of the Union to respond to management's notice if the Union desires to negotiate over the change. It sees no conflict with the Master Agreement, inasmuch as the Master Agreement is silent on the issue of the Union's obligation to respond. Thus, where the Master Agreement is silent, the Local Agreement prevails.

dress code. Fitzgerald testified that Butler called and asked for an appointment in order to have an "informal discussion". I credit Butler. The February 28, 1984, meeting was moved to an earlier date, February 23, 1984, and Butler, Farrell and Scott met with Fitzgerald. At the meeting, Butler requested negotiations concerning the dress code, but Fitzgerald replied that negotiation was not indicated. Fitzgerald did not inform the Union either that the dress code was to be implemented March 1, 1984, or that sweaters and jackets were prohibited. The Union team continued proposing that the headgear be retained because it served health and safety purposes. According to them, the caps protected the hair, skin, and eyes from dust, debris and cleaning solvents. Fitzgerald insisted that the employees would not be allowed to wear hats, "it was his thing," because he wanted people to be uniform. Butler replied "that the Union would buy union hats" for all the building maintenance employees who wear hats while performing their duties. Fitzgerald snickered and laughed. Butler also pointed out that the code was not in accordance with V.A. central office rules and regulations. Clearly no agreement was reached, Fitzgerald who is not credited denies that the dress code was mentioned during this meeting.

During this same meeting the proposed tour of duty change was also discussed. Butler, requested to negotiate the subject again. Additionally, the Union requested time to poll the employees on the issue. Fitzgerald agreed to the poll but indicated that the results would not necessarily change his mind. Fitzgerald recalls that Farrell asked to poll employees to see how they felt about the change. The meeting ended with the parties agreeing to meet again in March 1984. Subsequent to the meeting, Scott, who is a Service employee and affected by the tour of duty change, polled the other Service employees.

On March 12, 1984, the parties met again. This time the Union repeated its proposal that the tour of duty remain the same. According to Fitzgerald, he was not meeting with the Union to bargain and, indeed, he did not bargain when the Union asked him to do so. At the hearing, Fitzgerald denied that he even has authority to bargain. His colleague Parson however, testified that Fitzgerald does have such authority. Fitzgerald basically asserted that labor relations encompassed his ability, to sit down and discuss changes in working conditions with the Union knowing all the while that he does not have authority to bargain. Such a result was not, in my view intended by the Statute.

When the meeting began Scott attempted to tell Fitzgerald the results of the poll but Fitzgerald waved him off and turned to Farrell. Scott, however, persisted in explaining that the employees wanted the 6:30 a.m. to 2:30 p.m. tour to remain the same because it was a safe and efficient tour. Fitzgerald replied that he didn't want to talk to him. According to Fitzgerald, he asked that Farrell release the results of the poll. He claims that Farrell refused to tell him the results. I do not credit Fitzgerald. Farrell heatedly interjected a demand that Fitzgerald negotiate concerning the tour. Fitzgerald replied that he would not negotiate. Frustrated, Farrell asked Fitzgerald if he could conceive of a situation where he would have to negotiate with the Union. Fitzgerald allegedly replied, "that's another issue." Farrell rose out of this seat; Butler told Farrell to wait a minute because there were two more issues to discuss, the task lists and dress code. Fitzgerald responded that he had already surveyed the nurses regarding the tour. He indicated at the hearing, that he wanted to bring some one from personnel or labor relations in to negotiate. None of the Union witnesses mentioned any reference to bringing in others to negotiate. Butler, broke in at this point and uttered some profanity either shit, hell or damn, regarding Fitzgerald consulting with the nurses and not the Union. At that point, Butler who is black, perceived that she was being confronted with bigotry and racism. Fitzgerald stated that he didn't have to negotiate and he wouldn't negotiate until personnel told him to. Fitzgerald then stated, he didn't want profanity in his office and he told the Union team to leave. Fitzgerald's view was that nothing was being accomplished. Butler, Farrell and Scott stormed out and either during their exit through the doorway, or poised just outside in the corridor, Butler, a wisp of a woman stated, "Fuck you."

Farrell, Scott and Butler immediately proceeded to the office Chief of Personnel Jesse Raymond. It is uncontroverted that once there Butler told Raymond that Fitzgerald was impossible and that he was adamantly insisting that he did not have to negotiate concerning the tour, the dress code or the task lists. Butler's statements reveal no clue that Fitzgerald wanted to bring in personnel or labor relations help in the matter. Butler by way of apology explained that she had cursed out Fitzgerald. Butler and Farrell then requested Raymond to give them someone who knew how to negotiate, so they could resolve the issues for the good of the employees. Raymond replied that he would take care of that. Interestingly, Fitzgerald's inability or lack of authorization to negotiate for the service was never raised.

Several days passed without Raymond, Fitzgerald, or any management representative contacting the Union regarding bargaining. By that time Butler and Farrell decided no one was going to do anything about "enlightening" Fitzgerald regarding the negotiability of changes in work hours so the Union filed an unfair labor practice charge on March 16, 1984. The charge alleged that Fitzgerald had refused to bargain in good faith concerning the tour of duty on March 12, 1984.[2] Fitzgerald knew that an unfair labor practice charge had been filed because of the March 12, 1984 meeting, however, no action was taken. Instead, on April 16, 1984, the Union received a second memorandum from Fitzgerald regarding the identical shift change which they had already requested to negotiate on and proposed status quo. Fitzgerald's second memorandum referenced his January 23, 1984 correspondence wherein he had determined to transfer the remaining day shift personnel, North of Wilshire, to the 7 a.m. to 3:30 p.m. shift.

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[2] The charge was later withdrawn when the instant unfair labor practice, Case No. 8-CA-40223, was filed because the instant charge included the alleged violative conduct.

In the subsequent communication Fitzgerald declared that he had met with Butler, Farrell and Scott on two occasions regarding the proposed change but, to date, the Union had failed to offer any counterproposals or meaningful discussions. Fitzgerald's missive concluded that he was proceeding with the shift change effective April 29, 1984. All this despite clear evidence that at the February 23, 1984, meeting the Union proposed that the tour of duty remain at 6 a.m. to 2:30 p.m. Further, Fitzgerald on cross-examination stated that although Farrell declared that the Union wanted the 6 a.m. to 2:30 p.m. tour, in Fitzgerald's opinion, no proposals were offered at the second meeting. His opinion was that Farrell's proposal was not a proposal at all and could not, therefore, be the subject of negotiations. I find that the Union clearly requested negotiations concerning the change in tour of duty at that meeting.

Around April 19, 1984, 3 days after receiving Fitzgerald's second memorandum the Union filed the instant unfair labor practice charge alleging that Fitzgerald had again refused to negotiate concerning the shift change. Respondent's Personnel department also took no action. Thereafter, Fitzgerald implemented a negotiable change in work hours on April 29, 1984. On that date the employees were changed by 1 hour, from a 6 a.m. to 2:30 p.m. tour to 7 a.m. to 3:30 p.m. shift.

In the meantime, but prior to completing bargaining on the issue, Fitzgerald implemented the proposed dress code. A few days before March 1, 1984, Fitzgerald spoke at unit meetings of Service housekeeping aides and explained the new dress code. According to him, the hats would have to come off and the code would be enforced beginning March 1, 1984. Supervisors distributed the dress code to employees and enforced it through disciplinary action beginning March 1, 1984. Supervisor Pearl Harrington "wrote up" housekeeping aide Roger Howard because he came to work with his hat on. Prior to March 1, 1984, in 17 years, Howard had never been disciplined for wearing a hat on the job. Other employees were also disciplined due to the unilateral enforcement of the dress code. It appears that terminations also were part of the discipline.

Following her unit meeting, housekeeping aide Theresa Phillips spoke to her supervisor Ms. Metcalf and the Assistant Chief Alva Bonds. Phillips was wearing a long sleeved sweater under her short sleeved aqua tunic. Bond noticed the sweater and told Phillips that she could be disciplined. Phillips pointed out that first, sweaters were not included in the dress code and second, it was freezing outside. There had been no mention of any prohibition against sweaters during the unit meeting and the published dress code itself is silent in that respect. Phillips went home and cut the sleeves off of her sweaters. A few days later, Metcalf told her that she could still be written up.

Discussion and Conclusions

Respondent contends that the issue here is solely one of notice and chicanery on the part of the Union. It further asserts that the case involves only a refusal of the exclusive representative to deal with Respondent's designated representative and its attempts to make decisions as to whom it will deal with in management. Despite inference and rumor that Mr. Fitzgerald was intent on making certain changes earlier in his term as chief of the Service and despite the fact that Fitzgerald met with the Union well prior to any official notification of changes Respondent seeks to create an illusion that the Union was not dealing with the proper management representative and for that reason assumes that it has in this matter "attempted to deal with the Union in good faith, but due to the relative lack of labor expertise of the management 'representative' the Union had to deal with, and a consequent failure to at the time understand the reality of Labor-management relations with this Union, that good faith has not as of yet brought about the sought after results."

The General Counsel does not see this as such a simple matter, but maintains that a past practice of wearing certain clothing in addition to the issued uniform existed; that notification of implementation of the dress code was defective; that there was no notification that certain items such as sweaters and jackets were prohibited by the dress code; that Respondent failed to complete substantive bargaining of the dress code; that there was no waiver of bargaining on the dress code; that Fitzgerald the Chief of Service indeed had authority to bargain over the dress code; and, as well that the change in work hours without completing bargaining constituted a violation of the Statute.

It has long been established that parties may create conditions of employment by practice and such practices may not be altered without bargaining thereon. Internal Revenue Service and Brookhaven Service Center, 6 FLRA 713 (1981). Respondent supplies female housekeeping aides with an aqua dress or an aqua tunic top and pants. Similarly, the male housekeeping aides receive charcoal grey trousers and light grey shirts. It is undisputed that for over 7 years housekeeping aides have worn their own personal outerwear and apparel in addition to the issued uniforms while on duty. Also undisputed is the fact that employees wore their own sweaters, jackets, hats, caps, headbands, and sweatbands with the knowledge of and acquiescence of Service management. In addition to outer apparel the male employees wore their shirts either tucked into their trousers or on the outside of their pants. These practices were consistently exercised for an extended period of time, unchallenged, and acquiesced in by Respondent thereby ripening into conditions of employment. Accordingly, if Respondent desires to change this established condition of employment, it must give proper notification and bargain. Failure to do so violates the Statute.

The law is clear that an activity must specifically notify the exclusive representative of any intended change and a passing reference to a general subject is "neither specific nor clear enough to provide adequate notice" of changes in conditions of employment as are anticipated by the Statute. Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA 575 (1982); U.S. Department of Air Force, Air Force Systems Command, Electronic Systems Division, Hanscom AFB, Massachusetts, 5 FLRA 637 (1981). In January 1984, rumors were circulating in the bargaining unit that Fitzgerald was going to impose a dress code. On January 10, the Union met with Fitzgerald to discuss the task lists that he had already unilaterally implemented where he mentioned a possible dress code. At that time the Union requested to bargain even though it did not have the specifics of the plan. Approximately one month later, Butler received formal notice of the dress code, but no implementation date was indicated. Later, on February 9, 1984, Butler requested that Fitzgerald negotiate concerning the code, the tour of duty, and the task lists. In my view, the Union did all it could to perfect its right to bargain about the dress code. Although, it did not receive proper notice, pursuant to suggestions it contacted the responsible official in an attempt to start negotiations over the matter.

The record is clear that Respondent never, at any time from December 1983 to March 1, 1984, notified the Union of the March 1, 1984, implementation date. Failure to adequately notify the Union and surprise implementation of a condition of employment, in my view, constitutes a failure to bargain in good faith which is violative of the Statute.

While the Authority has not decided whether or not dress codes are substantively negotiable, in American Federation of Government Employees, Meat Graders' Council, AFL-CIO, and Department of Agriculture, Food Safety and Quality Service, Meat Grading Branch, Washington, D.C., 8 FLRA 118 (1982), it found a union proposal that the employer furnish protective clothing such as a cooler coat and gloves to employees was negotiable.3/ The Authority there noted that the statutory and regulatory provisions placed the decision as to whether to provide protective clothing within the discretion of the agency. That a discretionary past practice of dress existed in this case is unquestioned. In this regard, changes in the practice should be negotiated to the full extent of that discretion. With or without a dress code, the housekeeping aides still perform their assigned cleaning and maintenance duties with their respective tools.

Around February 23, 1984, the Union made oral proposals regarding the wearing of caps or hats. Whether or not such proposals were negotiable, Respondent was obligated to give the Union an opportunity to revise its proposals, pursuant to any non-negotiability argument raised by Respondent, and continue to bargain on those proposals which were negotiable as well as the remaining issues surrounding the dress code.

3/ The establishment of minimum dress standards altering existing past practices of dress have been found by my colleague Administrative Law Judge Garvin Lee Oliver to be substantively bargainable. See, Army and Air Force Exchange Service, Fort Carson, Colorado, 7-CA-30581, 39 ALJDR (1984); United States Department of the Treasury, Internal Revenue Service, Austin Service Center, 6-CA-20356, 31 ALJDR (1983).

Adjutant General's Office, Puerto Rico Air National Guard, 3 FLRA 343 (1980). Respondent did not provide such an opportunity because it failed to state an implementation date during the course of bargaining. In the instant case the Union acted with reasonable dispatch and should not be penalized because new proposals were not submitted between February 23 and March 1, 1984. Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois, 16 FLRA 141 (1984). Furthermore, no overriding exigency which required a dress code was shown on this record.

The record does disclose that Respondent eliminated the past practice of wearing sweaters and jackets without first notifying the Union or bargaining on the matter. The dress code did not contain a prohibition against either item and the issues were not raised prior to implementation. On March 1, 1984, Respondent imposed the prohibitions, but the Union did not discover that the change was in effect until several days later when employees began complaining to the Union. Such a change without first properly notifying an exclusive representative and affording it an opportunity to bargain is violative of the Statute. See Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA 74 (1981).

The corroborated testimony reveals that on January 10, February 9, February 23, and March 12, 1984, the Union requested to negotiate concerning the dress code. Respondent implemented the dress code on March 1, 1984 or during the course of what should have been continued bargaining. The record shows that at the February 23 meeting, the subject of hats was discussed extensively. At that time the Union proposed that the hat practice continue or alternatively, it would buy hats. However, the parties failed to agree and did not even reach the other dress code issues such as sweatbands or whether or not shirts could be worn outside one's trousers.

Sweaters and jackets while part of the new dress code were not discussed during any of these meetings. Notwithstanding no discussion Fitzgerald walked out of the February 23 meeting and implemented the dress code several days later on March 1, 1984.

There is no direct relation between the extra apparel such as sweaters, jackets and caps which the employees concerned herein wore and the duties they performed. The principal reasons the outer garments were worn appears to be to protect employees from cold weather, which indeed does occur in Southern California, and against some health hazards found on the job. The evidence does not reveal any hazard presented by wearing these outer garments and hats. Furthermore, there is no showing that the outer garments and hats worn by these employees interfered with their work performance in any way.

Cases such as, Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA No. 65 (1984), concerning uniforms are distinguishable on their facts. The uniforms of the civilian technicians in such cases constitute a method and means of performing work because the employees belong to a military organization which is theoretically subject to mobilization at any time. Because of the necessity to be prepared to act immediately the Guard uniforms are clearly a military symbol of that preparedness. They are therefore not aids to the comfort, health or safety of the guard employees. The issue here is not whether or not a uniform will be worn, but is whether an agency which has allowed certain items of dress to become permissible apparel can change that practice without negotiations with the exclusive representative. Even assuming, arguendo, that dress constitutes a "method and means" of performing cleaning work as Respondent earlier suggested, it still has failed to meet its obligation to bargain concerning the impact of the change.

Respondent through Fitzgerald also makes a meretricious argument that Fitzgerald had no authority to negotiate "as I understand negotiations." First, Respondent's Labor-Relations Specialist testified that Fitzgerald did have authority to negotiate. Second, the record shows negotiations with past Services chiefs on a variety of topics. Third, there were three separate meetings held between Fitzgerald and high level union personnel without a mention of lack of authority or ability to negotiate. Following this the Union complained to the chief of personnel and still there was no mention of any lack of authority to negotiate. Thus, all of Respondent's actions appear inconsistent with its contention that Fitzgerald could not negotiate or was the wrong individual for the Union to seek out for attempted negotiations. I find, therefore, that Fitzgerald had authority to negotiate the items concerned.

Moving to Respondent's assertion that it was free to implement the dress code because the Union never requested to bargain. And, if it did request to bargain, the request was untimely because of the 15 day response parameter contained in the Local Agreement. In discrediting Fitzgerald, it is found that the Union requested and met with a management official capable of negotiations covering both the dress code and the tour of duty, in a timely fashion. Butler made one request in January, two in February and a final one in March 1984. Respondent denies that the Union requested to negotiate concerning the dress code, thus, an argument that Butler's request was too late is impossible to prove.[4] Respondent must, however, acknowledge that it never told Butler she was untimely, since in its view the request never occurred. Similarly, timeliness according to the provisions of Article 6 of the Local Agreement was not raised prior to the hearing. Further, the Union did not receive any notification that the

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[4] Respondent does not directly raise nor does it appear necessary to resolve in this matter the effect of conduct of Union President Butler in using profanity, during and at the conclusion of one of the bargaining sessions.

Respondent was enforcing the 15 day provision which the Local Agreement contains. Butler maintained at the hearing, that in her view the Master Agreement superceded the Local's provision with regard to notice and bargaining. The Master Agreement's language at Article 5, Section 1, and Article 6, Section 6, supports that argument. Obviously, Respondent disagrees with Butler's construction of the Agreement and maintained at the hearing that the Local Agreement was in effect. The parties are essentially differing over the interpretation of Article 5, Section 1, in the Master Agreement and its effect on Article 6, Section 2, of the Local Agreement. The status of that provision of the Local Agreement is arguable and unclear and therefore clearly not suitable for resolution in the unfair labor practice forum.

With regard to the change in starting and quitting times, the cases are legion which state that "the decision to change starting and quitting times is subject to the duty to bargain unless it can be demonstrated that such a change directly or integrally relates to the numbers, types or grades of employees or positions assigned to a work project or tour of duty so as to be determinative of such numbers, types or grades and therefore negotiable solely at the election of the agency under section 7106(b)(1) of the Statute." Department of the Treasury, U.S. Customs Service and U.S. Customs Service, Region IX, Chicago, Illinois, 17 FLRA 221 (1985); Department of the Air Force, Lowry Air Force Base, Colorado, 16 FLRA 1104 (1985); National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1985); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 674 (1985); Veterans Administration, Hines Hospital, Hines, Illinois, 16 FLRA 3 (1984). See also, Department of Transportation, Federal Aviation Administration, Washington, D.C., 16 FLRA 479 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982); and National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 926 (1979); Department of the Treasury, United States Customs Service, Region I, Boston, Massachusetts, and St. Albans, Vermont District Office, 10 FLRA 566 (1982).

There is no evidence to suggest that the instant change directly or integrally related to the numbers, types or grades of employees or positions assigned to a work project or tour of duty so as to be determinative of such numbers, types or grades and negotiable solely at the election of the agency. Establishing such elements would of course be incumbent on Respondent who admittedly was prepared only to bargain the impact of the change in starting and quitting times herein. Since the change which occurred herein only changed an existing tour of duty, and there is no evidence to indicate that the change was in any manner determinative of the numbers, types or grades of employees assigned to the tours of duty, it is found that Respondent was obligated to bargain. Its failure to do so constitutes a violation of section 7116(a)(1) and (5) of the Statute.

Based on all of the foregoing, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by changing the dress code of its housekeeping aides and by changing the duty hours of certain of its housekeeping aides without good faith negotiations with the exclusive representative of those employees.

Considering the criteria set out in Federal Correctional Institution, 8 FLRA 604 (1982) and noting that Respondent was not exercising any reserved rights under Section 7106 of the Statute, I agree with the General Counsel that a status quo ante remedy is appropriate in this matter in order to effectuate the purposes and policies of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations of section 7118 of the Statute, it is hereby ordered that the Veterans Administration, West Los Angeles Medical Center, Los Angeles, California shall:

1. Cease and desist from:

(a) Unilaterally instituting changes in duty hours and dress code in the Building Management Service without first notifying the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of the employees involved herein, and providing it with an opportunity to negotiate concerning the above changes and the impact and implementation of those changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the change in duty hours implemented on April 29, 1984 and restore the previously existing duty hours of 6:00 a.m. to 2:30 p.m.

(b) Rescind the dress code, including the prohibition against wearing jackets and sweaters implemented on March 1, 1984 and rescind any disciplinary actions initiated as a result of the dress code and remove all reference to such disciplinary actions from the personnel files of those employees involved.

(c) Notify and upon request, negotiate with the American Federation of Government Employees, Local 1061, AFL-CIO, or any other exclusive representative of the employees in Building Management Service concerning the change in duty hours and dress code and the impact and implementation of such changes.

(d) Post at its Veterans Administration, West Los Angeles Medical Center, Los Angeles, California the attached Notice marked "Appendix A" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: December 4, 1985
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally institute changes in working conditions for bargaining unit employees by inaugurating changes in duty hours and a dress code in the Building Management Service without first notifying the American Federation of Government Employees, Local 1061, AFL-CIO, the exclusive representative of those employees or any other exclusive representative and provide it with an opportunity to negotiate concerning such changes and the impact and implementation of those changes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employee in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the change in duty hours which was implemented on April 29, 1984, and restore the previously existing duty hours of 6 a.m. to 2:30 p.m.

WE WILL rescind the dress code, including the prohibition against the wearing of sweaters and jackets, which was implemented on March 1, 1984, and will rescind any disciplinary actions which were initiated as a result of the dress code, and will remove all reference to such disciplinary actions from personnel files.

WE WILL notify the the American Federation of Government Employees, Local 1061, AFL-CIO, of any intention to change the duty hours or dress code in the Building Management Service and, upon request, negotiate with the the American Federation of Government Employees, Local 1061, AFL-CIO, concerning such changes and the impact and implementation of those changes.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071 and whose telephone number is: (213) 688-3805.

23 FLRA No. 38

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION, FIELD
OPERATIONS, NEW YORK REGION

Respondent

and

Case No. 2-CA-40376

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2369

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The General Counsel filed an opposition to the exceptions. The issue is whether the Respondent, by basing disciplinary action against an employee in part upon an earlier written reprimand, failed to comply with an arbitrator's award, as required by section 7122(b) of the Statute,1/ and therefore

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1/ Section 7122(b) provides:

> § 7122. Exceptions to arbitral awards
>
> . . . .
>
> (b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

has violated section 7116(a)(1) and (8) of the Statute.[2]

II. Background and Judge's Conclusion

On August 10, 1982, employee Derrick Thomas was reprimanded for improper conduct. The reprimand was grieved and processed to arbitration. While the Arbitrator's decision was pending, the Respondent proposed to and did suspend Thomas for a series of events that occurred subsequent to the August 10, 1982 reprimand. The suspension, characterized as "progressive discipline," was admittedly based in part on the reprimand. On January 20, 1984, the Arbitrator issued an award which provided that Thomas' reprimand was not for just cause. He ordered that the reprimand be expunged from Thomas' personnel file, and that the reprimand "not be used against [the] grievant in any other proceeding." Explaining his award, the Arbitrator stated: "The reprimand has apparently already been removed from grievant's . . . [f]ile . . . and the Official Personnel Folder by passage of time; however, the matter is not mooted thereby inasmuch as there was evidence that grievant had this reprimand used against him in another subsequent disciplinary proceeding to demonstrate progressive discipline. . . . I will award . . . that it is not only to be expunged from grievant's record but may not be used against him in any fashion." No exceptions to the award were filed with the Authority. Following unsuccessful attempts by the Union to persuade the Respondent to rescind the suspension of Thomas in light of the Arbitrator's award, the charge that led to this complaint was filed.

The Judge, noting that the Arbitrator's award became final and binding when no exceptions were filed, found that the Respondent violated section 7116(a)(1) and (8) of the

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[2] Section 7116(a)(1) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter[.]

Statute by failing to comply with the award. The Judge found that all references to an August 5, 1982 incident involved in Thomas' August 10, 1982 reprimand had been expunged from Thomas' personnel file, and that the only issue is whether the Arbitrator's award requires the Respondent to rescind Thomas' January 17, 1983 suspension. He further found that one of the admitted reasons relied upon for Thomas' suspension was the reprimand, and that Thomas would not have been suspended but for that reliance. Citing U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA 935 (1982), the Judge ordered the Respondent to comply with the Arbitrator's award by removing all references to the August 5, 1982 incident from Thomas' personnel file and from all formal disciplinary actions thereafter taken by the Respondent against Thomas. The Judge also ordered the Respondent to revise such actions to the extent required by law and regulation, and to rescind the January 17, 1983 suspension.

III. Positions of the Parties

In its exceptions, the Respondent argues that the Judge erred because the Respondent had removed from Thomas' personnel file all references to the August 5, 1982 incident and had thus complied with the Arbitrator's award. As the suspension was based also on other reasons, it argues that it did not violate the Arbitrator's award. Further, the Respondent argues that the Judge's reliance on Fort Ritchie is misplaced, as in that case rescission was not ordered. Finally, the Respondent contends that the Judge's recommended Order is "vague, incomplete, and fatally deficient" because it orders rescission without back pay. In its opposition to the exceptions, the General Counsel argues in support of the Judge's findings and argues that back pay is not only lawful, but is inherent in and thus required by the Judge's recommended order to rescind the suspension.

IV. Analysis

The Arbitrator's award states that Thomas' reprimand ". . . may not be used against grievant in any other proceeding" and ". . . it may not be used against him in any fashion." The Respondent acknowledges that the reprimand was one of the reasons for the suspension in question. We thus agree with the Judge that the Respondent unlawfully failed to honor the Arbitrator's award and thereby violated section 7116(a)(1) and (8) of the Statute. We do not find, however, that compliance with the award requires the

Respondent to rescind Thomas' suspension. Rather, we find that, as the Arbitrator's award requires that the reprimand not be used against Thomas in any other proceeding, the Respondent must, in order to comply with that award, take the following action. The Respondent must remove all references to the August 5, 1982 reprimand incident in any disciplinary action taken against Thomas, including the January 17, 1983 notice of suspension. Further, the January 17, 1983 suspension itself must be reconsidered, having first removed all reference to or reliance on the reprimand. If, upon such reconsideration, the Respondent concludes that the suspension should stand despite the "progressive discipline" reference in Thomas' suspension notice and the requirements of the parties' negotiated agreement, law and/or regulation, it may reaffirm the suspension. See Fort Ritchie. We shall thus modify the Judge's Order accordingly.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the opposition to the exceptions, the positions of the parties, and the entire record, and adopts the Judge's findings, conclusions, and recommended Order as modified.[3] We conclude that the Respondent, by basing disciplinary action against employee Derrick Thomas in part upon an earlier written reprimand which the Arbitrator had ordered be removed from the employee's record and not be used against him in any other proceeding, failed to comply with the Arbitrator's award, and that such action constituted a violation of section 7116(a)(1) and (8) of the Statute.

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[3] Paragraphs 1(a), 1(c) and 2(a) of the Judge's recommended Order also have been modified because we find portions of those paragraphs to be unnecessarily broad; they extend well beyond the circumstances of this case.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Health and Human Services, Social Security Administration, Field Operations, New York Region shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the January 20, 1984 final award of Arbitrator Jonas Aarons.

(b) Relying on the August 5, 1982 incident involving Derrick Thomas as a basis for imposing progressively severer penalties for other offenses in formal disciplinary actions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the January 20, 1984 final award of Arbitrator Jonas Aarons.

(b) Remove all references to the August 5, 1982 incident that led to the reprimand of Derrick Thomas from his personnel file and from all formal disciplinary actions taken against him, including the January 17, 1983 notice of proposed suspension; reconsider the January 17, 1983 suspension, having first removed all reference to or reliance on the reprimand; and take appropriate action as required by the parties' negotiated agreement, by law and/or regulation.

(c) Post at its facilities throughout the Respondent's New York Region copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 38)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with the January 20, 1984 final award of Arbitrator Jonas Aarons.

WE WILL NOT rely on the August 5, 1982 incident involving Derrick Thomas as a basis for imposing progressively severer penalties for other offenses in formal disciplinary actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the January 20, 1984 final award of Arbitrator Jonas Aarons.

WE WILL remove all references to the August 5, 1982 incident that led to the reprimand of Derrick Thomas from his personnel file and from all formal disciplinary actions taken against him, including the January 17, 1983 notice of proposed suspension; reconsider the January 17, 1983 suspension, having first removed all reference to or reliance on the reprimand; and take appropriate action as required by the parties' negotiated agreement, by law and/or regulation.

____
(Agency or Activity)

Dated:______________ By:____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, New York 10278, and whose telephone number is: (212) 264-4934.

(23 FLRA No. 38)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION, FIELD OPERATIONS,
NEW YORK REGION

Respondent

and

Case No. 2-CA-40376

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2369

Charging Party

Thomas H. Gabriel, Esquire
For the Respondent

Joseph Calefut
For the Charging Party

Allan W. Stadtmauer, Esquire
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

An unfair labor practice charge was filed on June 15, 1984, and amended on July 31, 1984, by the American Federation of Government Employees, AFL-CIO, Local 2369, hereinafter called AFGE Local 2369, and the Charging Party, alleging that the U.S. Department of Health and Human Services, Social Security Administration, Field Operations, New York

Region, herein called Respondent, violated the Statute. Based upon the foregoing, on July 27, 1984 the General Counsel of the FLRA, by the Regional Director of Region II, issued a Complaint and Notice of Hearing alleging that Respondent violated Section 7116(a)(1) and (8) of the Statute by failing to comply with an arbitrator's award. Respondent filed an Answer denying that it had violated the Statute.

A hearing was conducted before the undersigned in New York, New York. Respondent, AFGE Local 2369 and General Counsel for the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The parties entered into extensive stipulations of fact. Post hearing briefs have been filed and have been considered.

Based upon the entire record in this matter and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material to the matter, the American Federation of Government Employees, AFL-CIO, (AFGE) has been the certified exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all employees employed in the District and Branch Offices of the Social Security Administration in the states of New York and New Jersey, excluding all management personnel, professional employees, federal employees engaged in personnel work in other than a purely clerical capacity, guards and supervisors. AFGE has delegated to the National Council of SSA Field Operations Locals (Council) the Authority to act as its representative for the purposes of collective bargaining for certain of Respondent's employees at its Jersey City Teleservice Center, New Jersey and the Respondent has recognized the Council's delegation. During all times material herein, AFGE Local 2369 has acted as agent for the Council for the purposes of collective bargaining for the employees, among others, at Respondent's Jersey City Teleservice Center, New Jersey and Respondent has recognized this. Labor-management relations between AFGE and the Respondent have been and still are governed by a National Agreement which became effective on June 11, 1984.

On or about August 10, 1982, Respondent gave Derrick Thomas, a unit employee and an on-site union representative in the Jersey City Teleservice Center, a written reprimand for improper conduct alleged to have occurred on August 5, 1982 at his work site. On or about August 25, 1982 AFGE Local 2369 filed a grievance on Thomas' behalf regarding the August 10th reprimand, and this grievance was processed to arbitration pursuant to the parties' negotiated grievance procedure. The arbitration was ultimately heard on December 27, 1983.

By letter dated November 24, 1982, and while the arbitrator's decision was still pending on the August 10th reprimand, Respondent issued a proposal to suspend Thomas for a series of events which occurred prior thereto. The August 10th reprimand formed one of the bases for the proposed suspension which was characterized by Respondent as "progressive discipline." This procedure conformed with the parties' negotiated agreement. Ultimately, by letter dated January 17, 1983, Respondent suspended Thomas for two (2) days on February 8 and 9, 1983. On March 24, 1983, while his arbitration on the August 10th reprimand was still pending, Thomas chose to file an Equal Employment Opportunity (EEO) complaint with the Respondent concerning his suspension; he was represented by Charging Party.[1] The EEO Complaint was processed within Respondent and was dismissed on January 26, 1984. The issue of Thomas' suspension was also brought to the attention of the Federal Labor Relations Authority by a charge filed in Case No. 2-CA-30260, alleging violations of §§ 7116(a)(2), (4), and (8) of the Statute. The charge was dismissed on the basis that the suspension had nothing to do with Thomas' function as a union representative.

On or about January 20, 1984, pursuant to the parties' negotiated grievance and arbitration procedure, Arbitrator Jonas Aarons issued an arbitration award in FMCS Case No. 83K/10557 relating to Thomas' August 10th written reprimand. The award provided:

> There was not just cause for the reprimand issued to grievant on August 10, 1982, and such reprimand shall be removed from grievant's file, expunged completely, and may not be used against grievant in any other proceeding.

In the penultimate paragraph of the opinion, which preceded the award, the arbitrator set forth the reasons for fashioning the award as he did. He stated:

> The reprimand has apparently been removed from grievant's SF-7B Extension File and the official Personnel Folder by the passage of time; however,

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[1] Article 18, § 5, paragraph B, of the agreement, pertaining to Equal Employment Opportunity, provides as follows:

> An employee has the option of filing a complaint under the negotiated Grievance Procedure (Article 24), or under the agency EEO complaint procedure, but not both. EEO counselors will provide an inquiring employee a written description of both procedures.

> the matter is not mooted thereby inasmuch as there was evidence that grievant had this reprimand used against him in another subsequent disciplinary proceeding to demonstrate progressive discipline. So that I will award hereinafter regarding the reprimand involved here that it is not only to be expunged from grievant's record but may not be used against him in any fashion.

The only disciplinary action taken against Thomas subsequent to the August 10, 1982 reprimand was his proposed suspension of November 24, 1982, effectuated January 17, 1983. There have been no other disciplinary actions, at all, since November 24, 1982 proposed or taken.

By letter dated January 24, 1984, shortly after Arbitrator Aarons issued his decision, AFGE Local 2369 requested that Respondent implement the award by, among other things, withdrawing its January 17, 1983 decision to suspend Thomas. By letter dated February 2, 1984, Respondent by its agent, Alex W. Bussey, SSA Assistant Regional Commissioner for Field Operations, declined to accede to the request to set aside the 2-day suspension. This letter states that there were numerous incidents to justify Thomas' January 13th suspension but does not enumerate what the incidents were.

On or about February 20, 1984, the arbitrator's award became final and binding inasmuch as no exceptions had been filed by Respondent. On February 28, 1984, the AFGE Local 2369 filed an unfair labor practice charge in Case No. 2-CA-40234. This charge, which alleged conduct similar to the conduct in this matter, was resolved on May 7, 1984, by means of a non-FLRA settlement which provided, inter alia, that "the reprimand received by Derrick Thomas on August 10, 1982 was overturned at the arbitration and will not be used by the Agency in any way to justify Mr. Thomas' suspension."

On June 12, 1984, AFGE Local 2369 presented Case No. 021-084-X-0163 to the Equal Employment Opportunity Commission (EEOC) on behalf of Thomas. It was an appeal of Respondent's unfavorable EEO decision regarding his 2-day suspension. Th hearing opened and closed on the same day and written closing arguments and/or statements were made by AFGE Local 2369 and Respondent on June 28, 1984 and July 6, 1984 respectively. During the course of the EEO hearing, the Respondent elicited testimony from its own witness testified that the suspension was not an EEO matter but rather was based, in part, upon Thomas' August 10, 1982 written reprimand and reflected the application of "progressive discipline." In its Closing Statement, dated July 6, 1984, Respondent remarked, inter alia, "We are certainly not using this matter against Mr. Thomas in these proceedings but merely are articulating our sound reasoning in arriving at the decision to suspend. At the time in question we were administering progressive discipline, pure and simple."

At all times since the arbitrator's award was issued on January 20, 1984 and became final and binding on February 20, 1984, the January 17, 1983 suspension of Derrick Thomas has not been reversed and continues to remain in Thomas' permanent personnel record.

Discussion and Conclusions

Section 7122(a) of the Statute provides that exceptions to an arbitrator's award may be filed by either party to the arbitration. Section 7122(b) provides that "(1) if no exception . . . is filed under subsection (a) . . . during the 30 day period beginning on the dated of such award, the award shall be final and binding." Section 7122(b) provides that an agency must take the actions required by an arbitrator's award once that award has become final and binding, and defines a final and binding arbitrator's award as one to which no exceptions have been filed during the 30 day period following the service date of such award. Accordingly, where no timely exceptions to an arbitrator's award have been filed under Section 7122(a) of the Statute, an agency's subsequent failure or refusal to implement the award has been found to constitute a violation of Section 7116(a)(1) and (8) of the Statute. U.S. Soldiers' and Airmen's Home, Washington, D.C., 15 FLRA No. 26 (1984). See also U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA 935 (1982); United States Marshals Service, 13 FLRA 351 (1983).

Respondent, not having filed exceptions to the arbitrator's award was obliged on or about February 20, 1984, to comply with the award. To the extent the award required that all references to Thomas' reprimand be removed and expunged from Thomas' files and records, the award has been complied with. The sole issue remaining is whether the award requires Respondent to rescind Thomas' suspension. The arbitrator, in finding the reprimand was not justified, noted, in fashioning a remedy, that the matter was not moot because there was evidence that the grievant had the reprimand used against him in another subsequent disciplinary proceeding to demonstrate progressive discipline. Accordingly, the arbitrator stated that the reprimand must not only be "expunged from grievant's record but may not be used against him in any fashion." Since the only discipline Thomas received subsequent to the reprimand was the suspension, this must have been the subject of the arbitrator's reference.

I conclude that the case is controlled by the FLRA's decision in U.S. Army Health Clinic, Fort Ritchie, Maryland, 9 FLRA No. 935 (1982) where in almost an identical situation the FLRA concluded that such an award by an arbitrator[3] to be meaningful did require the recision of the suspension. It is clear, in the subject case that Respondent relied upon Thomas' reprimand in deciding to suspend him. It was part of the "progressive discipline." Respondent confirmed this in its testimony before in the EEO hearing. Thus the arbitrator's award clearly required, in the subject case, the recision of the suspension.

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[3] The Arbitrator's award in the U.S. Army Health Clinic, Fort Ritchie Maryland, supra, did not even mention the intervening suspension.

Bussey's response that Thomas even absent the reprimand, because Thomas had engaged in "numerous incidents of insubordination" is totally unsupported. I conclude this letter does not, in the absence of any evidence of misconduct by Thomas, other than the reprimand incident and the incident that immediately precipitated the suspension, rebut the fact that Thomas suspension was based in part upon the reprimand and, absent the reprimand, because of its principal of "progressive discipline," Thomas would not have been suspended. U.S. Army Health Clinic, Fort Ritchie, Maryland, supra.

Accordingly, I conclude Respondent violated Section 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitrator's award.

Based on the foregoing it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Health shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the January 20, 1984 final award of Arbitrator Jonas Aaron or with any arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

(b) Relying on August 5, 1982 incident involving Derrick Thomas as the basis for imposing progressively severer penalties for other offenses in formal disciplinary actions.

(c) In any like or related manner failing or refusing to comply with any provision of the Federal Service Labor-Management Relations Statute.

(d) In any like or related manner interfering with, restraining, or coercing employees for the exercise of any right under the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the January 20, 1984 final award of Arbitrator Jonas Aaron and any other arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

(b) Revoke, rescind, and remove all references to the August 5, 1982 incident involving Derrick Thomas personnel file and from all formal disciplinary actions taken against Derrick Thomas including the January 17, 1983 notice of proposed suspension and revise such actions accordingly to the extent required by law and regulations, including rescinding the January 17, 1983 suspension.

(c) Post at its Jersey City Teleservice Center facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official of U.S. Department of Health and Human Services, Social Security Administration, Field Operations, New York Region, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places were notices to employees are customarily posted. The Official shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

SAMUEL A. CHAITOVITZ
Administrative Law Judges

Dated: September 12, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with the January 20, 1984 final award of Arbitrator Jonas Aaron or with any arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

WE WILL NOT rely on August 5, 1982 incident involving Derrick Thomas as the basis for imposing progressively severer penalties for other offenses in formal disciplinary actions.

WE WILL NOT in any like or related manner fail or refuse to comply with any provision of the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of any rights assured under the Federal Service Labor-Management Relations Statute.

WE WILL comply with the January 20, 1984 final award of Arbitrator Jonas Aaron and any other arbitrator's final award issued pursuant to the Federal Service Labor-Management Relations Statute.

WE WILL revoke, rescind, and remove all references to the August 5, 1982 incident involving Derrick Thomas personnel file and from all formal disciplinary actions taken against Derrick Thomas including the January 17, 1983 notice of proposed suspension and revise such actions accordingly to the extent required by law and regulations, including rescinding the January 17, 1983 suspension.

(Agency or Activity)

Dated: ________________________ By: ____________________________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

9/Case 391

Federal Labor Relations Authority

Washington, D.C. 20424

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NUMBER 391 REPORT OF CASE DECISIONS September 10, 1986

REPRESENTATION CASE

23 FLRA No. 44 (September 10, 1986)

Jerry L. Pettis Memorial Veterans Hospital, Loma Linda, California and Suzanne C. Lareau, R.N. and Pettis Memorial Registered Nurses Association, United States Nurses Association of California, Case No. 8-DR-50002

MISCELLANEOUS CASE

23 FLRA No. 45 (September 10, 1986)

Decision on Request for General Statement of Policy or Guidance, Case No. 0-PS-29

NEGOTIABILITY CASES

23 FLRA No. 42 (August 27, 1986)

International Association of Machinists and Aerospace Workers, Lodge 2424 and Department of the Army, Aberdeen Proving Ground, Maryland, Case No. 0-NG-1295

23 FLRA No. 43 (September 10, 1986)

American Federation of Government Employees, AFL-CIO, General Committee of AFGE for SSA Locals and Social Security Administration, Case No. 0-NG-860

*Case No. 0-NG-988 (Order Denying Request for Reconsideration of 22 FLRA No. 62) (September 10, 1986)

American Federation of Government Employees, Local 1799 and Department of the Army, Aberdeen Proving Ground, Maryland

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ARBITRATION CASES

23 FLRA No. 39 (August 20, 1986)

Social Security Administration, Northeastern Program Service Center and American Federation of Government Employees, Local 1760, AFL-CIO (Stein, Arbitrator), Case No. O-AR-1194

23 FLRA No. 40 (August 29, 1986)

Veterans Administration Medical Center, Kansas City, Missouri and American Federation of Government Employees (Wasserstrom, Arbitrator), Case No. O-AR-1180

23 FLRA No. 41 (August 29, 1986)

Social Security Administration, Albuquerque Data Operations Center and American Federation of Government Employees, Local 3512 (Hamilton, Arbitrator), Case No. O-AR-1103

23 FLRA No. 46 (September 11, 1986)

U.S. Department of Housing and Urban Development and American Federation of Government Employees, AFL-CIO, Case No. O-AR-1201

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

August 28, 1986

O-AR-1163 O-AR-1181 O-AR-1182

August 29, 1986

O-AR-1184

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

23 FLRA No. 39

SSA, Northeastern Program Service Center and AFGE, Local 1760 (Stein, Arbitrator), Case No. 0-AR-1194 (Decided August 20, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

STATUTE

7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with SS 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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Federal Labor Relations Authority

23 FLRA No. 40

VA Medical Center, Kansas City, Mo. and AFGE (Wasserstrom, Arbitrator), Case No. 0-AR-1180 (Decided August 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration Procedure Jurisdiction Matters Covered By 5 U.S.C. § 7512	7121(f) 7122(a)

DIGEST NOTES

In his arbitration award the arbitrator determined that the removal of the grievant was not justified and sustained the grievance. He ordered the grievant reinstated without backpay. The union excepted and the Authority determined that it was without jurisdiction to review the union's exceptions because the award relates to a matter covered by 5 U.S.C. § 7512. Review of an arbitration award relating to such matters must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

23 FLRA No. 41

SSA, Albuquerque Data Operations Center and AFGE, Local 3512 (Hamilton, Arbitrator), Case No. 0-AR-1103 (Decided August 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7122(a)

  Exceptions Asserted in Appeal
    Award Contrary to Fair Labor Standards Act
      Overtime
        Work Not "Suffered or Permitted"
5 CFR § 551.102(e)

DIGEST NOTES

A grievance was filed claiming the the grievant, an employee covered by the Fair Labor Standards Act (FLSA), had improperly been denied compensation for fifteen minutes overtime. The grievant alleged that her supervisor asked her to complete some work that needed to be performed before the night shift came on duty and completion of the work extended her worktime by 15 minutes for which she was entitled to overtime under the FLSA. The grievant acknowledged that her supervisor did not request that she work overtime and that she did not seek permission to work overtime. The supervisor testified that she was unaware that the grievant had extended her work time by 15 minutes. The Arbitrator determined that under the FLSA, compensable worktime includes time during which an employee is suffered or permitted to work. He denied the grievance finding in effect that the 15 minutes was not time during which the grievant was suffered or permitted to work.

In its exception to the arbitrator's award the union asserted that the award was deficient because the 15 minutes was time during which the grievant was suffered or permitted to work, therefore the award was contrary to the FLSA and its implementing regulations. The Authority held that under 5 CFR § 551.102(e), compensable worktime includes "any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed." The union failed to substantiate in accordance with 5 CFR § 551.102(e) both that the grievant's supervisor knew or had reason to believe that work was being performed and that she had an opportunity to prevent the work from being performed. The union is attempting to relitigate the merits of the case before the Authority by disagreeing with the arbitrator's findings of fact and reasoning and conclusions in resolving the dispute before him. The union therefore provides no basis for finding the award deficient.

23 FLRA No. 42

Federal Labor Relations Authority

Int'l Assn. of Machinists and Aerospace Workers, Lodge 2424 and Dep't of the Army, Aberdeen Proving Ground, Md., Case No. 0-NG-1295 (Decided August 27, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Withdrawal of Allegation of Nonnegotiability

STATUTE

7105(a)(2)(E)
7117

DIGEST NOTES

Since the agency withdrew the allegation concerning the union's proposal, there is no longer an issue as to whether the proposal is within the parties' duty to bargain under the Statute. The Authority therefore, dismissed the petition for review in this case.

Federal Labor Relations Authority

23 FLRA No. 43

AFGE, General Committee of AFGE for SSA Locals and SSA, Case No. 0-NG-860
(Decided September 10, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Work
      - Performance Standards
        - Definition of Qualitative Term
    - Direct Employees
      - Performance Standards
        - Definition of Qualitative Term
  - Performance Appraisals
    - Frequency of Monitoring - "Normally"
    - Preservation of Employee Consent Rights
  - Subjects of Bargaining - Mandatory
    - Appropriate Arrangements
      - Performance Appraisals
        - Take Into Consideration Reduced Opportunities for Monitoring
        - Errors Re Judgmental or Discretionary Issues For Information Purposes Only
        - Validate Performance Measurement Techniques
    - Procedures
      - Performance Appraisals
        - Prohibition of Secret Studies
        - Provide Employees With List of Errors Applicable to Job
        - Studies Must Be Conducted On Average Workers Under Normal Working Conditions
- 5 U.S.C. § 4302

STATUTE

7105(a)(2)(E)
7106(a)(2)(A) and (B)
7106(b)(2) and (3)
7117(c)(3)

DIGEST NOTES

A proposal that would establish the normal frequency that employees would be subject to telephone monitoring ("normally" once every 6 months) is within the duty to bargain. The Authority found that the proposal was illustrative rather than restrictive and that the use of the words "normal" and "normally" did not inhibit the agency in employing more rigorous scrutiny of employees' work when closer review was warranted. The proposal

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

was within the duty to bargain because it did not interfere with management's rights to direct employees, to assign work and to determine the methods and means of performing work. (proposal 1)

A proposal which provides that "any subjective term such as 'courtesy' will have a universally accepted meaning accepted by all parties . . . and will be applied consistently" is inconsistent with management's rights to assign and direct employees under § 7106(a)(2)(A) and (B). The Authority found that "courtesy," in this case, has a qualitative rather than quantitative connotation. By negotiating on the meaning of that word, as the proposal would require, the union would be participating in defining what is acceptable performance with respect to that aspect of employee performance. The proposal, therefore, requires a performance standard to be established by means of collective bargaining, and is inconsistent with management's rights to direct employees and to assign work. (proposal 2)

A proposal barring "secret studies," and providing that all studies "will be conducted on average workers under normal working conditions" is a negotiable procedure under § 7106(b)(2). The Authority held that the proposal was a procedure management would observe in developing performance standards. (proposal 3)

A proposal which provides that "[e]rrors involving judgmental or discretionary issues will be for informational purposes only," is a negotiable appropriate arrangement under § 7106(b)(3). The proposal was intended to protect employees who take actions in reliance on available agency guidance when, upon review, the employee's supervisor disagrees with the course of action selected, although that action was among those prescribed by the agency. The Authority held that the proposal clearly did not interfere with the agency's authority to identify critical elements or to set performance standards. Nor did the proposal protect employees from negative evaluations if they fail or refuse to seek advice, when directed by management, in selecting from among authorized options in a given case. Additionally, the proposal did not apply to an employee who fails to select the known preferred option from among authorized alternatives, nor did it prevent the agency from eliminating options or from identifying one or more available options as preferable to the others in certain circumstances. Consequently, there is no interference with the rights to assign work or to direct employees pursuant to section 7106(a)(2). (proposal 4)

A proposal which would require the agency to furnish each bargaining unit employee with a list of errors applicable to his or her work and would further require that the errors be defined in a manner understandable to all parties to the agreement, is a procedure within the meaning of § 7106(b)(2). The Authority concluded that the purposes of the proposal are to assure that employees are informed of what errors the agency has determined are applicable to their jobs and to ensure that those employees understand what constitutes errors. Such a proposal merely obligate management to comply with the statutory requirement that performance standards and critical elements be communicated to employees. (proposal 5)

A proposal requiring that management validate its selected measurement techniques by application of other, established observation methods, constitutes a negotiable appropriate arrangement in accordance with § 7106(b)(3). The Authority held that the proposal does not purport to interfere with the agency's selection of evaluation methods, nor does it preclude management's taking personnel actions based on application of those methods. The proposal likewise does not seek negotiation over critical elements or performance standards. The primary thrust of the proposal is to assure the validity and objectivity of management's selected measurement techniques. (proposal 6)

A proposal which requires management to take into consideration the fact that there will be reduced opportunities to use telephone monitoring as a method of performance evaluation when it assigns employees to work with clients who communicate poorly in English, is an appropriate arrangement, pursuant to § 7106(b)(3). The Authority found that the proposal deals with consequences arising from the nature of work assigned and is merely a more specific description of the "fair and equitable" criterion enunciated in Office of Personnel Management, 3 FLRA 784. The proposal would only apply in the context of the application to an employee of performance standards established by management. The "allowance" was therefore negotiable. (proposal 7)

A proposal designed to prevent an employee's use of telephones designated for monitoring, from being construed as consent to monitoring undertaken in violation of the collective bargaining agreement, law, rule or regulation, is within the duty to bargain. The Authority found that the proposal was in no way intended to impede the agency's use of telephone monitoring as a tool in measuring employee performance or to shield employees from discipline. Rather, the proposal's sole purpose is to preserve the right to consent to telephone monitoring granted to employees and the union by their negotiated agreement, by the agency itself or by law. (proposal 8) [illegible] A proposal which would require the agency to [illegible] with a list of [illegible] applicants [illegible] the union [illegible] requirements [illegible] all parties to the agreement [illegible]

[illegible]

[illegible]

[illegible]

A proposal [illegible] requirement [illegible] employee [illegible] in effect [illegible] regulation [illegible] within the meaning of [illegible] The authority [illegible] that the proposal was [illegible] to bargaining [illegible] discipline. Rather, the proposal's sole purpose is to [illegible] the right to [illegible] employees and the union by their negotiated agreement, by the agency itself, or by law. (proposal 4)

23 FLRA No. 44

Federal Labor Relations Authority

Jerry L. Pettis Memorial Veterans Hospital, Loma Linda, Calif. and Suzanne C. Lareau, R.N. and Pettis Memorial Registered Nurses Association, U.S. Nurses Association of California, Case No. 8-DR-50002 (Decided September 10, 1986)

SUBJECT MATTER INDEX ENTRIES

Representation
  Request for Review
    No Compelling Reason

STATUTE

DIGEST NOTES

Upon consideration of the Petitioner's application for review of the Regional Director's Decision and Order on Objections, including all arguments in support thereof, the Authority determined that no compelling reason existed for granting the application. Rather the application expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

23 FLRA No. 45

Federal Labor Relations Authority

Decision on Request for General Statement of Policy or Guidance, Case No. 0-PS-29 (Decided September 10, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
General Statement of Policy and Guidance	7104(f)(2)
General Counsel	7105
Authority to Enter Informal Settlements	7116(b)(7)
Reviewability of Decision	7118
Informal Settlement Of ULP Complaints	7120(f)(2)
Purposes of Settlement Policy	
Standards Governing Issuance	
Issuance Would Be Inconsistent Policy Articulated In Authority's Rules and Regulations	
Issuance Would Impinge Upon Statutory Duties and Responsibilities of the General Counsel	
Issuance Would Not Otherwise Promote Purposes of the Statute	
Issuance Would Not Promote Constructive and Cooperative Labor Management Relationships	
Resolution of the Questions Would Not Have General Applicability	

DIGEST NOTES

The Department of Justice requested that the Authority issue a general statement of policy and guidance on certain questions relating to the authority of the General Counsel to "unilaterally engage in the informal settlement of an unfair labor practice involving a violation of § 7116(b)(7)." The Authority considered Justice's request and determined that it did not satisfy the standards governing the issuance of general statements of policy or guidance set forth in section 2427.5 of the Authority's Rules and Regulations.

The Authority found that issuance of a general statement of policy or guidance with respect to the limitation on the role of the General Counsel suggested by Justice would not promote constructive and cooperative labor-management relationships or otherwise promote the purposes of the Statute. Rather issuance of the statement requested by Justice would impinge on the statutory duties and responsibilities of the General Counsel and would be inconsistent with the settlement policy articulated in the Authority's Rules and Regulations.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Where, upon the investigation of an unfair labor practice charge, the General Counsel issues a complaint but subsequently determines that it will effectuate the purposes and policies of the Statute to settle the matter, the General Counsel may then decide to cease prosecuting the complaint and enter into an informal settlement agreement. Such agreement may be either bilateral or unilateral depending on whether or not the charging party to the complaint is also a party to the settlement agreement. Once the General Counsel enters into an informal settlement agreement, Authority approval of that agreement is not required. The determination of the General Counsel to cease prosecuting a complaint and enter into informal settlement agreement is thus fully within his authority as expressed by Congress in enacting § 7104(f)(2).

The policy behind the informal settlement of unfair labor practice complaints was designed to foster constructive and cooperative labor-management relationships by encouraging parties involved in a labor-management disputes to communicate with one another in an attempt to resolve the matter and hopefully, to forestall the occurrence of future disputes. It was also designed to resolve disputes expeditiously without resort to possibly lengthy and costly litigation and, generally, to promote harmony at the workplace. The General Counsel, through his regional directors, clearly possesses the authority to informally settle all allegations of unfair labor practices where the offered settlement will effectuate the purposes and policies of the Statute.

23 FLRA No. 46

Federal Labor Relations Authority

HUD and AFGE (Perea, Arbitrator), Case No. 0-AR-1201 (Decided September 11, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

STATUTE

7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with §§ 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
NORTHEASTERN PROGRAM SERVICE CENTER

Activity

and Case No. 0-AR-1194

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Bruno Stein filed by the Union pursuant to section 7122(a) of the Federal Service Labor Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated June 26, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on July 30, 1986. However, the Union's exceptions were not filed with the Authority until July 31, 1986, and are, therefore, untimely.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 20, 1986.

for Jerome P. Hardiman

Harold D. Kessler
Director of Case Management

23 FLRA No. 40

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL CENTER
KANSAS CITY, MISSOURI

Activity

and

Case No. 0-AR-1180

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Solbert M. Wasserstrom filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

In his award the Arbitrator found that the removal of the grievant was not justified and sustained the grievance. He ordered the grievant reinstated without backpay.

III. ANALYSIS AND CONCLUSIONS

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute pertinently provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as a removal. Review of an arbitration award relating to such matters must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. *American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base*, 21 FLRA No. 41 (1986).

Because the Arbitrator's award relates to a matter covered by section 7512, under section 7122(a) of the Statute, exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

IV. DECISION

Accordingly, for these reasons, the Union's exceptions are dismissed.

Issued, Washington, D.C., August 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 41 (23 FLRA No. 41)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
ALBUQUERQUE DATA OPERATIONS CENTER

Activity

and Case No. 0-AR-1103

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3512

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Don Hamilton filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming that the grievant, an employee covered by the Fair Labor Standards Act (FLSA), had improperly been denied compensation for 15 minutes of overtime. According to the Arbitrator, the grievant alleged that her supervisor approached and asked her to complete some work that needed to be performed before the night shift came on duty and that completion of the work extended her worktime by 15 minutes for which she is entitled to overtime compensation under FLSA. The Arbitrator noted that the grievant acknowledged that her supervisor did not request that she work overtime and that the grievant did not seek permission of her supervisor to work overtime. The Arbitrator also noted that the supervisor testified that she was unaware that the grievant had extended her worktime by 15 minutes. In resolving the grievance the Arbitrator indicated that under FLSA compensable worktime includes time during which an employee is suffered or permitted to work. In particular, he cited 5 CFR § 551.102(e) which defines work that is suffered or permitted as follows:

> [A]ny work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

Applying that definition to the case presented to him, he denied the grievance, finding in effect that the 15 minutes in dispute was not time during which the grievant was suffered or permitted to work.

III. EXCEPTIONS

In its exceptions the Union essentially contends that the award is deficient because, contrary to the determination of the Arbitrator, the disputed 15 minutes was time during which the grievant was suffered or permitted to work within the meaning of FLSA and implementing regulations. Specifically, the Union asserts that therefore the denial of the grievance is contrary to FLSA and implementing regulations, is arbitrary and capricious, is in excess of the Arbitrator's authority, and fails to draw its essence from the parties' collective bargaining agreement. The Union also asserts that the Arbitrator based his award on the fact that the grievant directly filed a grievance rather than requesting overtime compensation and that this constitutes a restraint on the use of the negotiated grievance procedure contrary to the Statute and the agreement.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the Union fails to establish that the award is deficient. As noted, the Arbitrator denied the grievance finding in effect that the disputed 15 minutes was not time during which the grievant was suffered or permitted to work. In its exceptions the Union fails to establish otherwise. The Union fails to substantiate in accordance with 5 CFR § 551.102(e) both that the grievant's supervisor knew or had reason to believe that work was being performed and that she had an opportunity to prevent the work from being performed. Instead, in disputing the determination of the Arbitrator, the Union is attempting to relitigate the merits of this case before the Authority by disagreeing with the Arbitrator's findings of fact and reasoning and conclusions in resolving the dispute before him. Consequently, the Union in this respect provides no basis for finding the award deficient. U.S. Department of Labor and American Federation of Government Employees, Local 12, 17 FLRA 952 (1985). We also conclude that no basis is provided for finding the award deficient as contrary to the Statute or the agreement as asserted by the Union. Contrary to the assertion of the Union, we find that the award was based on the Arbitrator's determination that no work was suffered or permitted to be performed by the grievant and not on the fact that the grievant directly filed a grievance claiming overtime compensation.

V. DECISION

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 29, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 42

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LODGE 2424

Union

and   Case No. 0-NG-1295

DEPARTMENT OF THE ARMY
ABERDEEN PROVING GROUND, MARYLAND

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of a negotiability issue filed by the Union.

The record in this case indicates that by letter dated June 20, 1986, the Activity declared the Union's proposal concerning Mutual Rights and Obligations to be nonnegotiable. On July 7, 1986, pursuant to section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, the Union filed a petition for review as to whether the disputed proposal was within the duty to bargain. Subsequently, in a letter dated July 16, 1986, the Agency withdrew the allegation of nonnegotiability.

Since the Agency has withdrawn the allegation concerning the Union's proposal, there is no longer an issue as to whether the proposal is within the parties' duty to bargain under the Statute.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C.,August 27, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, GENERAL COMMITTEE
OF AFGE FOR SSA LOCALS

Union

and Case No. O-NG-860

SOCIAL SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of eight Union proposals.

II. Procedural Issue

The Agency specifically acknowledged that its Statement of Position was not filed within the time limits established by section 7117(c)(3) of the Statute and section 2424.6 of the Authority's Rules and Regulations. However, the Agency did not specifically allege or establish that the events occasioning the untimely filing were "extraordinary circumstances" warranting a waiver of time limits under section 2429.23(b) of the Rules and Regulations. Consequently, the untimely Statement of Position has not been considered in deciding this case. Further, the Agency head's determinations on the disputed proposals did not include any rationale supporting the allegations that the proposals were not negotiable.

III. Union Proposal 1

Employees subject to the Service Observation monitoring shall normally only be the subject

> of one (1) such Service Observation during each six month period commencing from the effective date of the agreement.

A. Position of the Union

The Union, in its Reply Brief, characterizes this proposal as "a general procedure to be followed after the agency has made its substantive decision to conduct service monitoring." The effect of the proposal is explained in the following manner:

> This proposal would establish the normal frequency that employees would be subject to telephone monitoring. While the proposal sets this frequency at "normally" once every six (6) months the agency retains the right to perform service monitoring more or less often. Further, management would retain full discretion to determine who would be monitored, by whom and when.

B. Analysis

Based primarily on the Union's statements as to the intent and effect of Union Proposal 1, the Authority finds that it is not materially different from Proposal 7 under the heading "Measuring Productivity" in American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration, 15 FLRA 909 (1984), rev'd as to other matters, Decision and Order on Motion for Reconsideration, (June 19, 1985). Proposal 7 in that case, deemed to be illustrative rather than restrictive, provided that employee's work products would be subject to "normal quality checks that are normally utilized." The Authority concluded, in effect, that use of the words, "normal" and "normally" in that proposal did not inhibit the agency in employing more rigorous scrutiny of employees' work when closer review was warranted. Thus, the Authority found the proposal to be within the duty to bargain because it did not interfere with management's rights to direct employees, to assign work and to determine the methods and means of performing work. In like manner, Union Proposal 1 in this case is within the duty to bargain.

C. Conclusion

Based on the rationale in Social Security Administration, and the Authority's interpretation of the proposal's purpose in that case, Union Proposal 1 in this case is within the duty to bargain.

IV. Union Proposal 2

> Any subjective term such as "courtesy" will have a universally accepted meaning accepted by all parties to this agreement and will be applied consistently in all affected SSA localities nationwide.

A. Position of the Union

The Union describes this proposal as establishing "general, nonqualitative criteria on which subjective performance standards will be based." The proposal, according to the Union, leaves the Agency with sole discretion to decide to use such subjective terms in evaluating performance, but requires a jointly developed standardized definition of such terms should management decide to use them. The Union asserts that its proposal is similar to proposals found negotiable by the Authority in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 7 FLRA 235 (1981), in that its proposal also seeks to standardize performance requirements "to prevent arbitrary, capricious and inconsistent management practices."

B. Analysis

The Union's attempt to analogize its proposal to proposals (presumably Union Proposals 1 through 5) in Internal Revenue Service is unpersuasive. In the cited case, the proposals only addressed the method of counting work production and left with management discretion to establish quantitative performance standards within the accounting procedures established by the proposals. Union Proposal 2 however, presents a different issue because "courtesy" has a qualitative rather than quantitative connotation.1/ By negotiating on the meaning of that word, as the proposal would require (note the requirement that the meaning "be accepted by all parties to this agreement"), the Union would be participating in defining what is acceptable performance with respect to that aspect of employee performance. Thus, as the proposal requires a

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1/ The Random House College Dictionary (1973) defines "courtesy" in pertinent part, as follows:

> 1. excellence of manners or social conduct; polite behavior. 2. a courteous, respectful, or considerate act or expression.

performance standard to be established by means of collective bargaining, it is inconsistent with management's rights to direct employees and to assign work pursuant to section 7106(a)(2)(A) and (B) of the Statute. American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corporation, Massena, New York, 5 FLRA 70 (1981) (Union Proposal 3), aff'd sub nom. AFGE, Local 1968 v. FLRA, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

C. Conclusion

Based on the reasoning and case cited in Saint Lawrence Seaway Development Corporation, Union Proposal 2 is inconsistent with management's rights to assign and direct employees under sections 7106(a)(2)(A) and (B) of the Statute.

V. Union Proposal 3

> There will be no secret studies. All studies will be conducted on average workers under normal working conditions.

A. Position of the Union

The Union asserts that its proposal is "nearly identical" to the first paragraph of Union Proposal 4, found to be negotiable in American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981).

B. Analysis

The record establishes that the words "average workers" in Proposal 3 are intended to convey the same meaning as "typical workers" in paragraph 1 of Union Proposal 4 found negotiable in Federal Deposit Insurance Corporation. Thus, the Authority finds Union Proposal 3 in this case is to the same effect as paragraph 1 of Union Proposal 4 in Federal Deposit Insurance Corporation. The Authority found the cited part of the proposal in that case, barring secret studies and requiring that studies be conducted on "typical workers under normal working conditions," to be a negotiable procedure management would observe in developing performance standards.

C. Conclusion

Based on the reasoning and case cited in Federal Deposit Insurance Corporation, Union Proposal 3 in this case is a negotiable procedure under section 7106(b)(2).

VI. Union Proposal 4

> Errors involving judgmental or discretionary issues will be for informational purposes only.

A. Position of the Union

The Union explains that published Agency guidance frequently lists alternative permissable actions to be taken by an employee in a specific situation, and that the Agency considers all such alternatives proper. According to the Union, the purpose of its proposal is to protect employees from the adverse effect of choosing an authorized alternative with which the employee's supervisor subsequently disagrees. The Union points out that the proposal would not prevent management from deciding which situations may be handled in more than one way. Nor is management prohibited from determining what the allowable options are. The proposal would only apply after those decisions are reached.

B. Analysis

Union Proposal 4, in essence, is intended to protect employees who take actions in reliance on available Agency guidance when, upon review, the employee's supervisor disagrees with the course of action selected, although that action was among those prescribed by the Agency. While the proposal would not obligate management to communicate to employees what options, among those authorized, are preferred in various circumstances, failure to communicate a preference would, in effect, prevent the Agency from subsequently finding unacceptable an employee's choice among alternatives it had already identified as acceptable.

An Agency is required by 5 U.S.C. § 4302 to develop a performance appraisal system which, among other things, provides for establishment of performance standards and identification of critical elements and obligates management to communicate those standards and critical elements to affected employees. Proposal 4 clearly does not interfere with the Agency's authority to identify critical elements or to set performance standards. Nor does Proposal 4 protect employees from negative evaluations if they fail or refuse to seek advice, when directed by management, in selecting from among authorized options in a given case. Additionally, the proposal does not apply to an employee who fails to select the known preferred option from among authorized alternatives, nor does it prevent the Agency from eliminating options or from identifying one or more available options as preferable to the others in certain circumstances. Consequently, there is no interference with the rights to assign work or to direct employees pursuant to section 7106(a)(2) of the Statute. Rather, the Authority views Union Proposal 4 as being similar in effect to Union Proposal 5 in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980) which was construed as requiring that performance standards be applied in a "fair and equitable" manner. Noting in that case that "the proposal . . . does not impose on the Agency a particular decision as to the quantity, quality, and timeliness of production or the establishing of priorities, or otherwise establish the content of performance standards," the Authority concluded that the proposal was within the duty to bargain "as an appropriate arrangement for employees adversely affected by management's authority under the Statute to direct employees and assign work through establishment of performance standards and to discipline employees for unacceptable performance."

In reaching this conclusion, the Authority stresses that it is relying solely upon the union's explanation that employees are given alternative courses of action and have the freedom to select any alternative so identified by the Agency. Similarly, the Authority notes the absence in the record of any explanation by the Agency as to the role an employee's judgment is expected to play in selecting among alternatives. There is no indication that the Agency has identified the exercise of sound judgment in choosing among alternative courses of action as a critical element of the positions involved. This is not to say, however, that an agency in exercising its reserved management rights cannot make the exercise of sound judgment a critical element and establish standards of performance for that element. Such actions would be outside the duty to bargain.

C. Conclusion

Therefore, the Authority finds Union Proposal 4, in those circumstances, to be a negotiable "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute.

VII. Union Proposal 5

> Each technician will be given an appropriate list of errors, each defined in such a manner that all affected parties to this agreement will have a common understanding of what they are and how they will be applied. Any error definition will be applied consistently to all affected employees, regardless of location nationwide.

A. Position of the Union

According to the Union, this proposal would require the Agency to furnish each bargaining unit employee with a list of errors applicable to his or her work and would further require that the errors be defined in a manner understandable to all parties to the agreement. The Union points out that management would retain the authority to identify errors and that management would not need to negotiate over the definitions. The proposal only requires that the definitions be understood in both their meaning and application and that they be applied consistently throughout the bargaining unit.

B. Analysis

Adopting the Union's explanation, which is consistent with the language of the proposal itself, the Authority concludes that the purposes of the proposal are to assure that employees are informed of what errors the Agency has determined are applicable to their jobs and to ensure that those employees understand what constitute errors. Thus, Union Proposal 5 is similar in purpose to those proposals, found negotiable by the Authority, requiring management to give notice to employees of which elements of their jobs will be subject to performance rating and which of those elements are deemed by management to be critical. Specifically, in American Federation of Government Employees, AFL-CIO, Local 3028 and Department of Health and Human Services, Public Health Service, Alaska Area Native Health Service, 13 FLRA 697 (1984), the Authority observed that such proposals merely obligate management to comply with the statutory requirement that performance standards and critical elements be communicated to employees.

C. Conclusion

The Authority finds, therefore, that Union Proposal 5 constitutes a "procedure" within the meaning of section 7106(b)(2) to be followed by management in directing employees and assigning work through application of its performance appraisal system. Consequently, the proposal is within the duty to bargain.

VIII. Union Proposal 6

> Evaluative conclusions based upon the observation of any employee must be supported and accompanied by evidence gathered by valid, objective commonly accepted and understood evaluative techniques. This other evidence must be sufficient to leave no reasonable doubt that the evidence does indeed represent improper activity or inefficiency by the employee.

A. Position of the Union

The Union contends that this proposal is "equivalent" to the proposal the Authority held to be negotiable in National Treasury Employees Union and Internal Revenue Service, 8 FLRA 30 (1982), in that its proposal is neither intended to dictate what evaluative techniques the Agency is to use in evaluating employee performance nor to change the quantum of proof necessary to impose performance based discipline on employees. It characterizes Union Proposal 6 as establishing a general, nonquantitative standard and suggests that its proposal is negotiable pursuant to the Authority's holding with respect to Union Proposal 5 in American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 3 FLRA 784 (1980).

B. Analysis

The Authority finds Union Proposal 6 to be to the same effect as the proposal held negotiable in the cited Internal Revenue Service case. In the cited case, the Authority determined that the proposal merely required that management validate its selected measurement techniques by application of other, established observation methods. As with the Internal Revenue Service proposal, the disputed proposal in this case does not purport to interfere with the Agency's selection of evaluation methods, nor does it preclude management's taking personnel actions based on application of those methods. Further this proposal likewise does not seek negotiation over critical elements or performance standards.

The primary thrust of the proposal is to assure the validity and objectivity of management's selected measurement techniques. A similar objective was found to be a negotiable "appropriate arrangement" in Office of Personnel Management where Union Proposal 5 sought to require management to apply the performance standards it had established in a fair and equitable manner. The proposal therefore was held to be within the scope of section 7106(b)(3) of the Statute.

C. Conclusion

Therefore, based on the reasoning in the cited Internal Revenue Service and Office of Personnel Management cases, Union Proposal 6 constitutes a negotiable appropriate arrangement in accordance with section 7106(b)(3) of the Statute for employees adversely affected by management's exercise of reserved rights.

IX. Union Proposal 7

> Employees who deal with claimants/ beneficiaries whose primary language is not English, will not be disadvantaged by their less frequent use of Direct Contact and lack of Service Observation.

A. Position of the Union

The Union explains that telephone contacts with clients whose primary language is not English are less frequent than with English speaking clients because of the communication difficulties involved. Consequently, management's opportunity to use its telephone monitoring technique in evaluating employees dealing with non-English speaking clients is reduced. Therefore, according to the Union,the proposal is intended to protect employees who, because of the nature of the work assigned them, do not provide management with the opportunity to employ telephone monitoring to the same extent that it is used in evaluating other employees.

B. Analysis

The Authority finds that Union Proposal 7 deals with consequences arising from the nature of the work assigned. That is, the proposal requires management to take into consideration the fact that there will be reduced opportunities to use telephone monitoring as a method of performance evaluation when it assigns employees to work with clients who communicate poorly in English. Hence, the proposal is similar in purpose and effect to the portion of Union Proposal 2 in American Federation of Government

Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217 (1981) which required that agency performance standards "make allowances for factors beyond the control of the employee." The Authority found that the quoted part of the proposal was merely a more specific description of the "fair and equitable" criterion enunciated in Office of Personnel Management (3 FLRA 784) and "would apply only in the context of the application to an employee of performance standards established by management." Therefore, the Authority concluded that the "allowance" requirement was negotiable as an "appropriate arrangement" for employees adversely affected by management's exercise of a reserved right.

C. Conclusion

Based on the reasons and cases cited in Federal Deposit Insurance Corporation, the Authority concludes that Union Proposal 7 is within the duty to bargain pursuant to section 7106(b)(3) of the Statute.

X. Union Proposal 8

> In no case will an employee's utilization of any telephone designated pursuant to #9 (of the memorandum) be construed as agreement with or consent to Service Observation/Monitoring of telephones.

A. Position of the Union

According to the Union, the telephones in question are those designated by management for monitoring in connection with evaluating employee performance. The Union states that the Agency is required, pursuant to its own regulations, to obtain employee consent prior to each instance of monitoring those telephones. The Union states that the proposal's purpose is to prevent an employee's use of the designated telephones from being construed as consent to monitoring undertaken in violation of the collective bargaining agreement, law, rule or regulation. The Union points out that the proposal does not authorize employees to refuse to participate in monitoring as a performance evaluation technique nor does it insulate employees from discipline for refusing to give the required consent to telephone monitoring.

B. Analysis

Based on the Union's explanation, it is clear that Union Proposal 8 is in no way intended to impede the Agency's use of telephone monitoring as a tool in measuring employee performance or to shield employees from discipline. Rather, the proposal's sole purpose is to preserve the right to consent to telephone monitoring granted to employees and the Union by their negotiated agreement, by the Agency itself or by law.

C. Conclusion

The Authority finds that Union Proposal 8 does not interfere with rights reserved to management under the Statute and the proposal does not appear to be nonnegotiable on any other ground. Consequently, the proposal is within the Agency's duty to bargain.

XI. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1, 3, 4, 5, 6, 7, and 8.[2] IT IS FURTHER ORDERED that the petition for review as it relates to Union Proposal 2 be, and it hereby is, dismissed.

Issued, Washington, D.C., September 10, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding these proposals within the duty to bargain, the Authority makes no judgments as to their merits.

23 FLRA No. 44

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

JERRY L. PETTIS MEMORIAL
VETERANS HOSPITAL, LOMA
LINDA, CALIFORNIA

Activity

and

SUZANNE C. LAREAU, R.N. Case No. 8-DR-50002

Petitioner

and

PETTIS MEMORIAL REGISTERED
NURSES ASSOCIATION, UNITED STATES
NURSES ASSOCIATION OF CALIFORNIA

Incumbent

ORDER DENYING APPLICATION FOR REVIEW

On July 25, 1986, Suzanne L. Lareau, R.N. (the Petitioner) filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Objections in the above-named case. The Petitioner contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations to support the application for review.*/

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*/ Section 2422.17(c) provides:

> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:

(Continued)

Upon consideration of the Petitioner's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review of the Regional Director's Decision and Order on Objections be, and it hereby is, denied.

Issued, Washington, D.C., September 10, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from Authority precedent;

(2) That there are extraordinary circumstances warranting reconsideration of an Authority policy;

(3) That the conduct of the hearing held or any ruling made in connection with the proceeding has resulted in prejudicial error; or

(4) That the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party.

23 FLRA No. 45

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-PS-29

DECISION ON REQUEST FOR GENERAL STATEMENT OF POLICY OR GUIDANCE

The Authority received a request from the Department of Justice (Justice) that the Authority issue a general statement of policy or guidance on the following questions:

> (1) Whether the General Counsel of the Federal Labor Relations Authority, pursuant to his charter under 5 U.S.C. § 7105 and 7118, is vested with the authority to unilaterally engage in the informal settlement of an unfair labor practice involving a violation of 5 U.S.C. § 7116(b)(7); and, if so, whether and to what extent, this authority is limited.
>
> (2) Whether a settlement agreement which merely provides for posting a notice is, in itself, sufficient to constitute "tak[ing] any other appropriate disciplinary action" as required by 5 U.S.C. § 7120(f)(2).
>
> (3) Whether the act of calling for, or condoning, a strike, work stoppage, or slowdown by a labor organization, in violation of 5 U.S.C. § 7116(b)(7) is, in the absence of an actual strike, sufficient to require that the action set out at 5 U.S.C. § 7120(f) be carried out.

The Authority has carefully considered this request and has determined that it does not satisfy the standards governing the issuance of general statements of policy or guidance set forth in section 2427.5 of the Authority's Rules and Regulations, which provides in pertinent part:

> § 2427.5 Standards governing issuance of general statements of policy or guidance.
>
> In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:
>
> . . . .

> (c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor-Management Relations Statute;
>
> . . . .
>
> (f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor-Management Relations Statute.

Underlying Justice's request, in our view, is a desire to have the Authority examine the role of the General Counsel in investigating, prosecuting and remedying conduct which is alleged to violate section 7116(b)(7) of the Statute.[1] Justice would apparently limit the role of the General Counsel in entering into unilateral informal settlement agreements in such cases.

Considering first the standard set forth in section 2427.5(f) of our Rules and Regulations, we find that issuance of a general statement of policy or guidance with respect to the limitation on the role of the General Counsel suggested by Justice would not promote constructive and cooperative labor-management relationships or otherwise promote the purposes of the Statute. Rather, issuance of the statement requested by Justice would have the opposite effect. It would impinge on the statutory duties and responsibilities of the General Counsel and would be inconsistent with the settlement policy articulated in the Authority's Rules and Regulations.

---

[1] Section 7116(b)(7) provides as follows:

> § 7116. Unfair labor practices
>
> (b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--
>
> . . . .
>
> (7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
>
> (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity[.]

Section 7104(f)(2) of the Statute defines the duties and reponsibilities of the General Counsel. Specifically, that section empowers the General Counsel to "investigate alleged unfair labor practices, . . . file and prosecute complaints, . . . and exercise such other powers of the Authority as the Authority may prescribe." Among these "other powers" is the "full and final authority and responsibility, on behalf of the Authority . . . to enter into and approve the informal settlement of charges" as set forth in Appendix B of our Rules and Regulations. Where, upon investigation of an unfair labor practice charge, the General Counsel issues a complaint but subsequently determines that it will effectuate the purposes and policies of the Statute to settle the matter, the General Counsel may then decide to cease prosecuting the complaint and enter into an informal settlement agreement. Such agreement may be either bilateral or unilateral depending on whether or not the charging party to the complaint is also a party to the settlement agreement. Once the General Counsel enters into an informal settlement agreement, Authority approval of that agreement is not required.2/ The determination by the General Counsel to cease prosecuting a complaint and enter into an informal settlement agreement is thus fully within his authority as expressed by Congress in enacting section 7104(f)(2) of the Statute.3/

Moreover, efforts by the General Counsel to informally resolve an allegation that an unfair labor practice has been committed are fully consistent with Appendix B of the Rules and Regulations, noted above, and the Authority's settlement policy.

2/ Formal settlement agreements, on the other hand, must be submitted to the Authority for approval. See generally section 2423.11 of the Rules and Regulations for a description of the different types of settlement agreements.

3/ Similarly, the General Counsel maintains the discretion to determine whether to issue a complaint in the first instance. Such action is not subject to review by the Authority and is generally not subject to judicial review. See Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

In exercising its leadership role under the Statute,[4] the Authority has long maintained a policy of encouraging the informal resolution of unfair labor practice charges. This policy, expressed in sections 2423.2 and 2423.11 of the Rules and Regulations, extends to any phase of an unfair labor practice proceeding where the purposes and policies of the Statute will be effectuated.[5] The settlement policy was designed to foster constructive and cooperative labor-management relationships by encouraging parties involved in a labor-management dispute to communicate with one another in an attempt to resolve the matter and, hopefully, to forestall the occurrence of future disputes. It was also designed to resolve disputes expeditiously without resort to possibly lengthy and costly litigation and, generally, to promote harmony at the workplace. No limitation on the "full and final authority and responsibility" of the General Counsel to effect informal settlements as expressed in Appendix B and elsewhere in the Authority's Rules and Regulations was stated or intended.

Therefore, based upon the role of the General Counsel set forth in section 7104(f)(2) of the Statute and the further delegation of duties as prescribed in our Rules and Regulations and given the considerations underlying the Authority's settlement policy, we find that the General Counsel, through his regional directors, clearly possesses the authority to informally settle all allegations of unfair labor practices where the offered settlement will effectuate the purposes and policies of the Statute. To grant Justice's request and resolve the questions raised in the manner suggested would not, in our view, promote constructive and cooperative labor-management relationships in the Federal service.

---

[4] Section 7105(a) of the Statute provides:

> § 7105. Powers and duties of the Authority
>
> (a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

[5] See also Norfolk Naval Shipyard, 10 FLRA 641 (1982) and Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, D.C., 12 FLRA 552 (1983).

We also find that the request does not meet the standard set forth in section 2427.5(c) in that resolution of the questions presented would not have general applicability under the Statute. As noted by Justice, there have been very few instances in which the General Counsel has entered into such settlement agreements and therefore very few instances in which such issues have arisen. Any questions concerning the authority of the General Counsel to act in this area have been addressed above.

Issued, Washington, D.C. September 10, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 46 (23 FLRA No. 46)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
Agency

and Case No. 0-AR-1201

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Kenneth A. Perea filed by the Union pursuant to section 7122(a) of the Federal Service Labor Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated July 5, 1986, and it was served on the parties by mail on July 7, 1986.

Under section 7122(b) of the Statute, as amended,1/ and section 2425.1 of the Authority's Rules and Regulations, as amended,2/ which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's

---

1/ Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

2/ 49 Fed. Reg. 22623 (1984).

award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on August 11, 1986. However, the Union's exceptions were not filed with the Authority until August 13, 1986, and are, therefore, untimely.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 11, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1799

Union

and

Case No. O-NG-988
22 FLRA No. 62

DEPARTMENT OF THE ARMY
ABERDEEN PROVING GROUND,
MARYLAND

Agency

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority because of the Union's request for reconsideration of the Authority's Decision and Order on Negotiability Issues of July 15, 1986, in the above-entitled matter. For the reasons set forth below, the request must be denied.

In its decision the Authority held that because the disputed portion of Provision 1 provided non-appropriated fund (NAF) employees who are not covered by 5 U.S.C. § 4303 with an option to contest performance based non-disciplinary separations for cause through either the Agency's internal regulatory appeals procedure or through the negotiated grievance procedure which covers such matters, it was outside the duty to bargain. The provison was contrary to section 7121(a)(1) which establishes that, except for those matters set out in section 7121(d) and (e), the negotiated grievance procedure shall be the exclusive procedure for resolving all matters which fall within its coverage. The Authority found that the Agency's internal administrative appeals system did not constitute an "appellate procedure" within the meaning of section 7121(e)(1) which permits employees not covered by title 5 the option of challenging performance based non-disciplinary separations, through their negotiated grievance procedure or through the applicable "appellate procedure" which may exist under their non-title 5 personnel system.

In support of its request for reconsideration, the Union contends that since the position of the Agency as set forth in the record of the case does not address whether its administrative appeals procedure is an "appellate procedure" under section 7121(e), the Authority's decision is based on a matter that was not at issue in the case.

Section 2429.17 of the Authority's Rules and Regulations provides that a party which can establish "extraordinary circumstances" may request reconsideration of an Authority decision. Here, however, the Union has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the Union's arguments essentially constitute nothing more than disagreement with the Authority's decision. Contrary to the Union's argument, the Authority must apply all relevant provisions of the Statute in resolving negotiability appeals and is not limited to considering only the arguments of the parties.

Consequently, the Authority concludes that the Union has failed to establish the existence of extraordinary circumstances. Accordingly, IT IS ORDERED that the Union's request for reconsideration be, and it hereby is, denied.

Issued, Washington, D.C., September 10, 1986.

J. Calhoun
Jerry D. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
Agency

and

Case No. 0-AR-1163

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3231
Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John P. Linn filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., August 28, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Agency

and

Case No. 0-AR-1181

SSA LOCAL 1923, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Jack A. Warshaw filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 28, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1858

Union

Case No. 0-AR-1182

and

U.S. ARMY MEDICAL DEPARTMENT
U.S. ARMY MISSILE COMMAND
REDSTONE ARSENAL, ALABAMA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Sherman Dallas filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 28, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY

Agency

and

Case No. 0-AR-1184

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3953

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator James J. Sherman filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., August 29, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case No. 392

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 392 REPORT OF CASE DECISIONS September 24, 1986

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REPRESENTATION CASE

23 FLRA No. 47 (September 19, 1986)

United States Department of Agriculture Forest Service, Intermountain Region Challis National Forest and Forest Service Council National Federation of Federal Employees, Independent, Case No. 9-CU-60002 and 9 CU-60003

UNFAIR LABOR PRACTICE CASES

23 FLRA No. 49 (September 23, 1986)

American Federation of State, County, and Municipal Employees, Local 2910, AFL-CIO, Case No. 3-CO-50030

23 FLRA No. 54 (September 23, 1986)

Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 5-CA-50046

NEGOTIABILITY CASE

23 FLRA No. 50 (September 23, 1986)

Federal Union of Scientists and Engineers, National Association of Government Employees and Naval Underwater Systems Center Newport, Rhode Island, Case No. 0-NG-1164

Y 3.F 31/21-3:

ARBITRATION CASES

23 FLRA NO. 51 (September 23, 1986)

U.S. Customs Service Chicago-O'Hare and National Treasury Employees Union, Chapter 172 (Craver, Arbitrator), Case No. 0-AR-1076

23 FLRA NO. 52 (September 23, 1986)

United States Marine Corps Marine Corps Logistics Base Albany, Georgia and American Federation of Government Employees, Local 2317, Case No. 0-AR-1122

23 FLRA No. 53 (September 23, 1986)

Federal Prison System U.S. Medical Center for Federal Prisoners and American Federation of Government Employees, Local 1612 (Stix, Arbitrator), Case No. 0-AR-11106

MISCELLANEOUS CASE

23 FLRA No. 48 (September 23, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, Case No. 0-MC-11

Federal
Labor Relations
Authority

23 FLRA No. 47

Dep't of Agriculture, Forest Service, Intermountain Region, Challis National Forest and Forest Service Council, NFFE, Case Nos. 9-CU-60002 and 9-CU-60003
(Decided September 19, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

- Representation
  - Post Election Matters
    - Clarification of Unit
      - Seasonal Supervisors
        - Executive Order Precedent Remains Valid
  - Request for Review
    - No Compelling Reason
    - No Substantial Question of Law or Policy
      - Executive Order Precedent Remains Valid

DIGEST NOTES

The activity filed an application for review seeking to set-aside in part, the Regional Director's finding that "seasonal supervisors" should be excluded from the certified unit during the period in which they are supervising seasonal employees, but should be considered to be within the unit for that part of the year when they have no subordinates reporting or assigned to them. The activity contended that the case raised a substantial question of law or policy and asserted that review should be granted because of the Regional Director's reliance on Executive Order law and the absence of Authority precedent on the subject. The Authority found no reason to change the long-standing policy with regard to "seasonal supervisors" established under the Executive Order cases. The Authority therefore concluded that no compelling reason existed for granting the application, which amounted to mere disagreement with the Regional Director's findings which were based on precedent and had not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

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23 FLRA No. 48

Federal Labor Relations Authority

HHS, SSA and AFGE, Case No. 0-MC-11 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Miscellaneous
  Procedure
    Motion For Emergency Stay of Arbitral Proceedings
      Pending Authority Resolution of Exceptions to Previous Award
5 U.S.C. § 7101 et seq. [Federal Service Labor-Management Relations Statute]

DIGEST NOTES

The agency requested an emergency stay of arbitral hearings ordered by an arbitrator until the Authority ruled on exceptions to awards previously rendered by the arbitrator. The Authority found that there is no basis in the Federal Service Labor-Management Relations Statute for the issuance of a stay such as that requested by the agency. The Authority therefore, denied the agency's motion.

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23 FLRA No. 49

Federal Labor Relations Authority

AFSCME, Local 2910 and Library of Congress, Case No. 3-CO-50030 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7114(a)(1)
Union Violations	7116(b)(1) and (8)
Interference, Restraint, Coercion	7118
Nomination of Union Members to Rating Panels	
Otherwise Refuse to Comply With Statute	
§ 7114(a)(1)	

DIGEST NOTES

The Authority found, in agreement with the Judge, that a contractual provision permitting union participation on rating panels does not interfere with any employee rights under the Statute. Nor was the union in violation of the Statute when in the selection of its own representative, it established a policy of only nominating union members for selection and service on the panels. Accordingly, the union did not violate § 7116(b)(1) and (8) by confining its nominees to rating panels to unit employees who were union members. The Judge found that it is well settled that a union must represent all unit employees equally and without regard to union affiliation. It is also well settled that a union is entitled to select its own representatives. To the extent that a union limits its representatives to union members, it could hardly be argued that it was discriminating against non-union unit members in violation of § 7114(a)(1). The Judge concluded that the contract provision did not constitute a benefit for unit employees but instead conferred a right of representation on the rating panels to the union.

The Authority concluded that the union did not violate § 7116(b)(1) when its steward informed a unit employee that the union would only nominate union members to be rating panel members. The Authority found that the pronouncement of this lawful policy did not interfere with, restrain or coerce employees in the exercise of statutory rights.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

23 FLRA No. 50

Federal Union of Scientists and Engineers, NAGE and Naval Underwater Systems Center, Newport, R.I., Case No. 0-NG-1164 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Conditions for Review	7106(a)(2)(B) and (C)
Proposal Inconsistent with FPM	7106(b)(2)
Chapter 511, Subchapter 4-3	7117(a)(1)
Subjects of Bargaining	
At Election of Agency	
Proposal Applies to Positions Outside Bargaining Unit	
Position Descriptions	
Delay Change in Descriptions - 90 Days	
Vacancies	
Posting of Announcement	
Positions Outside Bargaining Unit	
Positions Within Bargaining Unit	

DIGEST NOTES

A proposal which provides that no position description will be changed for a minimum of 90 days, is inconsistent with FPM Chapter 511, Subchapter 4-3 and therefore, nonnegotiable. That regulation requires that position descriptions accurately state the duties and responsibilities assigned employees. Although, the Authority found that the proposal would not preclude the agency from assigning duties which if included in the position descriptions would result in reclassification of the position, it concluded that the proposal would prohibit the agency from including those duties in position descriptions for a minimum of 90 days even if duties are actually assigned to employees during that time period. The proposal would therefore result in inaccurate position descriptions, in violation of the FPM. The fact that the conflict with the FPM would occur for a specified time period did not change the Authority's conclusion because a proposal is nonnegotiable if it conflicts at all with a Government-wide rule or regulation under § 7117(a)(1).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal which would require the agency to advertise, within 30 days, "all new positions" established by a reorganization, is negotiable only at the election of the agency and the agency has elected not to bargain concerning the matter. The Authority found that to the extent that the proposal would require the posting of notices concerning vacancies in bargaining unit positions only, and would not require management to fill such positions or select from any particular source, the proposal constitutes a negotiable procedure under § 7106(b)(2). To the extent that the proposal would apply to positions outside the bargaining unit, it is negotiable only at the agency's election. Both the language of the proposal and the record indicated that the proposal applies to all newly created positions, not just those within the bargaining unit. The proposal does not, however, require the agency to fill any of those newly created positions or restrict management's right under § 7106(a)(2)(C) to select from any appropriate source.

Federal Labor Relations Authority

23 FLRA No. 54

Dep't of the Air Force, HQ, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and AFGE, Council 214, Case No. 5-CA-50046 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Otherwise Refuse to Comply With Statute
      - § 7115(a)
  - Dues Allotments
    - Recoupment of Overpayment to Union
      - Deduction From Subsequent Remittances
  - "Law of the Case" Doctrine

STATUTE

7103
7112(b)
7115(a) and (b)
7116(a)(1) and (8)
7123(a)

DIGEST NOTES

The Authority held that the activity did not violate § 7115(a)(1) and therefore did not commit an unfair labor practice under § 7116(a)(1) and (8) when it recouped overpayments of union dues previously remitted by the activity to the union by deducting such overpayments from subsequent remittances. The Authority adopted the Judge's findings that the activity properly recouped the overpayment of dues, on behalf of former unit employees who had been promoted to supervisory positions, by using the set-off method. The Judge correctly found that the Authority's supplemental decisions in Griffis, 15 FLRA 1032 (1984); and Goodfellow, 14 FLRA 795 (1984)(In both cases the Authority accepted the decisions of the circuit courts as the "law of the case," and held that the set-off method violated § 7115(a)), did not change Authority precedent which holds that use of the set-off method to recoup the overpayment of dues does not violate § 7115(a).

Section 7115(a) enables a bargaining unit member to have his employing agency deduct periodic union membership dues from his regular pay and forward it to the exclusive representative of the bargaining unit directly. An agency's recoupment of dues erroneously paid to an exclusive representative on behalf of an employee after his appointment to a supervisory position constitutes the correction of an administrative error in compliance with the terms of the Statute. The setoff of such overpayments against current allotments and remittances to the union constitutes a lawful and efficient means of recoupment. The Authority adheres to the position that such a method of recoupment does not violate either § 7115(a) or § 7116(a)(1) and (8). Further, when the agency corrects the overpayment by setoff against presently allotted dues before remittance to the exclusive representative, the right of current unit members to have their dues remitted to the union is not violated. Rather, the portion of the dues of the current unit members which was not remitted to the union was, in effect, "pre-paid" by the agency through previous overpayments. An agency need not maintain the dues allotments of current member employees intact until they are remitted to the union under § 7115(a), as long as the agency remits sufficient payments to the union to avoid arrearage on the part of employees properly covered by § 7115(a).

Under the "law of the case" doctrine, an issue of law as decided in a reviewing court becomes binding precedent to be followed in successive stages of litigation involving the same case.

Federal Labor Relations Authority

23 FLRA No. 51

U.S. Customs Service, Chicago-O'Hare and NTEU, Chapter 172 (Craver, Arbitrator), Case No. 0-AR-1076 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7122(a)

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to Law
      5 U.S.C. 5596 *et seq.*
      5 U.S.C. 5701 *et seq.*
  Remedy
    Back Pay
      "Pay, Allowances, or Differentials"
        Does Not Include Employee Commuting Expenses
  Travel Expenses
    Travel Expense Act
      Employee Commuting Expenses Not Proper Payment or Reimbursement Under the Act

5 U.S.C. 5596 *et seq.* [Back Pay Act]
5 U.S.C. 5596(b)(1)(A)(i)
5 U.S.C. 5701 *et seq.* [Travel Expense Act]
5 CFR part 550, subpart H
5 CFR § 550.803
41 CFR part 101-7 [Federal Travel Regulations]

DIGEST NOTES

The parties submitted to arbitration the issue of whether the failure to permit the grievants to exchange work locations violated the parties collective bargaining agreement. The Arbitrator determined that the activity had violated the agreement and sustained the grievance. Noting that each grievant had additional miles added to the distance between home and work as a result of the activity's improper actions, the Arbitrator as a remedy directed that the grievants be paid for their additional commuting expenses.

In its exceptions to the arbitrator's award the agency contended that the remedy directing that the activity pay the additional commuting expenses incurred by grievants was contrary to law because commuting expenses are not authorized as reimbursable travel expenses. The agency also maintained that the award of such expenses was not authorized under the Back Pay Act as an award of backpay. The Authority held that there is no provision in any relevant statute or regulation that permits the payment or reimbursement of the additional personal commuting expenses of the grievants. Unless essential to the transacting of official business, no costs or expenses incurred by federal employees for transportation between their residences and official duty stations are payable or reimbursable under law and regulation pertaining to travel expenses. Instead, federal employees must bear all such transportation costs as personal commuting expenses. Accordingly, there is no authorization under law or regulation for the payment directed by the arbitrator of the additional personal commuting expenses incurred by the grievants.

The Authority held that neither the Back Pay Act nor its implementing regulations authorized the payment or reimbursement of personal commuting expenses as part of an award of backpay. The Back Pay Act provides the appropriate authority to remedy with an award of backpay an unjustified or unwarranted personnel action that has denied an aggrieved employee "pay, allowances, or differentials" that the employee would have earned or received if the personnel action had not occurred. "Pay, allowances, and differentials" are defined in 5 CFR § 550.803 as "monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a federal function." "Pay, allowances, or differentials" encompassed by the Act constitute normal, legitimate employee benefits in the nature of employment compensation or emoluments. The additional personal commuting expenses incurred by the grievants as the result of the activity's unwarranted action are not proper components of an award of backpay under the Back Pay Act and its implementing regulations. Further the arbitrator did not find, as required by the Act, that the expenses directed by the arbitrator to be reimbursed are expenses which the grievants "normally would have . . . received during the period if the personnel action had not occurred."

Federal Labor Relations Authority

23 FLRA No. 52

U.S. Marine Corps, Marine Corps Logistics Base, Albany, Ga. and AFGE, Local 2317 (King, Arbitrator), Case No. 0-AR-1122 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to § 7106(a)(2)(B)
  Management Rights
    Assign Work
      Determine Employees Qualified to Perform Work
      Determine Qualifications to Perform Work
    Overtime
      Grievant Not Qualified to Perform Work

STATUTE

7106(a)(2)(B)
7122(a)

DIGEST NOTES

A grievance was submitted to arbitration claiming that the grievant had been denied overtime work assignments in violation of the overtime provisions of the parties' collective bargaining agreement. At arbitration the activity explained that the overtime work was not assigned to the grievant because he did not possess the necessary familiarity with the inspection work in the particular shop, which was different from the work in the shop where the grievant normally worked, and did not possess the special skills required to assure the continuity and efficiency of the inspection work. The arbitrator found, contrary to the activity's determination, that the grievant had the special skills necessary for the performance of the work and that granted an opportunity to perform the work on overtime, the grievant had the capability to become sufficiently familiar with that inspection work. The arbitrator found that under the parties' agreement, the grievant should have been offered overtime work assignments and sustained the grievance. As a remedy the arbitrator directed the activity to assign the grievant overtime work in sufficient amounts to permit him to recoup that which he had been improperly denied.

In its exception to the arbitrator's award the agency contended that the award was contrary to § 7106(a)(2)(B) because it interfered with management's right to assign work. The agency also argued that the arbitrator substituted his judgment for that

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of management in determining which employees were qualified to perform the work on overtime. The Authority found that the activity had not assigned overtime work to the grievant because it determined that he was not qualified. When the arbitrator as his award found that under the agreement the grievant was qualified for and entitled to have been offered overtime work assignments and directed that he be assigned such work, he negated the exercise by management of its rights to establish qualifications and to determine whether particular employees meet those qualifications . The arbitrator did not merely enforce a procedure of the parties' collective bargaining agreement by which parties previously judged by management to be equally qualified will be selected to perform certain work. Instead, the arbitrator enforced the agreement to improperly interfere with management's right to assign work in accordance with § 7106(a)(2)(B). The arbitrator's award was therefore, set aside.

Federal Labor Relations Authority

23 FLRA No. 53

Federal Prison System, U.S Medical Center for Federal Prisoners and AFGE, Local 1612 (Stix, Arbitrator), Case No. 0-AR-1106 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Exceptions Asserted in Appeal
    Award Contrary to § 7106(a)(2)(A) and (B)
  Performance Appraisal
    Scope of Review
      Arbitrator May Not Substitute His Judgment for Management's

STATUTE

7106(a)(2)(A) and (B)
7122(a)

DIGEST NOTES

A grievance was submitted to arbitration on the issue of whether the grievant was properly accorded an overall annual performance appraisal rating of "fully successful" rather than "exceeds." The arbitrator determined that the reviewing official failed to meet his responsibility under the performance appraisal regulation to review the grievant's rating for consistency with the ratings given other employees. The arbitrator determined that in the rating process of formulating performance ratings for the appraisal period in dispute, the grievant was unfairly discriminated against because the evidence showed that the grievant had been evaluated under standards different from those applied to other employees. As his award, the arbitrator directed that the grievant's performance be reevaluated. He also directed that the reevaluation be in accordance with an elaborate process that he specified in his award. That process provided that the grievant's rating must be reevaluated solely by a comparison with five samples, as specified by the award, and required under certain circumstances that the grievant's rating must be changed to "exceeds."

In its exceptions to the arbitrator's award the agency contended that the award was contrary to § 7106(a)(2)(A) and (B) because the arbitrator substituted his judgment for that of management in the area of performance appraisal and had fashioned a remedy without basis in law, regulation, or the parties' collective bargaining agreement. The Authority held that the

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

arbitrator properly sustained the grievance and properly ordered the grievant reevaluated on finding that the grievant's appraisal was not reviewed for consistency with other appraisals, as required by the performance appraisal regulation, and that in the rating process, the grievant was unfairly discriminated against by having been evaluated under different standards from those applied to other employees. The Authority, however, concluded that the process prescribed by the arbitrator for reevaluation of the grievant's performance was contrary to § 7106(a)(2)(A) and (B). By requiring that the grievant's performance must be reevaluated solely by comparison with a sample of five appraisals selected under a precise method prescribed by the arbitrator, the award interfered with management's right to determine the method by which it will evaluate an employee's work performance. Likewise by specifying the circumstances under which the grievant's performance must be evaluated as "exceeds," the arbitrator improperly substituted his judgment for that of management as to what the grievant's performance evaluation and rating should be. The award was modified to provide that the grievant be reevaluated under established elements and standards and in accordance with the general performance appraisal system.

In resolving disputes pertaining to performance appraisal matters, an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his/her performance appraisal by management's application of the established performance standards. An arbitrator may sustain the grievance on finding that management applied the standards in violation of law, regulation or an appropriate provision of the parties' agreement. In sustaining the grievance, the arbitrator as a remedy may direct that the grievant's work product be properly evaluated. An arbitrator may not substitute his own judgment for that of management in the exercise of the rights under § 7106(a)(2)(A) and (B) to direct employees and assign work.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE, INTERMOUNTAIN REGION
CHALLIS NATIONAL FOREST

Activity

and

Case No. 9-CU-60002
9-CU-60003

FOREST SERVICE COUNCIL
NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, INDEPENDENT

Labor Organization

ORDER DENYING APPLICATION FOR REVIEW

On July 21, 1986, the United States Department of Agriculture Forest Service, Intermountain Region, Challis National Forest (Activity) filed a timely application for review pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside in part, the Regional Director's Decision and Order in the above-named cases. In its application for review, the Activity contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application.

The Regional Director, citing Department of Interior, Bureau of Land Management, District Office, Lakeview Oregon, 2 A/SLMR 515 (1972) and United States Forest Service, Salmon National Forest, Salmon, Idaho, 5 A/SLMR 586 (1975), review denied by the Federal Labor Relations Council, 4 FLRC 89, 75A-107 (1976), found that "seasonal supervisors" should be excluded from the certified unit during the period in which they are supervising seasonal employees, but should be considered to be within the unit for that part of the year when they have no subordinates reporting or assigned to them.

In its application for review, the Activity contends that review should be granted based on the Regional Director's reliance on Executive Order law and in the absence of Authority precedent since the case raises a substantial question of law or policy. Contrary to the Activity's position, the Authority finds no reason to change the long-standing policy with regard to "seasonal supervisors" established under the cited Executive Order cases.

Upon consideration of the Activity's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather the application in essence expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review of the Regional Director's *Decision and Order* be, and it hereby is, denied. As the Activity's application for review only sought review of the Regional Director's findings with respect to three "seasonal supervisors," all other findings of the Regional Director are not at issue herein and are final.

Issued, Washington, D.C., September 19, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

Case No. 0-MC-11

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DENYING MOTION FOR EMERGENCY STAY OF FURTHER ARBITRAL PROCEEDINGS

On September 8, 1986, the Department of Health and Human Services (HHS) requested an emergency stay of arbitral hearings ordered by Arbitrator Justin C. Smith until the Authority ruled on exceptions to awards previously rendered by Arbitrator Smith presently before the Authority in Case Nos. 0-AR-1207 and 0-AR-1210.

There is no basis in the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 *et seq.*) for the issuance of a stay such as that requested by HHS. Accordingly, apart from other considerations and confirming oral advice, the Agency's motion is denied.

For the Authority.

Issued, Washington, D.C., September 23, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 2910,
AFL-CIO

Respondent

and — Case No. 3-CO-50030

THE LIBRARY OF CONGRESS

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and the Respondent filed a brief in opposition to such exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommendation that the complaint be dismissed.

In agreement with the Judge we find no showing that the contractual provision permitting union participation on the panel interferes with any employee rights under the Statute. Nor was the Respondent in violation of the Statute when in the selection of its own representative, it established a policy of only nominating union members for selection and service on such panels. Accordingly, we find that the Respondent did not violate sections 7116(b)(1) and (8) of the Statute by confining its nominees to rating panels to unit employees who were union members. We note that the parties may clarify the matter in future negotiations.

While the Judge did not specifically resolve the General Counsel's argument regarding an independent violation of section 7116(b)(1), the Judge, as noted by the General Counsel, nonetheless made the necessary factual findings regarding this issue. Based on such findings, the Authority concludes that the Respondent did not violate the Statute when it informed a unit employee that it would only nominate union members to be panel members. In the Authority's view, the pronouncement of this lawful policy did not interfere with, restrain or coerce employees in the exercise of statutory rights. Accordingly, we find that the Steward's statement was not violative of section 7116(b)(1).

ORDER

IT IS ORDERED that the complaint in Case No. 3-CO-50030 be, and it hereby is, dismissed.

Issued, Washington, D.C., September 23, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 49)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
LOCAL 2910, AFL-CIO

Respondent

and

Case No. 3-CO-50030

THE LIBRARY OF CONGRESS

Charging Party

Peter A. Sutton, Esquire
For the General Counsel

James Mundy, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on May 15, 1985, by The Library of Congress (hereinafter called the Library), a Complaint and Notice of Hearing was issued on July 31, 1985, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the American Federation of State, County and Municipal Employees, Local 2910, AFL-CIO (hereinafter called the Respondent or Guild), violated Sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by virtue of its action in denying non-union unit employees the opportunity to serve on "Qualifications Rating Panels."

A hearing was held in the captioned matter on September 26, 1985, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on October 28, and October 25, 1985, respectively, which have been duly considered.[1]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact,[2] conclusions, and recommendations.

Findings of Fact

The Guild has, for many years, been recognized as the exclusive representative of approximately 1300 professional employees at the Library. The Guild's current collective-bargaining was negotiated in March 1983 and expires in March 1987. The Guild's 1983-1987 negotiated agreement replaced the Guild's initial collective-bargaining agreement with the Library which had been negotiated in 1978.

Article XI of the Guild's current negotiated agreement entitled "Merit Employment and Promotions" addresses the procedures which the Library will follow in making employment and promotion decisions affecting positions within the Guild's bargaining unit. The purpose of Article XI is to ensure that merit principles are applied in an equitable manner to all applicants and to ensure that the Library selects the best qualified candidates for unit position vacancies.

Section 9(A) of Article XI provides that whenever there are six (6) or more eligible applicants for an announced unit position vacancy, the Library will convene a qualifications rating panel. The function of a qualifications rating panel is to rate the applicants for a unit position in accordance with prescribed ranking factors, i.e., the qualifications rating panel develops a best qualified list and refers the names of the five best qualified applicants to the Library's selecting official. The final selection is made by the Library's selecting official.

Pursuant to Section 9(B) of Article XI, the Library's rating panels consist of three (3) members. Two of the members are from the Library's managerial and supervisory staff. The third member is a bargaining unit employee. In order to become eligible to serve on a rating panel, a bargaining unit employee must first receive training on rating panel procedures from the Library's Recruitment and Placement (R & P) Office. In this latter respect, Section 9(B) of Article XI states that: "Panel members from the unit will be nominated by the Guild for training on official time and selected from the Guild lists of nominees." This particular language was carried over from the Guild's 1978 negotiated agreement with the Library. The only difference between the two agreements is that the current agreement contains a provision whereby the Library agrees to rotate service on the rating panels among the eligible unit employee nominees who have received the qualifying training after being specifically nominated by the Guild for such training.

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[1] In the absence of any objection, General Counsel's Motion to Correct Transcript, should be, and hereby is, granted.

[2] All parties agree that the facts for the most part are not in dispute.

From 1979 to the present, the Guild has been submitting the names of unit employees to the Library's R & P Office for the required rating panel training. Since the Guild nominates unit employees for rating panel training on an on-going basis and since once unit employees have been trained they are eligible for rating panel service as long as they remain employed by the Library, the Library's R & P Office has developed a cumulative listing of unit employees qualified for rating panel service. As of May 1985, there were approximately 271 Guild unit employees who were eligible for rating panel service.

The Library's R & P Office provides the names of Guild unit employees eligible for rating panel service to the various department heads in the Library.[3] Whenever there is a vacancy for a Guild unit position and there are the requisite number of qualified applicants, six or more, Library management at the department level where the position is located consults the lists of eligible panel members and decides which three (3) members will serve on the rating panel.

On or about April 15, 1985 bargaining unit employee Linda Miller telephoned Guild Chief Steward Josie Hawkins and requested to be nominated for training and service on the Library's rating panels. Ms. Miller was quite familiar with the duties and requirements of several unit position vacancies in her work area and she believed she would be a good candidate to serve as the unit employee member on any of the rating panels. Ms. Miller expressed this information to Ms. Hawkins and asked if the Guild would nominate her for training and service on the rating panels. Ms. Hawkins asked Ms. Miller if she was a Guild member. Ms. Miller replied she was not. Ms. Hawkins then informed Ms. Miller that it was the Guild's policy to only nominate dues-paying members for training and service on the Library's rating panels.

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[3] The Library's R & P Office also provides the Library's department heads with the names of all managerial and supervisory staff who are qualified for qualifications rating panel service.

Following this conversation with Ms. Hawkins, Ms. Miller spoke with Mr. Donald Panzera, a former Guild official and chief negotiator of the Guild's current negotiated agreement. Ms. Miller recounted her conversation with Ms. Hawkins to Mr. Panzera. Unaware that the Guild had adopted such a members-only policy, Mr. Panzera contacted Ms. Hawkins in an attempt to help Ms. Miller get on the Guild's list of nominees. Ms. Hawkins confirmed to Mr. Panzera that the Guild had adopted a members-only policy but agreed to look into the Miller matter and call Mr. Panzera back. On May 3, 1985, Ms. Hawkins telephoned Mr. Panzera and suggested that Mr. Panzera contact the Guild's President Mary Ann Joyce, which Mr. Panzera proceeded to do that day. Ms. Joyce informed Mr. Panzera that the Guild was in the process of deleting the names of all non-members from the Guild's list of nominees and that in the future the Guild would only nominate Guild members for service on the Library's rating panels. Ms. Joyce further stated that the Guild would only consider nominating a non-member unit employee if there were no other members available in a particular department or section.

On May 6, 1985, Respondent's President Joyce forwarded to the Library's R & P Office a listing containing the names of 118 unit employees, effective from that day forward, which was to be used as the Guild's nominees for rating panel service. Respondent's May 6, 1985, list of nominees consisted solely of unit employees who were dues-paying members of Respondent. As had been indicated to Mr. Panzera, Respondent's May 6, 1985 list of nominees removed from consideration for rating panel service the names of approximately 153 unit employees who were presently qualified for rating panel service solely on the basis that these employees were not dues-paying members of Respondent. In this regard, Respondent's President Joyce testified that she was personally aware of who was a dues-paying member of Respondent; that she was aware that as of April 1985, there were approximately 281 Guild unit employees who were eligible for rating panel service, and that she prepared Respondent's May 6, 1985 list of 118 nominees with the specific purpose of removing the non-union member unit employees from consideration by the Library for rating panel service. Respondent's President Joyce defended her purging of all the non-union member unit employees qualified for rating panel service as a means of remedying her perception that the Library had discriminated against Guild members in the past in its selection of qualified unit employees for service on the qualifications rating panels. Respondent has not, however, filed any grievances over the Library's selection of unit employees to serve on the qualifications rating panels.

The Library has continued to utilize the complete listing of the approximately 281 unit employees who are eligible to serve on rating panels.

Discussion and Conclusions

The General Counsel takes the position that the Guild's May 6, 1985, policy of only nominating dues paying members of the Guild's bargaining unit for service on the Library's rating panel constitutes an unlawful discriminatory representational practice against the non-union members of the Guild's bargaining unit in violation of Sections 7116(b)(1) and (8) of the Statute.

According to the General Counsel, Article XI of the contract dealing with nominations by the Guild to the qualification rating panels constitutes a negotiated contractual benefit for all unit employees irrespective of union membership. In such circumstances, the Guild's denial of such contractual benefit because of non-membership in the Guild constitutes "invidious discrimination" in "defiance of the mandates of Section 7114(a)(1)," which requires a union to represent all bargaining unit members equally and without regard to labor organization membership. In support of its position the General Counsel relies in the main on the Authority's decision in National Treasury Employees Union, 10 FLRA 519, aff'd, 721 F.2d 1402.

In support of his position that Section XI of the contract established a benefit for all unit employees, irrespective of union affiliation, the General Counsel points to the wording of various other provisions of the contract and notes that such provisions clearly state that the rights set forth run solely to the Guild as the unit representative, while in Section XI there is no clear statement that the nominated employee is to be a representative of the Guild.

The Guild on the other hand takes the position that the unit employees designated by the Guild for training and subsequent service on the qualification rating panels serve as the Guild representative on such panels in that they are there to ensure that "merit principles are applied in an equitable manner." In such circumstances, since they are to be representatives of the Union, the Union is free to select only unit members who are members of the Union to serve on the rating panels.

It is well settled that a union is obligated to represent all unit members equally and without regard to union affiliation. It is equally well settled that a union is entitled to select its own representatives. To the extent that a union limits its representatives to union members, it could hardly be argued that it was discriminating against non-union unit members in violation of Section 7114(a)(1) of the Statute.

Inasmuch as it appears that all parties to the instant proceeding recognize the above conclusions as the current state of the law, resolution of the instant controversy turns on whether Section XI of the collective bargaining agreement constitutes a contract benefit for unit employees or confers a right of representation on the rating panels to the Guild.

Contrary to the contention of the General Counsel, I can not agree that Section XI of the collective bargaining agreement establishes a contract benefit for all unit employees. In fact I can not see where service on a rating panel is beneficial to any employee, save several hours release from their normal daily duties.

In the absence of any bargaining history supporting a contrary conclusion, I find that Section XI of the collective bargaining agreement was designed to confer upon the Guild the right to have a representative on the rating panel to ensure that merit principles are applied in an equitable manner, etc. To the extent that other provisions of the collective bargaining contract may spell out the Guild's representational rights in other areas in clearer or less ambiguous terms, such fact does not require a contrary conclusion. If the Guild's nominee was not to serve as the Guild's representative on the rating panel, I question why the Guild was given the power to nominate panel members.

Having concluded that the nominees to rating panels serve as Guild representatives on such panels, I find that the Guild did not violate Sections 7116(a)(1) and (8) of the Statute by confining the nominees to unit employees who were Guild members. Accordingly, it is hereby recommended that the Authority adopt the following Order dismissing the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 3-CO-50030 should be, and hereby is, dismissed in its entirety.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 3, 1985
Washington, D.C.

23 FLRA No. 50

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL UNION OF SCIENTISTS
AND ENGINEERS, NATIONAL
ASSOCIATION OF GOVERNMENT EMPLOYEES

Union

and Case No. O-NG-1164

NAVAL UNDERWATER SYSTEMS CENTER
NEWPORT, RHODE ISLAND

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of two Union proposals submitted in response to an announced Agency reorganization.

II. Union Proposal 1

> No Position Description will be changed except for pen and ink changes for branch changes, etc., for a minimum of 90 days.

A. Positions of the Parties

The Agency contends first that Union Proposal 1 is inconsistent with a Government-wide regulation--specifically FPM Chapter 511, Subchapter 4-3--because it conflicts with the requirement of that regulation for position descriptions to accurately state the duties and responsibilities assigned to employees, as the Authority held in National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colo., 9 FLRA 151 (1982) (Union Proposal 1). Second, the Agency asserts that the proposal interferes with management's rights to assign work, determine its organization, reduce in grade or pay, and promote. Finally, the Agency asserts that, in view of these restrictions on the exercise of management's rights, the proposal does not contribute to an effective and efficient government.

According to the Union, the intent of the proposal at issue here is to ensure that "unit employees will not be promoted or downgraded by deleting or adding duties" as a result of a reorganization. Union Petition at 2. The Union contends that Proposal 1 "merely establishes a procedure the Agency must follow in amending position descriptions, a matter which the Authority found was appropriate for collective bargaining" in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508 (1981) (Union Proposal III). Reply Brief at 2. Similar to the proposal in that case, the Union argues, its proposal here "merely prescribes a waiting period of 90 days before position descriptions may be changed, and imposes no restriction on the assignment of work to employees prior to the change in the position descriptions." Reply Brief at 2.

B. Analysis

The Union states that the purpose of Proposal 1 is to ensure that "unit employees will not be promoted or downgraded by deleting or adding duties" as a result of a reorganization. Union Petition at 2. This intent is consistent with the plain language of the proposal because a position description is the basis for classification of a position. See National Federation of Federal Employees, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado, 9 FLRA 151, 153 (1982) (Proposal 1). By prohibiting the Agency from making substantive changes in position descriptions for a minimum of 90 days, the proposal would effectively preclude reclassifications of those positions for that period of time.

The Union also states that Proposal 1 does not restrict the Agency's right to assign work under section 7106(a)(2)(B) of the Statute and is intended only as a procedure for amending position descriptions. In Lowry, 9 FLRA 151, 153, we found a proposal nonnegotiable which limited the duties which could be included in a position description because it conflicted with Chapter 511, Subchapter 4-3 of the Federal Personnel Manual (FPM). That FPM provision requires position descriptions to accurately reflect the duties and responsibilities of positions. By limiting the duties which could be included in the position description, the proposal in Lowry conflicted with the FPM because it precluded the Agency from including certain duties in position descriptions even if those duties were assigned to employees. We concluded that the proposal implicitly necessitated "the certification of an inaccurate position description." 9 FLRA 151, 154.

Proposal 1 in this case has the same effect as the one in Lowry. Consistent with the Union's intent, the proposal would not preclude the Agency from assigning duties which if included in the position descriptions would result in reclassification of the position. The proposal would, however, prohibit the Agency from including those duties in position descriptions for a minimum of 90 days even if the duties are actually assigned to employees during that time period. Like the proposal in Lowry, the proposal would result in inaccurate position descriptions, in violation of the FPM and is nonnegotiable.

The fact that the conflict with the FPM would occur for a specified time period does not change this conclusion. A proposal is nonnegotiable if it conflicts at all with a Government-wide rule or regulation under section 7117(a)(1) of the Statute. As noted in Lowry, 9 FLRA 151, 154-55, the provisions of Chapter 511 of the FPM constitute a rule or regulation within the meaning of section 7117(a)(1). Also, our decision in National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 6 FLRA 508 (1981) (Proposal III), is not dispositive in this case because potential conflict between the proposal in that case and the FPM was not raised by the Agency or addressed by the Authority.

C. Conclusion

Union Proposal 1 conflicts with FPM, Chapter 511, Subchapter 4-3, and, therefore, is nonnegotiable under section 7117(a)(1) of the Statute.

III. Union Proposal 2

> All new positions, except lateral transfers, established by the reorganization, will be advertised within 30 days as promotional opportunities.

A. Positions of the Parties

The Agency asserts that, in view of the Union's stated intent that this proposal applies to all newly-established positions, including nonbargaining unit positions, it is negotiable only at the Agency's election and the Agency has elected not to bargain. The Agency also contends that, if the Union's intent is to prevent management from filling a position which has not been advertised as a promotional opportunity within 30 days, or if it would require the Agency to fill all newly created positions by promotions or lateral transfers only, the proposal is inconsistent with management's right under section 7106(a)(2)(C) of the Statute to select from any appropriate source or not to fill positions.

The Union contends that this proposal does not restrict the Agency's right to select or concern how new positions created by the reorganization are to be filled, and therefore does not interfere with management's right to select under section 7106(a)(2)(C) of the Statute. Rather, the Union asserts that the proposal would merely establish a procedural 30-day posting requirement and therefore is analogous to a proposal found negotiable by the Authority in American Federation of Government Employees, AFL-CIO, International Council of United States Marshals Service Locals and Department of Justice, United States Marshals Service, 2 FLRA 765 (1980).

B. Analysis

The Authority has previously held that a proposal which would require the posting of vacancy announcements before filling positions within the bargaining unit constituted a negotiable procedure. See National Treasury Employees Union and Internal Revenue Service, 7 FLRA 275, 285 (1981) (Union Proposal 4). Accordingly, to the extent that Union Proposal 2 in this case would require the posting of notice concerning vacancies in bargaining unit positions only, and would not require management to fill such positions or select from any particular source, the proposal constitutes a negotiable procedure under section 7106(b)(2) of the Statute.

The Agency asserts without contradiction that the Union's proposal would require management to post all newly-established positions, including those outside the bargaining unit. To the extent that the proposals would apply to positions outside the bargaining unit, it is negotiable only at the Agency's election. See American Federation of Government Employees, AFL-CIO, Local 2 and Department of the Army, Military District of Washington, 4 FLRA 450 (1980). Contrary to the Union's assertion, the Marshals Service case cited above is not controlling. In that case, the Authority held that a proposal requiring the announcement of "all vacancies for which unit employees are eligible to apply regardless of how the vacancies are to be filled" constituted a negotiable procedure under section 7106(b)(2) of the Statute. However, there was no indication either in the language of the proposal or in the record that the proposal was intended to apply to positions outside the bargaining unit, and the Agency in that case did not so contend. As the Authority has previously stated in a related context, where neither the express language of a proposal nor the Union's stated intent requires a proposal to be applicable to nonunit employees, the proposal will be presumed to apply only to unit employees. See American Federation of State, County and Municipal Employees, Local 2910 and 2477 and Library of Congress, 15 FLRA 717, 718-719 (1984). As noted above, both the language of Union Proposal 2 and the record in this case indicate that the proposal applies to all newly created positions, not just those within the bargaining unit.

However, consistent with the Union's stated intent, we conclude that nothing in Union Proposal 2 would require the Agency to fill any of those newly created positions or restrict management's right under section 7106(a)(2)(C) of the Statute to select from any appropriate source.

C. Conclusion

Since Union Proposal 2 applies to positions outside the bargaining unit, it is negotiable only at the election of the Agency and the latter has elected not to bargain concerning the matter. The proposal does not conflict with management's right to select under section 7106(a)(2)(C) of the Statute.

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., September 23, 1986.

Calhoun

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. CUSTOMS SERVICE
CHICAGO-O'HARE

Activity

and

Case No. 0-AR-1076

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 172

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Charles B. Craver filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The parties submitted to arbitration the issue of whether the failure to permit the grievants to exchange work locations violated the parties' collective bargaining agreement. The Arbitrator determined that the Activity had violated the agreement and sustained the grievance. Noting that each grievant had additional miles added to the distance between home and work as a result of the Activity's improper actions, the Arbitrator as a remedy directed that the grievants be paid for their additional commuting expenses.

III. EXCEPTIONS

In its exceptions the Agency contends that the remedy directing that the Activity pay the additional commuting expenses incurred by the grievants is deficient. Specifically, the Agency maintains that the award of such commuting expenses is contrary to law because it is not authorized as reimbursable travel expenses. The Agency further maintains that the award of such expenses is not authorized under the Back Pay Act as an award of backpay. The Agency states that the commuting expenses are not "pay, allowances, or differentials" awardable as backpay under the Act.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency. There is no provision in any relevant statute or regulation that permits the payment or reimbursement of the additional personal commuting expenses of the grievants as directed by the Arbitrator.

Both the Authority and the Comptroller General have indicated that unless essential to the transacting of official business, no costs or expenses incurred by Federal employees for transportation between their residences and official duty stations are payable or reimbursable under law and regulation pertaining to travel expenses. Internal Revenue Service, Houston District and National Treasury Employees Union, Chapter 222, 18 FLRA No. 64 (1985); 60 Comp. Gen. 420 (1981); see Travel Expense Act, 5 U.S.C. § 5701 et seq.; Federal Travel Regulations, 41 CFR part 101-7. Instead, Federal employees must bear all such transportation costs as personal commuting expenses. See IRS, Houston District, slip op. at 2. Accordingly, there is no authorization under law and regulation for the payment directed by the Arbitrator of the additional personal commuting expenses incurred by the grievants.

Similarly, neither the Back Pay Act, 5 U.S.C. § 5596, nor its implementing regulations, 5 CFR part 550, subpart H, authorize the payment or reimbursement of personal commuting expenses as part of an award of backpay. The Back Pay Act provides the appropriate authority to remedy with an award of backpay an unjustified or unwarranted personnel action that has denied an aggrieved employee "pay, allowances, or differentials" that the employee would have earned or received if the personnel action had not occurred. "Pay, allowances, and differentials" are defined in 5 CFR § 550.803 as "monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function." In Community

Services Administration and National Council of CSA Locals, AFGE, AFL-CIO, 7 FLRA 206 (1981), the Authority concluded that "pay, allowances, or differentials" encompassed by the Act constitute normal, legitimate employee benefits in the nature of employment compensation or emoluments. 7 FLRA at 209. Accordingly, in this case, we find that additional personal commuting expenses incurred as the result of the Activity's unwarranted action are not proper components of an award of backpay under the Back Pay Act and its implementing regulations. Furthermore, in terms of the Act, the Arbitrator did not find, and it is not otherwise apparent, that the expenses directed by the Arbitrator to be reimbursed are expenses which the grievants "normally would have . . . received during the period if the personnel action had not occurred." 5 U.S.C. § 5596(b)(1)(A)(i).

V. DECISION

For these reasons we find that the award of additional personal commuting expenses incurred by the grievants as a result of the Activity's actions is not authorized by governing law and regulation and therefore is deficient and must be modified. Accordingly, the award is modified by striking the second sentence of the Arbitrator's award directing the Activity to make whole the two grievants for their additional commuting expenses.*/

Issued, Washington, D.C., September 23, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, the Authority need not address the Agency's other contention in its exceptions to the award.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES MARINE CORPS
MARINE CORPS LOGISTICS BASE
ALBANY, GEORGIA

Activity

and

Case No. 0-AR-1122

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2317

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on exceptions to the award of Arbitrator J. Thomas King filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration claiming that for an extended period of time, the grievant had been denied overtime work assignments in violation of the overtime provisions of the parties' collective bargaining agreement. The grievant was a heavy equipment inspector assigned to shop 714 at the Activity. The overtime to which he claimed entitlement had been assigned to four heavy mobile equipment inspectors in shop 723. At arbitration the Activity explained that the overtime work of shop 723 was not assigned to the grievant because he did not possess the necessary familiarity with the inspection work of shop 723, which was different than shop 714, and did not possess the special skills required to assure the continuity and efficiency of that inspection work. Thus, the Arbitrator stated the dispositive issue to be whether the grievant had the requisite familiarity and special skills for the performance of the inspection work of shop 723. The Arbitrator found, contrary to the determination of the Activity, that the grievant had the special skills necessary for the performance of the work of shop 723 and that granted an opportunity to perform the work on overtime, the grievant had the capability to become sufficiently familiar with that inspection work. On this basis, the Arbitrator found that under the collective bargaining agreement, the grievant should have been offered overtime work assignments in shop 723, and he sustained the grievance. As a remedy the Arbitrator directed the Activity to assign the grievant overtime work in shop 723 in sufficient amounts to permit him to recoup that which he had been improperly denied since 1983.

III. EXCEPTIONS

In its exceptions the Agency contends that the award is contrary to section 7106(a)(2)(B) of the Statute because it interferes with management's right to assign work. In particular, the Agency argues that the Arbitrator has substituted his judgment for that of management in determining which employees were qualified to perform the work of shop 723 on overtime.

IV. ANALYSIS AND CONCLUSIONS

The Authority agrees with the Agency. The Authority has repeatedly held that an arbitration award may not interpret or enforce a collective bargaining agreement so as to improperly deny an agency the authority to exercise the rights enumerated in section 7106(a) of the Statute. See, for example, Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002, 22 FLRA No. 48 (1986). Section 7106(a)(2)(B) of the Statute, in particular, reserves to management officials the authority to assign work. Encompassed within that right is the discretion to establish the particular qualifications needed to perform the work assignment and to exercise judgment in determining whether a particular employee meets those qualifications. National Marine Fisheries Service, Northeast Region, National Oceanic and Atmospheric Administration, United States Department of Commerce, Gloucester, Massachusetts and International Organization of Masters, Mates and Pilots, AFL-CIO, Boston, Massachusetts, 22 FLRA No. 43 (1986); U.S. Customs Service, Laredo, Texas and Chapter 145, National Treasury Employees Union, 17 FLRA 68 (1985).

In this case the Activity had not assigned overtime work of shop 723 to the grievant because the Activity determined he was not qualified: he did not possess the necessary familiarity with the inspection work of shop 723 and the special skills required to assure the continuity and efficiency of that inspection work. Thus, the Arbitrator has negated the exercise by management of the rights to establish qualifications and to determine whether particular employees meet those qualifications when the Arbitrator as his award found that under the agreement the grievant was qualified for and entitled to have been offered overtime work assignments in shop 723 and directed that he be assigned such work. See U.S. Customs Service, Laredo, Texas, 17 FLRA at 69. Thus, the Arbitrator has not merely enforced a procedure of the parties' collective bargaining agreement by which employees previously judged by management to be equally qualified will be selected to perform certain work. See National Marine Fisheries Service, Northeast Region. Instead, the Arbitrator has enforced the collective bargaining agreement to improperly interfere with management's right to assign work in accordance with section 7106(a)(2)(B) of the Statute.

V. DECISION

Accordingly, for these reasons, the Arbitrator's award is set aside.*/

Issued, Washington, D.C. September 23, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary for the Authority to address the Agency's other contentions in its exceptions.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL PRISON SYSTEM
U.S. MEDICAL CENTER FOR
FEDERAL PRISONERS

Activity

and

Case No. 0-AR-1106

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1612

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator William Stix filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration on the substantive issue of whether the grievant was properly accorded an overall annual performance appraisal rating of "fully successful" rather than "exceeds" for the appraisal period ending March 31, 1985. The Arbitrator determined that the reviewing official failed to meet his responsibility under the performance appraisal regulation to review the grievant's rating for consistency with the ratings given other employees. In particular, the Arbitrator determined that in the rating process of formulating performance ratings for the appraisal period in dispute, the grievant was unfairly discriminated against because the evidence showed that the grievant had been evaluated under standards different from those applied to other employees. Accordingly, as his award, the Arbitrator directed that the grievant's performance be reevaluated. In addition, he directed that the reevaluation be in accordance with an elaborate process that he specified in his award. In sum, the process provides for the selection, by a method specified by the Arbitrator, of a sample of five performance appraisals in which the appraised employee was rated "exceeds" for the appraisal period in dispute and provides for the comparison by the grievant's new reviewing official of the grievant's appraisal with the sample appraisals. In addition, it provides that the grievant's rating must be reevaluated solely by a comparison with the samples and requires under certain circumstances that the grievant's rating must be changed to "exceeds."

III. EXCEPTIONS

In its exceptions the Agency contends that the award is deficient by sustaining the grievance and by directing that the grievant be reevaluated in accordance with the procedure specified by the Arbitrator. Specifically, the Agency primarily argues that the award is contrary to section 7106(a)(2)(A) and (B) of the Statute because the Arbitrator has substituted his judgment for that of management in the area of performance appraisal and has fashioned a remedy without basis in law, regulation, or the parties' collective bargaining agreement.

IV. ANALYSIS AND CONCLUSIONS

The Authority in a number of recent decisions has discussed in detail the role of an arbitrator in resolving disputes pertaining to performance appraisal matters. Mare Island Naval Shipyard and International Federation of Professional and Technical Engineers, Local 11, AFL-CIO-CLC, 23 FLRA No. 32 (1986); Veterans Administration Hospital, Bath, New York and American Federation of Government Employees, Local 491, 22 FLRA No. 103 (1986) (and cases cited in the decision). The Authority has found that an arbitrator may resolve an employee's grievance claiming to have been adversely affected in his or her performance appraisal by management's application of the established performance standards. An arbitrator may sustain the grievance on finding that management had not applied the standards which it established to the grievant or had applied the standards in violation of law, regulation, or an appropriate provision of the parties' collective bargaining agreement. In sustaining the grievance, the arbitrator may direct that the grievant's work product be properly evaluated. The Authority, however, has cautioned that an arbitrator may not substitute his or her own judgment for that of management in the exercise of the rights under section 7106(a)(2)(A) and (B) to direct employees and assign work as such rights pertain to matters of performance appraisal. In particular, the Authority has repeatedly held that the arbitrator may not substitute his or her own judgment for that of management as to what the grievant's evaluation and rating should be. The Authority has also held that section 7106(a)(2)(A) and (B) encompass the right to determine the methods to be used in evaluating employee work performance. American Federation of Government Employees, Local 1760, AFL-CIO and Department of Health and Human Services, Social Security Administration, 23 FLRA No. 21 (1986) (Proposals 2-6).

Applying these decisions to this case, we conclude contrary to the argument of the Agency that the Arbitrator properly sustained the grievance and properly ordered the grievant reevaluated on finding that the grievant's appraisal was not reviewed for consistency with other appraisals, as required by the performance appraisal regulation, and that in the rating process, the grievant was unfairly discriminated against by having been evaluated under different standards from those applied to other employees. However, in agreement with the Agency, we conclude that the process prescribed by the Arbitrator for reevaluation of the grievant's performance is contrary to section 7106(a)(2)(A) and (B) of the Statute. By requiring that the grievant's performance must be reevaluated solely by comparison with a sample of five appraisals selected under a precise method prescribed by the Arbitrator, the award interferes with management's right to determine the method by which it will evaluate an employee's work performance. Likewise, by specifying the circumstances under which the grievant's performance must be reevaluated as "exceeds," the Arbitrator improperly substituted his judgment for that of management as to what the grievant's performance evaluation and rating should be. Accordingly, this portion of the award is deficient and must be modified.

V. DECISION

For these reasons, the Arbitrator's award is modified by striking paragraphs 3 and 4 and substituting the following language as paragraph 3:*/

3. To remedy the discrimination, management shall reevaluate the grievant's performance for the appraisal period in dispute under the established elements and standards and in accordance with the general performance appraisal system as contained in Program Statement 3430.7.

Issued, Washington, D.C. September 23, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary to specifically address the Agency's other contentions in its exceptions.

23 FLRA No. 54

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Respondent

and

Case No. 5-CA-50046

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

In this unfair labor practice case, the Administrative Law Judge dismissed the General Counsel's complaint alleging that the Respondent committed an unfair labor practice under section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute). The General Counsel asserted that the Respondent violated section 7115(a) of the Statute in recouping overpayments of union dues previously remitted by the Respondent to the Charging Party (the Union) by deducting such overpayments from subsequent remittances. The Judge found that the Respondent properly recouped the overpayment of dues, on behalf of former unit employees who had been promoted to supervisory positions, by using that setoff method.

The case is now before the Authority on the General Counsel's exceptions to the Judge's Decision. Both the General Counsel and the Respondent have filed briefs in support of their opposing positions.

II. Background

In 1978 and again in 1982, the Respondent in this case entered into master labor agreements with the Union. Both agreements provided that "[a]dministrative errors in remittance checks [to the Union] and/or improper deductions will be corrected by the [Respondent] and adjusted in the next remittance check to be issued to the Union local." An official of the Respondent charged with effecting these adjustments at the Wright-Patterson Air Force Base in Ohio testified that, in practice, payroll transactions and adjustments are processed by computer upon receipt of a Standard Form 50 for each change in employment status, and that such adjustments were made during a subsequent pay period. He testified further that underpayments and overpayments of dues were corrected as a matter of course by adding to or subtracting from the amount remitted to the Union during any given pay period, and that he undertook this method of adjustment, in reliance on the master labor agreements' provision quoted above, since at least as early as August of 1981.

For pay periods ending on June 23, 1984, September 15, 1984, September 22, 1984, and September 29, 1984, the Respondent deducted from the amount allotted and remitted to the Union a total of $220.50, representing dues allotments withheld erroneously in the past from the salaries of unit employees who had once authorized such allotments but later became ineligible to do so when they were promoted to supervisory positions. The Respondent then reimbursed the supervisors for the amount of dues erroneously withheld from their salaries. This proceeding before the Authority ensued.

III. Decision of the Administrative Law Judge

In finding the Respondent's dues recoupment procedure to be lawful, the Judge discounted the General Counsel's contention that it violated section 7115(a) of the Statute under the Authority's supplemental decisions in Department of the Air Force, Griffiss Air Force Base, Rome, New York (Griffiss), 15 FLRA 1032 (1984), and Department of the Air Force, 3480th Air Base Group, Goodfellow Air Force Base, Texas (Goodfellow), 14 FLRA 795 (1984). The Judge noted that those decisions were rendered on reversal and remand from the U.S. Courts of Appeals for the Second and Fifth Circuits,[1] and that the Authority's language in the supplemental decisions indicated that it simply "accepted" the Court's decision in each case as "the law of the case." 14 FLRA at 796; 15 FLRA at 1033. The Judge found that the Authority had not altered its own original interpretation of the Statute in issuing the two decisions on remand because they contained no implication that the Authority was doing so. He therefore concluded that the Respondent's method of recouping erroneously allotted union dues did not violate the Statute under existing Authority precedent.

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[1] American Federation of Government Employees, AFL-CIO, Local 2612 v. Federal Labor Relations Authority (Griffiss), 739 F.2d 87 (2d Cir. 1984); American Federation of Government Employees, AFL-CIO, Local 1816 v. Federal Labor Relations Authority (Goodfellow), 715 F.2d 224 (5th Cir. 1983).

IV. Positions of the Parties

The General Counsel contends in its brief that the Judge should have found that the Authority's supplemental decisions on remand in Griffiss and Goodfellow did indeed alter the Authority's position on the lawfulness of the agencies' method of dues recoupment under section 7115(a) of the Statute. The General Counsel argues that the Authority made it clear in the Griffiss and Goodfellow supplemental decisions that an agency may not recoup erroneously withheld union dues of former unit members by deducting overpayments from union dues allotments for current unit members, and then reimbursing the former unit members whose dues had been incorrectly withheld.

The General Counsel maintains further that, as the Courts held in Griffiss and Goodfellow, section 7115(a) of the Statute imposes an affirmative duty on an agency to honor the assignments of current unit members by remitting regular and periodic dues deducted from their accrued salaries to their exclusive representative, so that an agency's application of a portion of the pay of current unit members to extinguish a debt to former unit members abrogates the agency's statutory duty to its current member employees. This statutory duty, the General Counsel urges further, cannot be waived by an exclusive representative in a collective bargaining agreement and, even if it could, parole evidence in this case shows that the provision of the master labor agreement regarding the correction of "administrative errors" was intended to apply to "arithmetical errors" only.

The Respondent contests these arguments in its reply brief. The Respondent contends that it cannot be found to have committed an unfair labor practice by acting, as it did, in accord with a reasonable interpretation of the master labor agreement: "Improper deductions" fall within the agreement's provision with respect to "administrative errors." It also argues that an exclusive representative is indeed empowered to negotiate restrictions on a statutory right of its members. The Respondent argues in addition that the Authority has correctly not modified its position on the propriety of the Respondent's method of recoupment, despite its compliance with the remand orders in Griffiss and Goodfellow.

V. Analysis

In challenging the Judge's Decision in this case, the General Counsel acknowledges that the Authority's supplemental decisions in Griffiss and Goodfellow "may be interpreted as being limited to those cases" in the Second and Fifth Circuits. It argues that the Authority did not "intend" such a result, however, because it would lead to the anomalous situation of different decisions on the same issue in different federal circuits. We find no merit to this argument.

Under section 7123(a) of the Statute, the Authority's decisions and orders are reviewable by the U.S. Court of Appeals for the District of Columbia Circuit, or another of the U.S. Circuit Courts of Appeals depending on the parties' geographic location. Since one circuit court of appeals is not bound by another's decisions, judicial review of the Authority's decisions may result in inconsistent rules of law on the same or similar issues among the various circuits. Such inconsistency among the circuit courts may be resolved only by the U.S. Supreme Court.

The Judge correctly found that our supplemental decisions in Griffiss and Goodfellow, in which we accepted the decisions of the circuit courts in those cases as the "law of the case," were not intended to convey that the Authority had changed its opinion on the matter. Under the "law of the case" doctrine, an issue of law as decided in a reviewing court becomes binding precedent to be followed in successive stages of litigation involving the same case. The Authority was therefore bound to accept the circuit courts' decisions in Griffiss and Goodfellow. We have consistently held that an agency's recoupment of dues erroneously remitted to the exclusive representative of a bargaining unit on behalf of a former unit member, by deducting the previous overpayment from the subsequent remittance of dues for current members, is not inconsistent with the requirements of section 7115(a) and does not violate section 7116(a)(1) or (8) of the Statute.2/ For the following reasons we continue to follow this precedent and respectfully disagree with the Second and Fifth Circuits.

Section 7115(a) of the Statute enables a bargaining unit member to have his employing agency deduct periodic union membership dues from his regular pay and forward it to the exclusive representative of the bargaining unit directly. Section 7115(b) also provides that such an allotment "shall terminate when . . . the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee . . . ." Section 7112(b) provides that a bargaining unit may not be deemed "appropriate" if it includes a supervisor, and, by way of defining "collective bargaining" and "employee," section 7103 of the Statute provides that a supervisor may not be a member of a bargaining unit.

Consistent with these provisions, at the time a bargaining unit member is promoted to a supervisory position, he may no longer be included in the unit and, therefore, his statutory right to dues allotment ceases immediately by operation of law. Consequently, an agency's recoupment of dues erroneously paid to an exclusive representative on behalf of an employee after his appointment to a supervisory position constitutes the correction of an administrative error in compliance with the terms of the Statute. The setoff of such overpayments against current allotments and remittances to the union constitutes a lawful and efficient means of recoupment. The Authority adheres to the position that such a method of recoupment does not violate either section 7115(a) or section 7116(a)(1) and (8) of the Statute.

In the Goodfellow case, the Fifth Circuit held as follows:

> Section 7115(a) . . . imposes an affirmative duty on a federal agency to honor the current assignments of unit employees by remitting regular and periodic dues deducted from their

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2/ In addition to the Griffiss and Goodfellow cases noted above, see Dugway Proving Grounds, Dugway, Utah, 9 FLRA 409 (1982); National Archives and Records Service and National Archives Trust Board, General Services Administration, Washington, D.C., 9 FLRA 413 (1982); and Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA 371 (1981), reversed as to other matters sub nom. Internal Revenue Service Center, Fresno, California v. FLRA, 706 F.2d 1019 (9th Cir. 1983).

> accrued salaries to their exclusive representative. Until the funds thus deducted are delivered to the union, they remain the property of the particular members from whose earned wages they are taken. By applying a portion of the pay of unit employees to extinguish the debt owed another, [the agency] abrogated its statutory duty to the former.

Goodfellow, supra, 715 F.2d at 228. The Authority respectfully disagrees.

Once an agency deducts membership dues from the salary of a unit employee for remittance to the exclusive representative, that money becomes part of a fund designated for forwarding to the union in due course. The employee does not have immediate access to his portion of the fund before it is forwarded to the union. He is also precluded by the terms of section 7115(a) from revoking a dues allotment other than at intervals of one year, unless (1) the bargaining agreement between the agency and the exclusive representative ceases to apply to the employee, as discussed above; or (2) when the employee is suspended or expelled from membership in the exclusive representative, which is inapplicable here. See U.S. Army, U.S. Army Materiel Development and Readiness Command, Warren, Michigan, 7 FLRA 194, 199 (1981). There is no adverse impact on an employee's statutory right to a dues allotment which might result from an agency's use of the setoff method of recouping dues overpayments in this case, and the Fifth Circuit mentioned none in Goodfellow, other than the unspecific "impinge[ment] upon employee protections secured by § 7115(a) . . . ."[3/]

In the Griffiss case, the Second Circuit considered the legislative history of section 7115(a) of the Statute, and noted Congress' rejection of proposals for mandatory payment of union dues on behalf of all unit employees as well as proposals leaving the issue of dues check-off to negotiation. American Federation of Government Employees, AFL-CIO, Local 2612 v. Federal Labor Relations Authority, 739 F.2d 87 (2d Cir. 1984). The Court found that Congress' final enacted provision, specifying that no dues could be

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[3/] The Fifth Circuit even acknowledged in Goodfellow, 715 F.2d 229, that the Government has the right "to recover by offset or otherwise sums illegally or erroneously paid," quoting from Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO v. United States, 564 F.2d 66, 71 (Ct. Cl. 1977).

deducted from an employee's paycheck unless he authorized the deduction in writing, was intended "to allow the employee alone to control the manner of dues payment." Id. at 89. The Court found that, in view of this legislative intent, "an agency's obligation to honor dues check-off authorizations is mandatory and nondiscretionary." Id. The Court therefore concluded that current unit members who assigned portions of their wages for the payment of union dues had the right to expect their assigned wages to be used for that purpose. The Court concluded further that the agency's method of recouping its overpayment of dues on behalf of former unit members by setoff against dues allotments for present unit members violates the current unit members' right to allotment under section 7115(a), and thus constitutes an unfair labor practice under section 7116(a)(1) and (8). In the Authority's view Congress did not intend this interpretation of section 7115(a).

When an agency allots and remits more membership dues to the exclusive representative of a bargaining unit than it should have -- in this case by remitting dues withheld from former unit employees who had become supervisors and were therefore no longer eligible for inclusion in the unit or entitled to authorize dues withholding -- the union receives more dues under section 7115(a)'s dues deduction provisions than it would have if the overpayment had not occurred. When the agency corrects the overpayment by setoff against presently allotted dues before remittance to the exclusive representative, the right of current unit members to have their dues remitted to the Union is not violated. Rather, the portion of the dues of current unit members which was not remitted to the union was, in effect, "pre-paid" by the agency through previous overpayments. An agency need not maintain the dues allotments of current member employees intact until they are remitted to the union under section 7115(a) of the Statute, as long as the agency remits sufficient payments to the union to avoid dues arrearage on the part of employees properly covered by section 7115(a).4/

The Judge did not pass on the General Counsel's two additional contentions: (1) that the provisions of the master labor agreement quoted above did not permit the Respondent to recoup overpayments of union dues; and (2) that the Respondent and the Union could not waive the statutory right of employees to have dues withheld if they

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4/ The Second and Fifth Circuits would appear to place on management the statutory duty of setting apart or retaining intact the individual and collective dues allotted by employees until the dues are remitted to the Union. Aside

(Continued)

so authorize their employer in writing. In view of our interpretation of section 7115(a) of the Statute, it is unnecessary to consider these two additional contentions.

VI. Conclusion

Having considered all of the facts and circumstances of this case, as well as the positions of the parties, the Authority concludes that the Respondent did not violate section 7115(a) of the Statute and therefore did not commit an unfair labor practice under section 7116(a)(1) or (8), as charged by the General Counsel. Accordingly, we shall dismiss the General Counsel's complaint against the Respondent.

ORDER

IT IS ORDERED that the complaint in Case No. 5-CA-50046 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C. September 23, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

from the fact that dues are not allotted or transferred in any individually identifiable form, we respectfully disagree that the Statute imposes such a duty. To require such an interpretation of the Statute would be comparable to the common law recovery action of replevin, in which a plaintiff seeks to have his wrongfully withheld property returned to him without alteration or substitution. See Kelley v. Dunne, 369 F.2d 627 (1st Cir. 1966); Honeywell Information Systems, Inc. v. Demographic Systems, Inc., 396 F. Supp. 273 (S.D.N.Y. 1975). Such an action does not apply to the recovery of money, however, unless the plaintiff can show that the money he seeks to recover constitutes unique currency and may be identified specifically so that recovery of the same money wrongfully withheld by another is both justifiable and possible. Kelley, 369 F.2d at 628.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Respondent

and

Case No.: 5-CA-50046

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

. . . .

Lieutenant Colonel Glenn H. Schlabs and
Major W. Kirk Underwood
For Respondent

Paul Palacio
For the Charging Party

Judith A. Ramey, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.*

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Council 214, AFL-CIO, against the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region V, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute when it recouped erroneous union dues checkoff allotments previously transmitted to the Union by reducing subsequent dues remittances.

A hearing on the Complaint was conducted in Dayton, Ohio at which all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel, and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

On January 13, 1978 the American Federation of Government Employees, AFL-CIO, was certified as the exclusive representative of a consolidated unit of all non-supervisory non-professional employees, with certain exclusions, paid from appropriated funds and serviced by the Air Force Logistics Command (AFLC) Civilian Personnel Offices at various AFLC facilities including Kelly Air Force Base, San Antonio, Texas. At all times material herein the American Federation of Government Employees, Council 214, AFL-CIO (the Union) has been an agent of the American Federation of Government Employees with respect to the employees of Respondent, including the employees at Kelly Air Force Base, and Respondent and the Union have been parties to a Master Labor Agreement (MLA) covering the employees described above. The MLA contains a dues withholding provision (Article 8) that includes the following language under the caption "Administrative Errors" in Section 8.08:

> "Deductions will not be made for an employee who has been in a nonpay status for a pay period. Administrative errors in remittance checks and/or improper deductions will be corrected by the Employer and adjusted in the next remittance check to be issued to the Union local. If the Union local is not scheduled to receive a remittance check after discovery of the error, the Union agrees to promptly refund the amount of the erroneous remittance."

Pursuant to section 7115(a) and (b) of the Statute[1] and Article 8 of the MLA, *supra*, management officials at Kelly Air Force Base regularly

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[1] Section 7115(a) and (b) of the Statute provides:

> "(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the

continued

deduct union dues from the salaries of employees who are members of the bargaining unit who executed written assignments for such allotments and transfer said dues allotments to AFGE local 1617 in a single remittance check. For pay periods ending June 23, 1984, September 15, 1984, September 22, 1984 and September 29, 1984, management officials at Kelly Air Force Base, relying upon MLA Section 8.08 supra, deducted from the total amount due to the local for dues certain amounts representing dues allotments withheld erroneously in the past from the salaries of individuals who had for a period of time been ineligible for dues withholding by virtue of their promotion to supervisory positions. The total amount deducted from the amount due the local for the four above-described pay periods was $220.50. Management officials used these funds to reimburse the supervisors from whose salaries dues had been erroneously withheld and continue to use the above described method of recouping erroneously withheld dues remitted to the union.

The Master Labor Agreement was first negotiated in 1978 and renegotiated in 1982. The "Administrative Errors" section of the dues withholding provision, supra, was the same in both agreements. Val Buxton, Chief of Labor and Employees Relations Division and Respondent's chief negotiator during the negotiations which gave rise to the 1978 and 1982 agreements, testified that during the 1978 negotiations the language of Section 8.08 was adopted to reflect many existing local arrangements. He further testified that during the 1978 negotiations the parties discussed employees leaving the unit and Respondent erroneously continuing

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(continued)

> unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.
>
> "(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when -
>
> > "(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or;
> >
> > "(2) the employee is suspended or expelled from membership in the exclusive representative."

dues checkoff. However, Buxton did not provide any significant details regarding the specific nature of those discussions.[2/]

John Mullholland, AFGE's Director of Labor-Management Service Department, testified that in 1978 he was the chief negotiator for Council 214 during negotiations with Respondent for the MLA. According to Mullholland, during the 1978 negotiations there were no discussions about employees being promoted to supervisory positions and the application of Section 8.08 of the agreement to that situation. Rather, according to Mullholland the limited discussion of Section 8.08 concerned the recoupment of money which was occasioned by computer and arithmetical errors and not recouping money erroneously collected and paid to the Union.

Major Thayne H. Cuevas, Chief of the Accounting and Finance Branch at Kelly AFB testified to the dues deduction and remittance procedures at the facility. According to Cuevas, the total amount of dues deducted during a pay period is adjusted by those dues which might not have been previously deducted but should have been and dues erroneously deducted. That adjusted sum is then remitted to local 1617. Cuevas testified that such underpayments and overpayments would be corrected when documentation (a Standard Form 50) regarding a payroll change reached his office. Thus, an action requiring a payroll change might occur in one payroll period but would not be reflected in actual payments until a subsequent payroll period when the Standard Form 50 was received and acted upon in the Finance and Accounting Branch. A promotion of someone out of a position eligible for dues checkoff or a voluntary request to terminate dues checkoff could cause such an adjustment. The payroll transactions are computer processed and a recapitulation of adjustments to the remittance check is sent to local 1617. Cuevas testified he relied on Section 8.08 of the agreement to make these adjustments and this procedure has been followed since August 1981 to his personal knowledge and "as long as there's been a dues checkoff" according to some of his payroll employees.

Discussion and Conclusions

Respondent contends its recoupment actions herein were permissable based upon: (1) Existing Authority decisions, particularly Department of the Air Force, 3480th Air Base Group, Goodfellow Air Force Base, Texas, 9 FLRA 394 (1982) and Department of the Air Force, Griffiss Air Force Base, Rome, New York, 12 FLRA 198 (1983); (2) A contractual right provided in Section 8.08 the Master Labor Agreement; and (3) Rulings of the Comptroler General.

In support of its allegations the General Counsel contends: (1) Since the Authority's decisions in Goodfellow and Griffiss were set aside by

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[2/] I found Buxton's testimony to be confusing and inconclusive both as to the intent and meaning of Section 8.08 of the agreement as it applies to the issues herein.

Circuit Courts of Appeals[3] and in each case the Authority in Supplemental Decisions accepted the Court's opinion as "the law of the case,"[4] such conduct warrants the conclusion that the Authority has reversed it positions on the issue; and (2) Section 8.08 of the Master Labor Agreement does not privilege Respondent to recoup union dues and, in any event, the parties could not waive the employees' Statutory right to have dues deductions used by Respondent only as authorized by the employees.

Respondent's recoupment herein is virtually identical to that previously considered by the Authority in Goodfellow and Griffiss and found to be permissible conduct under the Statute. The General Counsel recognizes that Administrative Law Judges are obligated to follow Authority precidents and denial of enforcement of an Order of the Authority by a Court of Appeals does not "in and of itself, constitute a change of Authority law." The General Counsel argues however that accepting the decisions of the Circuit Courts in Goodfellow and Griffiss as "the law of the case" in those cases warrants the conclusion that the Authority has reversed its position on the matter.

I do not agree. In my opinion the Authority's action of accepting a Courts' decision as "the law of the case," whether it be one Court of Appeals or more,[5] gives no indication that the Authority is reversing its approach to the matter. If the Authority desired to change its position on recoupment it had ample opportunity to expressly do so in Goodfellow and Griffiss when it considered the reversals from the Courts of Appeals. However, the Authority merely accepted the Courts' decisions as "the law of the case", expressing no view contrary to that articulated in its underlying decisions. Accordingly, since I am constrained to follow the Authority's holding until such time as the Authority specifically revises its position on the matter or it becomes apparent that the Authority will no longer adhere to this position, I conclude that based upon existing Authority precident Respondent's conduct herein did not violate the Statute and I recommend the Authority issue the following:

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[3] AFGE, AFL-CIO, Local 1816 v. FLRA (Goodfellow), 715 F.2d 224 (5th Cir. 1983) and AFGE, AFL-CIO v. FLRA (Griffiss), 739 F.2d 87 (2nd Cir. 1984).

[4] Goodfellow, 14 FLRA 795 (1984) and Griffiss, 15 FLRA No. 188 (1984).

[5] I note in Griffiss, 12 FLRA 198, fn 1, the General Counsel sought to withdraw the complaint on the sole ground that Goodfellow, decided subsequent to issuance of the complaint, was dispositive of Griffiss.

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 5-CA-50046 be, and hereby is, dismissed.[6]

Salvatore J. Arrigo
SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 13, 1985
Washington, DC

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[6] In view of this disposition I need not reach the other issues presented in this matter.

9/Case No. 393

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 393 REPORT OF CASE DECISIONS September 25, 1986

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REPRESENTATION CASE

23 FLRA No. 58 (September 24, 1986)

Department of Transportation Federal Aviation Administration Aviation Standards National Field Office, Case No. 6-RO-40009

UNFAIR LABOR PRACTICE CASES

23 FLRA No. 56 (September 23, 1986)

Department of Health and Human Services, Social Security Administration, Dallas Region and American Federation of Government Employees, AFL-CIO National Council of Social Security Administration-Field Office Locals, Case No. 6-CA-40044

23 FLRA No. 62 (September 25, 1986)

Department of Health and Human Services Social Security Administration and Social Security Administration Field Operations, New York Region and American Federation of Government Employees, AFL-CIO, Case No. 2-CA-50221

MISCELLANEOUS CASE

23 FLRA No. 57 (September 23, 1986)

Petition for Amendment of Rules, Case No. 0-MC-10

Y 3.F31/21-3:

ARBITRATION CASES

23 FLRA No. 55 September 23, 1986)

Wright-Patterson Air Force Base Ohio, 2750th Air Base Wing and American Federation of Government Employees, Local No. 1138 (Kincaid, Arbitrator), Case No. 0-AR-1104

23 FLRA No. 59 (September 24, 1986) Subsequent to 21 FLRA No. 107

Internal Revenue Service Baltimore District Office and National Treasury Employees Union and NTEU Chapter 62, Case No. 0-AR-822

23 FLRA No. 60 (September 25, 1986)

U.S. Department of Justice United States Marshals Service and International Council of U.S. Marshals Service Locals, AFGE (Strogin, Arbitrator), Case No. 0-AR-953

23 FLRA No. 61 (September 25, 1986)

National Treasury Employees Union Chapter 49 and Internal Revenue Service Indianapolis District (Goldman, Arbitrator), Case No. 0-AR-1199

Federal Labor Relations Authority

23 FLRA No. 55

Wright-Patterson Air Force Base, Ohio, 2750th Air Base Wing and AFGE, Local No. 1138 (Warns, Arbitrator), Case No. 0-AR-1104 (Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Arbitration
  Exceptions Asserted in Appeal   7122(a)
    Award Contrary to 5 U.S.C. 5542(a)   7131(d)
    Award Contrary to 29 U.S.C. § 201 *et seq.*
    Award Contrary to 5 CFR part 551 subpart D
Official Time
  Wrongful Denial - Representational Activity on Nonduty Time
    Employees Paid Where Official Time Should Have Been Granted
Overtime
  Representational Activity
    Employee Must Already Be In Overtime Status

5 U.S.C. § 5542(a)
29 U.S.C. § 201 *et seq.* [Fair Labor Standards Act]
5 CFR § 551.401(a) and 551.501(a)
5 CFR § 551.424(a) and (b)

DIGEST NOTES

Grievances were submitted to arbitration on behalf of eight employees covered by the Fair Labor Standards Act (FLSA). The grievants sought overtime compensation for time spent as witnesses for the union attending an arbitration hearing. Two of the eight employees attended the hearing on official time for the period of the hearing when they otherwise would have been in a duty status. However, they remained at the hearing when the hearing extended beyond the end of their regularly scheduled duty hours. These two employee claimed overtime compensation for the time spent attending the hearing while they were not on official time. Six employees attended the hearing during time they were not scheduled to be in a duty status and they claimed overtime compensation for the entire time spent attending the hearing. The arbitrator determined that the activity had violated the intent of parties agreement and past practice by not rescheduling the worktime of the employees to fully coincide with the time of the hearing. She found that the intent of the agreement was that employees appearing as witnesses will not suffer any loss of pay, including overtime pay. The arbitrator sustained the grievance and ordered that employees be compensated at overtime rates or granted compensatory time off.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions to the arbitrator's award the agency asserted that time spent attending an arbitration hearing as a union witness is not hours of work officially ordered or approved that constitutes overtime work, under the provisions of 5 U.S.C. § 5542(a), for which overtime pay or compensatory time off is authorized. The agency also argued that such time likewise is not hours of work under 29 U.S.C. § 201 et seq., and 5 CFR part 551, subpart D, for which overtime pay or compensatory time off is authorized for nonexempt employees. The Authority held that time spent attending an arbitration hearing as union witnesses was not the performance of hours of work officially ordered or approved that constitutes overtime work under 5 U.S.C. § 5542(a) so as to entitle the employees to overtime pay or compensatory time off. The Authority also held that time spent attending the arbitration hearing as union witnesses is not hours of work under 5 CFR § 551.401(a) which would entitle the employees to overtime pay or compensatory time off under FLSA, and further, that 5 CFR § 551.424(a) (providing that time spent by an employee adjusting his or her grievance is hours of work) does not apply to the grievant's attendance as a union witness at the arbitration hearing to which he was not a party and at which his attendance was not otherwise required. The Authority, however, further concluded that the six employees were entitled to compensation for the time spent at the arbitration hearing in as much as they had been denied official time under the terms of the parties' agreement. Where official time properly authorized by the provisions of a collective bargaining agreement is wrongfully denied and the covered activities are thereafter performed on nonduty time, § 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. Where employees are not engaged in union representational activities, § 7131(d)(2) expressly provides for official time for bargaining unit employees "in connection with any other matter covered by the Statute which clearly encompasses testifying as a union witness at an arbitration hearing. The arbitrator found that under the parties agreement the six employees denied official time should have been granted official time for the usual number of hours of their shift. Consequently the award should have granted those six employees compensation for the usual number of hours of their shift at the appropriate straight-time rates. Compensation at straight-time rates was appropriate because the performance of those activities even on official time did not constitute overtime work. The Authority, therefore modified the arbitrator's award to strike the award to all eight employees of overtime or compensatory time off and to provide that the six employees attending the hearing entirely outside the regularly scheduled duty hours be compensated for the usual number of hours of their shift at appropriate straight-time rates.

23 FLRA No. 56

Federal Labor Relations Authority

HHS, SSA, Dallas Region and AFGE, National Council of SSA-Field Office Locals,
Case No. 6-CA-40044
(Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign and Direct Employees
      - Pay and Grade Retention
        - Declination of Reasonable Offer
  - Reclassification
    - Downgrade of Position
      - Declination of "Reasonable Offer"
      - Elements of "Reasonable Offer"
        - 5 CFR § 536.206
        - Agency Has Discretion to Establish Additional Elements
        - Subjective Belief of Employees No Basis To Reject Otherwise Reasonable Offer
          - Not Proper Additional Element
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Negotiate
      - Impact and Implementation
        - Reclassification
          - Downgrade of Positions
      - Pay and Grade Retention
        - Declination of Reasonable Offer
        - Elements of "Reasonable Offer"
          - Subjective Belief of Employees No Basis To Reject Otherwise Reasonable Offer

5 U.S.C. § 5102 and § 5361-66
5 CFR, part 536
5 CFR § 536.101(a)
5 CFR § 536.206, 536.207 and 536.209
45 Fed. Reg. 85656
FPM ch. 536, subch. 5, sec. 5-1(f)(2) (Oct. 1, 1981)
FPM Introduction (Feb. 14, 1983)
FPM ch. 171-5, sec. 2-1 (June 25, 1984)

STATUTE

7103(a)(14)(B) and (C)
7106(a)(2)(A) and (B)
7106(b)(2) and (3)
7116(a)(1) and (5)
7117(a)(1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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DIGEST NOTES

The activity did not violate § 7116(a)(1) and (5) when it refused to bargain over a proposal submitted by the union during negotiations over the impact and implementation of management's decision to downgrade certain positions. The proposal concerned what shall constitute declination of a reasonable offer of a comparable position, resulting in loss of retained grade and pay, where employees have been downgraded by reclassification. The Authority held that the proposal conflicted with OPM's Government-wide regulatory requirements for determining what constitutes a "reasonable offer." See 5 CFR § 536.206. The proposal would allow affected employees to reject an otherwise "reasonable offer" when the employee "believes" that he could not perform the duties of the offered position -- implicitly regardless of an agency determination of qualification -- or when he "believes" that accepting the offered position would create an "undue personal hardship." The proposal would also permit affected employees to reject an otherwise "reasonable offer" on the basis of his immediate eligibility for retirement. By granting such broad discretion to employees, the proposal would thwart all good faith efforts by the activity to to make "reasonable offers" of reassignment.

A proposal which would allow employees who were downgraded as a result of a reclassification to reject an otherwise reasonable offer of a comparable position, under conditions additional to those specified by OPM, and without a loss of retained grade and pay, does not conflict with management's rights to direct and assign work to employees under § 7106(a)(2)(A) and (B). The Authority found that the proposal involved employees who have been placed in lower-graded positions for reasons other than personal cause and who are entitled to retained grade and pay for up to two years. An employee's entitlement to retained grade and pay ends if the employee declines a "reasonable offer" of another position with a grade and pay equivalent to or greater than the employees' former position. While the employee clearly has the right to refuse such an offer, to do so terminates the employee's entitlement to retained grade and pay and the employee would remain in the lower-graded position. The proposal concerns only what constitutes such a "reasonable offer," and not whether management can, for example, "involuntarily assign an employee to any position.

An agency has discretion to add to the six elements of a "reasonable offer" required by 5 CFR § 536.206. The regulatory requirements are the "minimum conditions which must be met for an offer to be reasonable . . . Agencies may also establish additional conditions which must be met" before an "offer" of reassignment or promotion may be deemed "reasonable." Therefore, in addition to the regulatory requirements for continued entitlement to retained grade and pay for two years after a downgrade based on position reclassification, other requirements for such retention may be negotiable.

Federal Labor Relations Authority

23 FLRA No. 57

Petition for Amendment of Rules, Case No. 0-MC-10
(Decided September 23, 1986)

SUBJECT MATTER INDEX ENTRIES

Miscellaneous
Petition for Amendment of Rules
Time Limit for Issuance of Negotiability Decisions

Pursuit of ULP Remedies Where Agency Refuses to Negotiate On the Basis That Proposals Are Outside Duty to Bargain
5 U.S.C. § 553(e)
5 CFR § 2423.5, 2424/5 and 2424.10

STATUTE

7117(c)(6)
7118
7134

DIGEST NOTES

The Authority rejected a proposal to establish a regulatory time limit for the issuance of negotiability decisions. While the Authority found that a timely resolution of negotiability disputes is essential to the effective administration of the Federal labor-management relations program, it concluded that the establishment of a 60-day limit applicable to all negotiability appeals would not assist in accomplishing that goal. Negotiability cases vary substantially. The length of time it takes to decide a particular case depends upon such factors as the number and complexity of proposals at issue; the relationship of the disputed proposals to other cases; the size and composition of the Authority's case docket; the need to give priority consideration to some cases; and the availability of resources. The assumption that all negotiability decisions could be issued within a fixed regulatory time limit would ignore the existence of all these factors and might well reduce the operational flexibility necessary to enable the Authority to effectively carry out our responsibilities under the Statute.

The Authority rejected a proposed amendment to its rules which would allow the pursuit of unfair labor practice remedies in situations where an agency simply refuses to negotiate over contract proposals on the basis that they are outside the duty to bargain. Sections 2423.5 and 2424.5 of the Authority's Rules and

Regulations provide, in pertinent part, that where a labor organization files an unfair labor practice charge which involves a negotiability issue and also files a petition for review of the same negotiability issue, it is required to choose which procedure to pursue first. Cases which involve only an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained, and which do not involve alleged unilateral changes in conditions of employment, must be processed exclusively under the negotiability procedures in part 2424 of the Authority's Rules and Regulations. These regulations are consistent with § 7117 and 7118 of the Statute, which specify separate procedures for resolving negotiability and unfair labor practice cases respectively. They are consistent with the legislative history of the Statute, which indicates that Congress considered but rejected a provision which would have required all negotiability disputes to be resolved in unfair labor practice proceedings. Unfair labor practice remedies are available in appropriate refusal to bargain situations, such as (1) where the refusal to negotiate is accompanied by unilateral changes in conditions of employment; and (2) where an agency refuses to bargain over a proposal substantially identical to one which the Authority has previously determined to be negotiable under the Statute. The Authority concluded that the petitioner's suggestion to provide unfair labor practice remedies beyond these circumstances would be contrary to the language and legislative history of the Statute as well as Authority precedent.

Federal
Labor Relations
Authority

23 FLRA No. 58

DOT, FAA, Aviation Standards National Field Office and NAGE, Local R8-14 and AFGE, Local 2282,
Case No. 6-RO-40009
(Decided September 24, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Representation
  Request for Review
    No Compelling Reason

DIGEST NOTES

Upon consideration of the Petitioner's application for review of the Regional Director's Decision and Order on Objections, including all arguments in support thereof, the Authority determined that no compelling reason existed for granting the application. Rather the application expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 59

Federal Labor Relations Authority

IRS, Baltimore District Office and NTEU and NTEU Chapter 62, Case No. 0-AR-822 (Decided September 24, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

- Arbitration
  - Request for Issuance of General Statement of Policy or Guidance
    - Attorney Fees
      - Whether Union Is Entitled to Market Value Attorney Fees
    - Matter More Appropriately Resolved Through Case Processing Procedures
  - Request for Reconsideration
    - No Extraordinary Circumstances
- 5 U.S.C. 5596 [Back Pay Act]

DIGEST NOTES

The union filed requests for issuance of a general statement of policy or guidance on the issue of whether a labor organization is entitled to market value attorney fees where fees received are paid into a separate litigation account used solely for litigation purposes; and seeking reconsideration of the Authority's decision modifying the arbitrator's award in this case. The Authority's Rules and Regulations provides that in deciding whether to issue a general statement of policy or guidance, the Authority shall consider, among other things, whether the question presented can more appropriately be resolved by other means. In this case, the Authority found that the issue presented by the union in its request can be, and was, more appropriately resolved through case processing procedures and is therefore unsuitable for resolution by issuance of a general statement of policy or guidance. As to the union's request for reconsideration, the Authority held that the union had not established "extraordinary circumstances and that the request essentially constituted nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

23 FLRA No. 60

DOJ, Marshals Service and
Int'l Council of U.S.
Marshals Service Locals,
AFGE (Strongin,
Arbitrator), Case No.
0-AR-953 (Decided September
25, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Arbitration	
Exceptions Asserted in Appeal	7121(d)
Award Contrary to § 7121(d)	7122(a)
Statutory vs. Negotiated Grievance Procedure	
Consultation with EEO Counselor	
Does Not Preclude Subsequent Grievance	
Civil Rights Act of 1964, section 717	
5 U.S.C. § 2302(b)(1)	
29 CFR § 1613.213 and 1613.214	
29 CFR § 1613.402(a) and 1613.403	

DIGEST NOTES

The grievance concerned the suspension of the grievant for inattention to duty. The activity proposed to suspend the grievant for 14 days. During the advance notice period of the proposed disciplinary action, the grievant consulted with an EEO counselor concerning the proposed suspension pursuant to the precomplaint procedures of 29 CFR § 1613.213. The proposed penalty was reduced to a 10-day suspension and the activity issued a final decision suspending the grievant for 7-days. The grievant filed the grievance which was submitted to arbitration protesting that the suspension was not for just cause. The activity argued that the grievance was barred because the grievant's contact with the EEO counselor raised the matter of his suspension under the statutory EEO procedures, therefore, raising the matter under the negotiated grievance procedure was precluded by § 7121(d). The Arbitrator determined that the matter raised under the negotiated procedure was not the same matter that the grievance had raised under the statutory procedures. The arbitrator concluded that the grievance was not precluded by § 7121(d) and set aside the suspension, but stated that the activity may issue a written reprimand.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exception to the arbitrator's award the agency contended that the grievance was barred by § 7121(d) since the same matter was raised by the grievant under both the statutory and negotiated grievance procedures. The Authority held that the grievance was filed before the grievant initiated the action under the statutory EEO complaint procedures and that the grievance was not precluded by § 7121(d) by the grievant's previous contact with the EEO counselor. Under the provisions of § 7121(d), a grievance timely filed in writing in accordance the negotiated grievance procedure is only precluded or barred by the grievant having earlier raised the same matter by the timely filing of a formal written complaint in accordance with 29 CFR § 1613.213. Consultation with an EEO counselor pursuant to the precomplaint process of 29 CFR § 1613.213 does not preclude the subsequent filing of a grievance. One of the primary purposes of § 7121(d) is to preclude litigation of the same matter under both the applicable statutory procedure and the negotiated grievance procedure. This purpose is not served by having grievances filed under the negotiated grievance procedure precluded or barred by an employee's informal contact with an EEO counselor under 29 CFR § 1613.213. The precomplaint stage of the statutory EEO process is not a formal litigation proceeding.

23 FLRA No. 61

Federal Labor Relations Authority

NTEU, Chapter 49 and IRS, Indianapolis District (Goldman, Arbitrator), Case No. 0-AR-1199 (Decided September 25, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Jurisdiction
      Matters Covered By 5 U.S.C. § 4303
        Reduction in Grade - Unacceptable Performance

STATUTE

7121(f)
7122(a)

DIGEST NOTES

The Authority concluded that it was without jurisdiction to review the activity's exceptions to the arbitrator's ruling on a motion because the ruling was not separate and distinct from the matter submitted to arbitration concerning the grievant's reduction in grade for unacceptable performance under § 5 U.S.C. § 4303. Review of an arbitration award relating to such matters must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. Exceptions could not be filed with the Authority under § 7122(a).

Federal Labor Relations Authority

HHS, SSA and SSA Field Operations, New York Region and AFGE, Case No. 2-CA-50221 (Decided September 25, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

Unfair Labor Practice
  Agency Violations
    Refusal to Negotiate
      Disputed Interpretations of Parties Agreement
        Remedy Lies Within Grievance and Arbitration Procedures
      Ground Rules

DIGEST NOTES

The Authority concluded that the activity's refusal, based on its arguable interpretation of the parties' national agreement, to proceed to negotiations on ground rules until the union submitted substantive proposals on the subject matter did not violate § 7116(a)(1) and (5). The Authority agreed with the Judge's findings that the activity did not refuse to bargain on ground rules, but only insisted, consistent with its view of the parties' collective bargaining agreement, that bargaining on ground rules be deferred until the union also submitted its substantive proposals. The activity merely insisted that the union comply with a condition precedent to beginning negotiations on ground rules, namely, the submission of substantive proposals concerning the impact and implementation of a change in employees working conditions. The Authority also found, as did the Judge, that this case involved differing and arguable interpretations of the parties' collective bargaining agreement. In such cases involving disputed interpretations of the parties collective bargaining agreement, the aggrieved party's remedy lies within the grievance and arbitration procedures in the negotiated agreement rather than through the unfair labor practice procedures.

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23 FLRA No. 55

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WRIGHT-PATTERSON AIR FORCE BASE
OHIO, 2750TH AIR BASE WING

Activity

and

Case No. 0-AR-1104

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 1138

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Marian Kincaid Warns filed by the Department of the Air Force (the Agency) under section 7122(a) of the Federal Service Labor Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

This case involves grievances filed and submitted to arbitration on behalf of eight employees covered by the Fair Labor Standards Act (FLSA). The grievants sought overtime compensation for time spent as witnesses for the Union attending an arbitration hearing on another grievance. Apparently, two of the eight employees, including the grievant in the initial grievance, attended the hearing on official time for the period of the hearing when they otherwise would have been in a duty status. However, they remained at the hearing when the hearing extended beyond the end of their regularly scheduled duty hours. These two employees claimed overtime compensation for the time spent attending the hearing while they were not on official time. The regularly scheduled duty hours of the other six employees were not rescheduled by the Activity to coincide with the hearing. Consequently, these six employees attended the hearing during time they were not scheduled to be in a duty status and they claimed overtime compensation for the entire time spent attending the hearing.

The Arbitrator determined that the Activity had violated the intent of the parties' collective bargaining agreement and past practice by not rescheduling the worktime of the employees to fully coincide with the time of the hearing. She found that the intent of the parties' agreement is that employees appearing as witnesses will not suffer any loss of pay, including overtime pay. Accordingly, the Arbitrator sustained the grievances and ordered that the employees be compensated at overtime rates or granted compensatory time off for the time spent attending the arbitration hearing for which they were not otherwise compensated. Specifically, she ordered that the two employees who had attended the hearing on official time be compensated for the time spent beyond their regularly scheduled duty hours. She ordered that the other six employees be compensated at overtime rates for the usual number of hours of their workday and for any additional time spent attending the hearing.

III. EXCEPTION

The Agency contends that the award of overtime compensation or compensatory time off is contrary to governing law and regulation. Specifically, the Agency argues that time spent attending an arbitration hearing as a union witness is not hours of work officially ordered or approved that constitutes overtime work under the provisions of 5 U.S.C. § 5542(a) for which overtime pay or compensatory time off is authorized. The Agency also argues that such time likewise is not hours of work under FLSA, 29 U.S.C. § 201 et seq., and implementing regulations, 5 CFR part 551, subpart D, for which overtime pay or compensatory time off is authorized for nonexempt employees. The Agency further maintains as to one of the employees who was also the grievant in the initial grievance that 5 CFR § 551.424(a), providing that time spent adjusting grievances shall be considered hours of work, does not apply to time spent as a union witness attending an arbitration hearing to which the grievant was not a party. Accordingly, the Agency asserts that the award is deficient and should be set aside. In the alternative, the Agency asserts that if the Authority views this matter as involving a wrongful denial of official time, the award should be modified to provide appropriate compensation at straight-time rates.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency that the award of overtime compensation is contrary to governing law and regulation.

The basis for overtime pay is 5 U.S.C. § 5542(a) which provides that all hours of work officially ordered or approved in excess of 8 hours in a day or 40 hours in an administrative workweek are overtime work entitling the employee to overtime compensation or where appropriate under 5 U.S.C. § 5543 to compensatory time off. See, for example, American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986). The Authority has specifically held that a union official's performance of representational activities on nonduty time, outside regular work hours, was not the performance of hours of work officially ordered or approved that constituted overtime work for which overtime pay or compensatory time off could be granted. Id.; Social Security Administration and American Federation of Government Employees, AFL-CIO, 19 FLRA No. 104 (1985); Social Security Administration and American Federation of Government Employees, Local 1164, AFL-CIO, 19 FLRA No. 4 (1985). On the basis of these decisions, we similarly find in this case that time spent attending an arbitration hearing as union witnesses was not the performance of hours of work officially ordered or approved that constitutes overtime work under section 5542(a) so as to entitle the employees to overtime pay or compensatory time off.

Employees, as in this case, who are covered by FLSA are also entitled to overtime pay or compensatory time off in accordance with FLSA and provisions of 5 CFR part 551 implementing the Act for nonexempt Federal employees. Under these provisions covered employees are entitled to overtime compensation or where appropriate compensatory time off for all hours of work in excess of 40 in a workweek. 5 CFR § 551.501(a). Under 5 CFR § 551.401(a), all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." In Warner Robins Air Logistics Center, Warner Robins, Georgia and American Federation of Government Employees, Local 987, 23 FLRA No. 35 (1986), we specifically held that time spent by a union representative on nonduty time, outside regular work hours, representing an aggrieved employee at a meeting to resolve the grievance was not hours of work under 5 CFR § 551.401(a). On the basis of Warner Robins ALC and for the reasons set forth in that decision, we similarly find in this case that time spent attending the arbitration hearing as union witnesses is not hours of work under subsection 401(a) which would entitle the employees to overtime pay or compensatory time off under FLSA.

We also agree with the Agency that the one employee who was the grievant in the initial grievance was not entitled to overtime pay or compensatory time off under 5 CFR § 551.424(a). This provision provides:

> Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

We find that this provision does not apply to the grievant's attendance as a union witness at the arbitration hearing to which he was not a party and at which his attendance was not otherwise required. This was not time spent by the employee "adjusting his . . . grievance . . . during the time the employee is required to be on the agency's premises" within the meaning of subsection 424(a). Consequently, the Arbitrator's award of overtime compensation or compensatory time off is deficient as to all eight employees as contrary to governing law and regulation.

As recognized by the Agency, the Authority has determined that the Statute effectively provides a remedy when official time under section 7131(d) of the Statute is wrongfully denied. For example, American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986) (and cases cited in the decision). Specifically, where official time properly authorized by provisions of a collective bargaining agreement is wrongfully denied and the covered activities are thereafter performed on nonduty time, section 7131(d) entitles the aggrieved employee to be paid for the amount of time that should have been official time. In this case, although the employees were not engaged in union representational activities, section 7131(d)(2) expressly provides for official time for bargaining-unit employees "in connection with any other matter covered by [the Statute]" which clearly encompasses testifying as a union witness at an arbitration hearing. See U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 22 FLRA No. 16 (1986); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Seagoville, Texas and American Federation of Government Employees, Council of Prison Locals, Local No. 1637, 22 FLRA No. 5 (1986).

In this case, the Arbitrator found that it was the intent of the collective bargaining agreement and the practice of the Activity to reschedule the workday of employees scheduled to be union witnesses at an arbitration hearing to coincide with the hearing to enable them to be on official time to the extent of their workday. Thus, the Arbitrator found that under the parties' agreement the six employees denied official time should have been granted official time for the usual number of hours of their shift. Consequently, the award should have granted those six employees compensation for the usual number of hours of their shift at the appropriate straight-time rates. Therefore, the award will be modified accordingly. Compensation at straight-time rates is appropriate because the performance of those activities even on official time does not constitute overtime work. As indicated in Warner Robins ALC, 23 FLRA No. 35, the key under 5 CFR § 551.424(b) to whether time spent outside regular working hours performing representational activities on official time is overtime work is that the union official must already have been in an overtime duty status at the direction of the agency at the time an event arises which calls for the performance of representational functions. Slip op. at 2 (citing NTEU v. Gregg, No. 83-546 (D.D.C. Sept. 28, 1983)). Apart from the consideration of whether 5 CFR § 551.424(b) applies to official time under section 7131(d)(2) rather than (d)(1) alone, the six employees concerned were not already in an overtime duty status at the direction of the Activity at the time of the arbitration hearing, and, therefore, compensation at straight-time rates only is warranted.

V. DECISION

For these reasons the award is modified to strike the award to all eight employees of overtime compensation or compensatory time off and to substitute for the last sentence of paragraph 2 of the award the following remedy for the wrongful denial of official time to the six employees whose workdays were not rescheduled by the Activity:

> Each of the six employees who attended the arbitration hearing as union witnesses entirely outside regularly scheduled duty

hours shall be compensated for the usual number of hours of their shift at appropriate straight-time rates.

Issued, Washington, D.C., September 23, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, DALLAS REGION

Respondent

and

Case No. 6-CA-40044

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
NATIONAL COUNCIL OF SOCIAL SECURITY
ADMINISTRATION-FIELD OFFICE LOCALS

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Both the Respondent and the General Counsel have filed briefs for the Authority's consideration.

The complaint alleges that the Respondent committed an unfair labor practice in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by improperly refusing to bargain over one of the three proposals submitted by the Charging Party (the Union) during negotiations over the impact and implementation of management's decision to downgrade certain positions. The disputed proposal concerns what shall constitute the declination of a reasonable offer of a comparable position, resulting in the loss of retained grade and pay, where employees have been downgraded by reclassification.

II. Background

In 1981, officials in the Respondent's Dallas Regional Office conducted an audit of its "Mail and Supply Clerk" positions at the GS-4 level. They concluded that the position was not properly classified at the GS-4 level, and reclassified it at the GS-3 level. As a result of this reclassification, the Respondent immediately discontinued filling its Mail and Supply Clerk positions at the GS-4 level.

In 1983, the Respondent downgraded its GS-4 Mail and Supply Clerks located in Dallas, Fort Worth, Waco, Houston, and Brownsville, Texas, and Albuquerque, New Mexico, to the GS-3 level. Consistent with Federal regulations, the Respondent afforded retained grade and pay for a period of two years to its Mail and Supply Clerks who were downgraded as the result of the reclassification of their positions.[1]

In connection with this action, the Respondent sought specific proposals from the Union as to the impact and implementation of the downgradings, noting that affected employees could seek reassignment and compete for higher-graded positions during the two-year retention period. Under Federal regulations, eligibility for grade retention ceases if the employee declines a "reasonable offer" of a position for which the grade is equal to or higher than the retained grade, and eligibility for pay retention ceases if the employee declines a "reasonable offer" of a position for which the rate of basic pay is equal to or higher than the retained pay.[2]

The Union replied to the Respondent's solicitation with the following three bargaining proposals:

I. Management will take all necessary actions to assure that the affected employees will have the opportunity to exercise their full range of rights to priority consideration for other positions as afforded under applicable law, regulations, contract provisions, past practice and the Agency policy. Management will engage in no acts to discourage the exercising of the priority considerations.

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[1] 5 C.F.R. § 536.101(a).

[2] 5 C.F.R. §§ 536.207 and 536.209. The definition of a "reasonable offer," the declination of which may terminate eligibility for retained grade and pay, is set forth at 5 C.F.R. § 536.206, promulgated on Dec. 30, 1980; 45 Fed. Reg. 85656.

II. The failure to utilize a priority consideration will not constitute a Declination of a Reasonable Offer.

III. The failure to accept the offer of a position under any one of the following circumstances will not constitute a Declination of a Reasonable Offer: (1) The employee does not believe that he (or she) could perform satisfactorily in the offered position, (2) The employee has attained minimum age and length of service for retirement, (3) The employee believes that the change in positions would create undue personal hardship.

The Respondent agreed to bargain on the first two proposals, but declined to bargain on the third. The Respondent took the position that the third proposal was not negotiable because it was contrary to Government-wide policy concerning the requisite elements of a reasonable offer, as set forth in the Federal Personnel Manual (FPM) by the U.S. Office of Personnel Management (OPM). The Union asserted that the FPM specifically provides that an agency may establish factors in addition to those required by regulation for determining whether an offer of reassignment or promotion to another position constitutes a "reasonable offer." The Respondent disagreed, and contended that, in any event, additional factors must be established at the Agency's national level, not at the regional level involved here. The Union then filed its unfair labor practice charge, and the complaint in this case was issued.

III. Positions of the Parties

A. The General Counsel makes the following arguments in support of its contention that the last of the Union's three proposals was negotiable:

1. While management has the full authority to reduce its employees in grade or pay as a consequence of a proper reclassification of their positions, it must nonetheless negotiate, under section 7106(b)(2) and (3) of the Statute, as to "procedures" and "appropriate arrangements" for those bargaining unit members who have been adversely affected because of a reduction in grade and pay.

2. The Respondent recognized its duty to bargain in this case when it notified the Union of the

impending action and solicited specific proposals regarding the impact and implementation of the action.

3. The Respondent's insistence that it had no (or very limited) authority to add to the requisite elements of a "reasonable offer" is expressly contradicted by the language of the FPM on which the Respondent relies in support of its position in this regard.

B. The Respondent, on the other hand, makes the following arguments in support of its position that the last of the Union's proposals is not negotiable:

1. A classification action is explicitly excluded under section 7103(a)(14)(B) and (C) of the Statute as a negotiable "condition of employment."

2. The classification action in this case does not constitute an exercise of a retained management right under section 7106(a)(2)(A) of the Statute so as to be subject to impact and implementation bargaining under section 7106(b)(2) and (3).

3. Even if the impact and implementation of classification actions were negotiable in general, this case presents an exception because the Respondent's management had "very little discretion under applicable statutes and regulations to bargain over such matters."

4. Pertinent legal precedent, as well as the parties' own bargaining agreement, provide that agency management is bound by existing Government-wide rules and regulations,[3] and that the OPM provision concerning the definition of a "reasonable offer" for purposes of pay and grade retention constitutes a Government-wide rule or regulation which imposes the parameters of such a

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[3] In addition to the provisions of the pertinent bargaining agreement, section 7117(a)(1) of the Statute itself specifically provides that the duty to bargain in good faith does not extend to matters "inconsistent with any Federal law or any Government-wide rule or regulation . . . ." See discussion in the text.

"reasonable offer" to the exclusion of the terms of the Union's proposal.

5. In conclusion, the proposal conflicts with management's right to direct the work force and assign work to employees under section 7106(a)(2)(A) and (B) of the Statute.

IV. Analysis

A. Negotiability of the Union's Proposal In General

In March Air Force Base, Riverside, California, 13 FLRA 255 (1983), the Authority held that, consistent with section 7103(a)(14)(C) of the Statute and Authority precedent, bargaining proposals which relate directly to the classification of positions do not concern "conditions of employment" and therefore are not within the duty to bargain under the Statute. The Authority further found, however, that the duty to bargain does apply to the implementation of downgradings to be effected as the result of the reclassification of positions, and to the impact of such reclassification on affected employees, "to the extent consonant with law and regulation." The Authority followed this finding in Department of Transportation, Federal Aviation Administration, 19 FLRA No. 61 (1985), concluding that the agency was obligated to bargain over the procedures and appropriate arrangements for employees adversely affected by the agency's decision to reclassify positions, resulting in downgrades, reassignments, and promotions. The same rule of law applies equally here.

Also in the March Air Force Base decision, the Authority discounted the agency's argument that, even if a duty to bargain existed, the agency had little discretion under applicable statutes and regulations to bargain on such matters. The Authority noted that grade and pay retention are specifically provided for by law and regulation, and therefore may not be subject to bargaining under section 7103(a)(14)(C) of the Statute. The Authority concluded, however, that the agency had presented no evidence that the union's proposals were removed from the scope of bargaining, either because they were specifically provided for within the meaning of section 7103(a)(14)(C), or because the agency was left with no discretion to act under those particular circumstances. The Authority therefore ordered the agency to take certain steps to offer the union the opportunity to negotiate about the impact and implementation of its reclassification and downgrade action.

Under section 7117(a)(1) of the Statute, a Federal agency's duty to bargain does not extend to proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation . . . ." In this case, an OPM regulation at 5 C.F.R. § 536.206 provides that a "reasonable offer," the declination of which terminates eligibility for grade and pay retention, is composed of six specific elements.[4] The terms of that regulation clearly require that, at a minimum, all six elements must be present for an offer to be a "reasonable offer." An FPM provision published subsequently by OPM stipulates that the regulatory requirements are the "minimum conditions which must be met for an offer to be reasonable . . . ," so that "[a]gencies may also establish additional conditions which must be met" before an "offer" of reassignment or promotion may be deemed "reasonable." FPM ch. 536, subch. 5, sec. 5-1(f)(2) (Oct. 1, 1981). This FPM provision represents OPM's interpretation of its own regulations, see FPM Introduction (Feb. 14, 1983), and FPM ch. 171-5, sec. 2-1 (June 25, 1984), and is adopted for purposes of this decision because it is consistent with the regulation.

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[4] The six specific elements of a "reasonable offer," set forth at 5 C.F.R. § 536.206, are as follows:

(1) The offer must be in writing, and must include an official position description of the offered position; and

(2) The offer must inform the employee that an entitlement to grade or pay retention will be terminated if the offer is declined and that the employee may appeal the reasonableness of the offer as provided in § 536.302; and

(3) The offered position must be of tenure equal to or greater than that of the position creating the grade or pay retention entitlement; and

(4) The offered position must be in an agency, as defined in 5 U.S.C. § 5102, although not necessarily in the same agency in which the employee is serving at the time of the offer; and

(5) The offered position must be full-time, unless the employee's position immediately before the change creating entitlement to grade or pay retention was less than full-time, in which case the offered position must have a work schedule of no less time than that of the position held before the change; and

(6) The offered position must be in the same commuting area as the employee's position immediately before the offer, unless the employee is subject to a mobility agreement or a published agency policy which requires employee mobility.

The Respondent also asserted that "changes in the current policy" with regard to the requirements of a "reasonable offer" could only be effectuated at the Agency's national level because the regional office was not empowered to do so. The Respondent offered no evidence to support its assertion. In fact, the record indicates that the Respondent, in deciding to downgrade the GS-4 Mail and Supply Clerks at certain locations within the Dallas Region, sought specific proposals from the Union concerning the impact and implementation of that decision on these unit employees.

The Authority concludes that the Respondent has discretion to add to the six elements of a "reasonable offer" required by Federal regulation. In addition to the regulatory requirements for continued entitlement to retained grade and pay for two years after a downgrade based on position reclassification, other requirements for such retention therefore may be negotiable.

B. Negotiability of the Union's Proposal

The Union proposed three circumstances under which the downgraded employees would not be deemed to have declined a "reasonable offer" which would terminate their eligibility for retained grade and pay. Those three circumstances are as follows:

(1) Where the employee believes that he could not perform satisfactorily in the offered position;

(2) Where the employee has attained the minimum age and length of service for retirement; and

(3) Where the employee believes that taking on an offered position would create an undue personal hardship.

The Respondent contends that this proposal would eliminate its discretion to exercise its reserved management rights under section 7106(a)(2)(A) and (B) of the Statute to "direct" and "assign work" to the employees reduced in grade or pay as a result of the reclassification of their positions.

Contrary to the Respondent's position, we find that the disputed proposal in this case does not conflict with management's rights to "direct" and "assign work" to employees under section 7106(a)(2)(A) and (B) of the Statute. Rather, it involves employees who have been placed in lower-graded positions for reasons other than personal cause and who are entitled to retained grade and pay for up to two years under law and Governmentwide regulation. 5 U.S.C. §§ 5361-66; and 5 C.F.R. part 536. Under this law and regulation, an employee's entitlement to retained grade and pay ends if the employee declines a "reasonable offer" of another position with a grade and pay equivalent to or greater than the employee's former position. While the employee clearly has the right to refuse such an offer, to do so terminates the employee's entitlement to retained grade and pay and the employee would remain in the lower-graded position. The proposal in this case concerns only what constitutes such a "reasonable offer," and not whether management can, for example, "involuntarily" assign an employee to any position.

The Union's proposal would allow an affected employee to reject an otherwise "reasonable offer" when the employee simply "believes" that he could not perform the duties of the offered position -- implicitly regardless of an agency determination of qualification -- or when he "believes" that accepting the offered position would create an "undue personal hardship." The proposal also would permit the affected employee to reject an otherwise "reasonable offer" on the basis of his immediate eligibility for retirement. By granting such broad discretion to affected employees, the disputed proposal could thwart all good faith efforts by the Respondent to make "reasonable offers" of reassignment. Employees who represented that they "believe" subjectively that they cannot perform the duties of the offered positions or that the positions would result somehow in an "undue personal hardship," or who coincidentally happen to be qualified for retirement, would be entitled to decline otherwise reasonable offers. The Authority finds that the proposal conflicts with OPM's Government-wide regulatory requirements for determining what constitutes a "reasonable offer."[5] Accordingly, the Union's proposal is not negotiable, and the complaint in this case is dismissed.

V. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties, and concludes that the Respondent did not violate section 7116(a)(1) or (5) of the Statute, as alleged. We shall therefore dismiss the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 6-CA-40044 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., September 23, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[5] In view of this determination that the proposal conflicts with a Government-wide rule or regulation, we find that section 7106(b)(2) and (3) of the Statute is not applicable. *See American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO and Department of Justice*, 21 FLRA No. 121 (1986); *American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 FLRA No. 118 (1985), *petition for review filed sub nom. American Federation of Government Employees, Local 1546 v. FLRA*, No. 85-1689 (D.C. Cir. Oct. 21, 1985).

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PETITION FOR AMENDMENT OF RULES Case No. 0-MC-10

DECISION ON PETITION FOR AMENDMENT OF RULES

The Petition for Amendment of Rules was filed pursuant to 5 U.S.C. § 553(e) and 5 U.S.C. § 7134 and seeks an amendment to three provisions in the Authority's Rules and Regulations, specifically 5 CFR §§ 2423.5, 2424.5 and 2424.10.

I. Establishment of Deadlines for Deciding Scope of Bargaining Issues Under Section 7117(c)

Petitioner proposes the following amendment to section 2424.10(a) of the Authority's Rules and Regulations to provide a deadline for issuance of Authority negotiability decisions:

> Except in cases in which hearings are held, decisions in cases arising under 5 U.S.C. § 7117(c) shall be issued within 60 days of the submission of the union's response to the agency's statement of position.

In support of this proposed revision, the Petitioner relies on section 7117(c)(6) of the Federal Service Labor-Management Relations Statute (the Statute) which requires the Authority to expedite negotiability proceedings.

The Authority rejects the proposal to establish a regulatory time limit for the issuance of negotiability decisions. While the timely resolution of negotiability disputes is essential to the effective administration of the Federal labor-management relations program, we do not believe that the establishment of a 60-day time limit applicable to all negotiability appeals will assist in accomplishing that goal. Negotiability cases vary substantially. The length of time it takes to decide a particular case depends upon such factors as the number and complexity of the proposals at issue; the relationship of the disputed proposals to other cases; the size and composition of our case docket; the need to give priority consideration to some cases; and the availability of resources. The assumption that all negotiability decisions could be issued within a fixed regulatory time limit would ignore the existence of all these factors and might well reduce the operational flexibility necessary to enable us to effectively carry out our other responsibilities under the Statute.

The Authority has established goals which will significantly reduce the time taken to issue all of our decisions. Our immediate goal is to decide all cases within six months of their receipt. As of April 1, 1986, there were 512 cases that would be six months old on September 30, 1986; as of August 31, 1986 that figure was reduced to 232. We will continue our efforts until the goal is met.

II. Recognition of the Relationship Between Scope of Bargaining Disputes and Failure to Bargain Disputes.

The petitioner proposes that sections 2423.5 and 2424.5 of the Authority's Rules and Regulations should be replaced by the following:

> (a) If a union files an unfair labor practice charge over an agency's failure to bargain over a matter, and the union has already filed an appeal of the agency's allegation that the duty to bargain does not extend to that matter, a complaint shall be issued and the agency required to answer, but further proceedings concerning the unfair labor practice charge will be suspended pending decision on the duty to bargain issue.
>
> (b) If during the investigation of a charge that an agency has failed to bargain in good faith, the agency alleges as a defense that the duty to bargain in good faith does not extend to the matter sought to be bargained, the agency will be instructed to submit its allegation in writing to the union. If the union files a timely appeal of the allegation, a complaint on the unfair labor practice charge will be issued and an answer required, but further proceedings concerning the unfair labor practice charge will be suspended pending decision on the duty to bargain issue.
>
> (c) If at any time after issuance of the complaint the agency alleges as a defense that the duty to bargain in good faith does not extend to the matter sought to be bargained, the agency will be instructed to submit its allegation in writing to the union. If the union files

a timely appeal of the allegation, further proceedings concerning the unfair labor practice charge will be suspended pending decision on the duty to bargain issue.

(d) Upon issuance of the Authority's decision on the duty to bargain issue, the proceedings on the unfair labor practice case will be resumed in a manner consistent with that decision.

The petitioner asserts that adoption of this proposal is necessary to allow for the pursuit of unfair labor practice remedies in situations where an agency simply refuses to negotiate over contract proposals on the basis that they are outside the duty to bargain.

The Authority rejects this proposal for the following reasons. Sections 2423.5 and 2424.5 of the Authority's Rules and Regulations provide, in pertinent part, that where a labor organization files an unfair labor practice charge which involves a negotiability issue and also files a petition for review of the same negotiability issue, it is required to choose which procedure to pursue first. Cases which involve only an agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained, and which do not involve alleged unilateral changes in conditions of employment, must be processed exclusively under the negotiability procedures in part 2424 of the Authority's Rules and Regulations. In our view, these regulations are consistent with the language of sections 7117 and 7118 of the Statute, which specify separate procedures for resolving negotiability and unfair labor practice cases, respectively. They are also consistent with the legislative history of the Statute, which indicates that Congress considered but rejected a provision which would have required all negotiability disputes to be resolved in unfair labor practice proceedings.*/

Unfair labor practice remedies are available in appropriate refusal to bargain situations, such as (1) where the refusal to negotiate is accompanied by unilateral changes in conditions of employment (Veterans Administration,

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*/ See 124 Cong. Rec. 29184 (1978), reprinted in Sub-comm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 927 (Comm. print No. 96-7).

Washington, D.C., 22 FLRA No. 69 (1986)); and (2) where an agency refuses to bargain over a proposal substantially identical to one which the Authority has previously determined to be negotiable under the Statute. *See Department of the Air Force, U.S. Air Force Academy*, 6 FLRA 548 (1981), *affirmed sub nom. Department of the Air Force, United States Air Force Academy v. FLRA*, 717 F.2d 1314 (10th Cir. 1983); *Department of Treasury, Internal Revenue Service, Memphis Service Center*, 15 FLRA 829 (1984). We conclude that Petitioner's suggestion to provide for unfair labor practice remedies beyond these circumstances, such as where an agency is merely alleging--in the absence of clear precedent to the contrary--that a disputed proposal is nonnegotiable, would be contrary to the language and legislative history of the Statute as well as Authority precedent.

III. Conclusion

For the reasons stated above, the proposed amendments to the Authority's Rules and Regulations contained in the Petition for Amendment of Rules must be rejected. Accordingly, the Petition is denied.

Issued, Washington, D.C., September 23, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee Member

FEDERAL LABOR RELATIONS AUTHORIT

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
AVIATION STANDARDS NATIONAL FIELD OFFICE

Activity

and

Case No. 6-RO-40009

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (NAGE), SEIU/AFL-CIO
LOCAL R8-14

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFGE), AFL-CIO, LOCAL 2282

Intervenor

ORDER DENYING APPLICATION FOR REVIEW

On July 31, 1986, the National Association of Government Employees (NAGE), SEIU/AFL-CIO, Local R8-14 (NAGE), filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Objections in the above-named case. In its application for review, NAGE contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application.

Upon consideration of NAGE's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on record evidence and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, IT IS ORDERED that the application for review of the Regional Director's Decision and Order on Objections be, and it hereby is, denied.

Issued, Washington, D.C., September 24, 1986.

J C Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
BALTIMORE DISTRICT OFFICE

Activity

and

Case No. 0-AR-822
(21 FLRA No. 107)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 62

Union

ORDER

This matter is before the Authority at this time on requests filed by the Union asking the Authority to issue a general statement of policy or guidance on the issue of whether a labor organization is entitled to market value attorney fees where the fees received are paid into a separate litigation account used solely for litigation purposes and seeking reconsideration of the Authority's decision of May 22, 1986, modifying the Arbitrator's award in this case.[1]

In his supplemental opinion and award,[2] the Arbitrator determined that attorney fees were warranted in the interest of justice for the legal services rendered in conjunction with certain allegations giving rise to the underlying grievance. The Arbitrator granted the Union's application for attorney fees in part and ordered that the Union be compensated for the allowable time at an hourly rate at or near the prevailing rate of legal compensation in the locality. In its exceptions to the supplemental award, the Activity argued, among other things, that the Arbitrator's supplemental award of attorney fees to the Union at the prevailing private practice rate was contrary to law as enunciated by the Federal courts and the Merit Systems Protection Board. The Authority held, based upon its decision in Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), that because the attorneys who represented the grievant were employees of the Union, attorney fees for their services could only be awarded on a cost-plus basis and modified the Arbitrator's award accordingly.

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[1] The Union incorporates by reference the brief in support of its request for a general statement of policy or guidance into the record to support its request for reconsideration.

[2] The underlying grievance in this case concerned the 10-day suspension of the grievant for alleged failure to process tax remittance and tax returns in a timely manner. The Arbitrator sustained the grievance and left the record open to permit the parties to file briefs on whether reasonable attorney fees should be granted pursuant to the Back Pay Act, 5 U.S.C. § 5596. The Union filed an application for an award of fees and the Arbitrator ruled on the application in a supplemental opinion and award.

In support of its requests, the Union essentially argues that its maintenance of a litigation fund separate from the general treasury eliminates the potential for unethical fee splitting and that therefore the Union is entitled to recover attorney fees calculated at the prevailing market-value rate.

Section 2427.5 of the Authority's Rules and Regulations provides that in deciding whether to issue a general statement of policy or guidance, the Authority shall consider, among other things, whether the question presented can more appropriately be resolved by other means. In this case, the Authority finds that the issue presented by the Union in its request can be, and was, more appropriately resolved through case processing procedures and is therefore unsuitable for resolution by issuance of a general statement of policy or guidance.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Union has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Union in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Union's requests for reconsideration and for a general statement of policy and guidance are denied.

Issued, Washington, D.C., September 24, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 60

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
UNITED STATES MARSHALS SERVICE

Activity

and Case No. 0-AR-953

INTERNATIONAL COUNCIL OF U.S.
MARSHALS SERVICE LOCALS, AFGE

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Seymour Strongin filed by the Department of Justice (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition and the Office of Personnel Management filed a brief as an amicus curiae.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the suspension of the grievant for inattention to duty. On October 3, 1983, the Activity proposed to suspend the grievant for 14 days, and during the advance notice period of the proposed disciplinary action, the grievant on November 10, 1983, consulted with an equal employment opportunity (EEO) counselor concerning the proposed suspension pursuant to the precomplaint procedures of 29 CFR § 1613.213. On December 7, 1983, the proposed penalty was reduced to a proposed 10-day suspension, and on January 23, 1984, the Activity issued a final decision suspending the grievant for 7 days. On February 3, 1984, the grievant filed the grievance which was submitted to arbitration protesting that the suspension was not for just cause.

In the proceeding before the Arbitrator, the Activity argued that because of the contact with the EEO counselor on November 10, 1983, the subsequently filed grievance was barred by section 7121(d) of the Statute.[1] Specifically, the Activity maintained that by consulting with the counselor under the precomplaint procedures of 29 CFR § 1613.213, the grievant raised the matter of his suspension under the statutory EEO complaint procedures. Consequently, the Activity contended that raising the matter subsequently under the negotiated grievance procedure was precluded by section 7121(d), which permits an employee to raise such a matter under the statutory EEO procedures or the negotiated grievance procedure, but not under both. The Arbitrator however determined that the "matter" raised under the negotiated grievance procedure was not the same "matter" that the grievant had raised under the statutory EEO procedures. On that basis, the Arbitrator ruled that the grievance was not precluded by section 7121(d) of the Statute. On the merits, the Arbitrator set aside the suspension, but stated that the Activity may issue the grievant a written reprimand.

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[1] Section 7121(d) of the Statute pertinently provides:

> An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first.

III. EXCEPTION

A. Contentions

In its exception the Agency contends that the grievance was barred by, and the award is consequently deficient as contrary to, section 7121(d) of the Statute. In support, the Agency essentially argues that the matter raised by the grievant under both the statutory and negotiated procedures was the same and that such matter was earlier raised under the statutory EEO complaint procedures by initiating the pre-complaint procedures of 29 CFR § 1613.213.

B. Analysis and Conclusions

Section 7121(d) provides that when an employee affected by a prohibited personnel practice under section 2302(b)(1)[2] has raised the matter under a statutory procedure, the matter subsequently may not be raised as a grievance. Thus, the elements of section 7121(d), both of which must attach in order for a grievance to be precluded, are: (1) the matter which is the subject of the grievance is the same matter which is the subject of the action initiated under the statutory procedure, and (2) such matter was earlier raised by the employee timely initiating an action under the statutory procedure.

In this case, without deciding whether the matters raised under the statutory and negotiated procedures were the same, the Authority concludes that the grievance was filed before the grievant initiated the action under the statutory EEO complaint procedures and that therefore the grievance was not precluded by section 7121(d) of the Statute by the grievant's previous contact with an EEO counselor.

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[2] Section 2302(b)(1) pertinently provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
>
> (1) discriminate for or against any employee or applicant for employment--
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964[.]

Section 7121(d) provides with respect to grievances that the employee shall be deemed to have exercised the option to raise the matter under the negotiated grievance procedure when the employee timely files a grievance in writing in accordance with the provisions of the negotiated grievance procedure. However, with respect to statutory procedures, section 7121(d) merely provides that the option is exercised at the time the employee timely initiates an action under the applicable statutory procedure. In addition, 29 CFR part 1613, governing equal employment opportunity in the Federal government, does not specify when a matter of discrimination under section 717 of the Civil Rights Act of 1964 is raised under the statutory EEO complaint procedures or when an action is initiated under those procedures.[3]

For the reasons that follow, we conclude that under the provisions of section 7121(d) of the Statute, a grievance timely filed in writing in accordance with the negotiated grievance procedure is only precluded or barred by the grievant having earlier raised the same matter by the timely filing of a formal written complaint in accordance with 29 CFR § 1613.214. Contrary to the argument of the Agency, consultation with an EEO counselor pursuant to the precomplaint process of 29 CFR § 1613.213 does not preclude the subsequent filing of a grievance.

One of the primary purposes of section 7121(d) is to preclude litigation of the same matter under both the applicable statutory procedure and the negotiated grievance procedure. This purpose is not served by having grievances filed under the negotiated grievance procedure precluded or barred by an employee's informal contact with an EEO counselor under 29 CFR § 1613.213. The precomplaint stage of the statutory EEO process is not a formal litigation proceeding. As emphasized by the court in Mertz v. Marsh, 786 F.2d 1578, 1580-81 (11th Cir. 1986), in denying attorney fees for services performed during the precomplaint process, that stage of the process is different in purpose and nature from the proceedings after the filing of a formal written complaint under section 1613.214.

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[3] We note that the Equal Employment Opportunity Commission has proposed to amend its regulations to provide at 29 CFR § 1613.219 that an election to proceed under EEO procedures is indicated only by the filing of a formal written complaint and that the use of the precomplaint process of 29 CFR § 1613.213 does not constitute an election of remedies. 51 Fed. Reg. 29482, 29483, 29488-89 (Aug. 18, 1986).

Specifically, the court noted that the precomplaint process is informal; the identity of the complainant is confidential; the claim need not be in writing; the counselor has a duty to give counsel as well as to seek a solution on an informal basis; and if this stage does not bring the matter to solution, the aggrieved person must be notified of the right to file a complaint of discrimination. In short, the court affirmed for purposes of the statutory provisions authorizing attorney fees the "drawing of a line between the ameliatory system of .213 and the formal complaint procedure of .214." 786 F.2d at 1581. We agree that the precomplaint process is a predominantly informal, confidential, and conciliatory process. We note in addition that at the conclusion of the process nothing precludes an employee from seeking a formal resolution of the employee's concern by filing a formal complaint of discrimination. As we have previously indicated, one of the purposes of section 7121(d) is to preclude relitigation of a matter previously litigated in a fashion binding on all parties. This purpose is best served if, in determining whether an election has occurred under section 7121(d), the line is drawn between the informal and confidential counseling system of section 1613.213 and the litigation proceedings commenced by the filing of a formal written complaint under section 1613.214.

In addition, this determination in our judgment best facilitates the settlement of disputes between employees and their employing agencies involving conditions of employment. Certainly, employees contact EEO counselors seeking information, advice, and counseling on a wide variety of matters and may be advised that there is no basis for a discrimination complaint under applicable EEO laws and regulations. Under the interpretation of section 7121(d) advanced by the Agency in this case, an employee in such circumstances would be precluded from raising under the negotiated grievance procedure any matter that was discussed with the EEO counselor. We find that such a result was not intended by section 7121(d) and does not promote the purpose of the Statute of encouraging the settlement of disputes.

Similarly, this determination is consistent with the provision of 29 CFR § 1613.403 specifying when a "mixed case complaint"[4] is filed for purposes of the election between a mixed case complaint or a "mixed case appeal"[5] to the Merit Systems Protection Board. In this situation, which is similar to the election of the statutory EEO complaint procedure involved in this case, 29 CFR § 1613.403 specifies that the election of the mixed case complaint occurs when the formal written complaint is filed pursuant to 29 CFR § 1613.214.

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[4] 29 CFR § 1613.402(a) defines a mixed case complaint.

IV. DECISION

Accordingly, for these reasons, the Agency's exception provides no basis for finding the award deficient as contrary to section 7121(d) of the Statute and the exception is denied.

Issued, Washington, D.C., September 25, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[5] 29 CFR § 1613.402(b) defines a mixed case appeal.

23 FLRA No. 61

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 49

Union

and

Case No. 0-AR-1199

INTERNAL REVENUE SERVICE
INDIANAPOLIS DISTRICT

Activity

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to a ruling of Arbitrator Alvin L. Goldman filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

The matter submitted to arbitration concerned the grievant's reduction in grade for unacceptable performance under 5 U.S.C. § 4303. Before considering the merits of the grievance, the Arbitrator issued a final ruling and opinion on the Union's motion to require the Activity to make a prehearing disclosure of certain documents and information. The Arbitrator essentially sustained the motion and ordered the Activity to produce a substantial portion of the material requested. The Activity's exceptions in this case are to the Arbitrator's final ruling on the motion.

III. ANALYSIS AND CONCLUSIONS

We conclude that we are without jurisdiction to review the Activity's exceptions. We find, apart from any consideration of whether a challenge to the ruling is interlocutory, that the ruling on the Union's motion is not separate and distinct from the matter of the grievant's reduction in grade. Section 7122(a) of the Statute pertinently provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award

> pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include those covered under 5 U.S.C. § 4303 which applies to a reduction in grade for unacceptable performance. Review of an arbitration award relating to such matters must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. *Department of Defense Dependents Schools, Pacific Region and Overseas Education Association*, 16 FLRA 34 (1984).

Because we find that the Arbitrator's final ruling on the Union's motion relates to a matter covered by section 4303, exceptions to the award may not be filed with the Authority under section 7122(a) of the Statute. *See Headquarters, Department of the Army, Washington, D.C. and U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri*, 22 FLRA No. 71 (1986), slip op. at 5 n.2 and *Veterans Administration Medical Center, Hines, Illinois and Illinois Nurses Association, Hines Local Unit*, 20 FLRA No. 61 (1985) In *VA Medical Center, Hines, Illinois*, the Authority found that a supplemental award of attorney fees was not separate and distinct from the original award which related to a matter described in section 7121(f) of the Statute. Consequently, the Authority ruled that it was without jurisdiction to resolve the exceptions to the award of attorney fees and the exceptions were dismissed.

IV. DECISION

Accordingly, the Activity's exceptions are dismissed.

Issued, Washington, D.C., September 25, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 62

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION AND
SOCIAL SECURITY ADMINISTRATION FIELD
OPERATIONS, NEW YORK REGION

Respondent

and Case No. 2-CA-50221

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain over ground rules for scheduled negotiations between the Respondent and the Charging Party (the Union) concerning the impact and implementation of the Respondent's decision to relocate its Babylon, Long Island Branch Office to Lindenhurst, Long Island.

II. Background and Judge's Conclusion

The basic facts are not in dispute, having been stipulated at the hearing. By letter of February 8, 1985, the Union asked the Respondent if it planned to move its Babylon Branch Office. The Respondent replied that it planned to move the Office as of March 1, 1985. The parties met shortly before the move and identified several areas of disagreement. The move took place as scheduled. Shortly after the move, the

Union requested to bargain over the impact and implementation of the move, submitted ground rules proposals, and proposed to meet on these proposals. The Respondent replied that it was unwilling to meet on ground rules alone, since the parties' negotiated agreement required the submission of substantive proposals prior to bargaining on anything, including ground rules. The Union then filed the charge that led to the complaint before the Judge in this case.

The Judge found that the Respondent's refusal to bargain over the Union's ground rules proposals was not unlawful in the circumstances of this case. The Judge observed that the Respondent gave proper notice of the move to the Union, met with the Union to discuss preliminarily what problems the move posed, and admitted its obligation to bargain over the impact and implementation of the move. The Judge further found that the issue raised by the Respondent--that is, whether substantive proposals must be submitted prior to bargaining--is a long-standing, unresolved issue between the parties. She then found that Article 4, Section 1 of the parties' agreement does not distinguish between ground rules and substantive proposals, but only provides that "proposals" shall be submitted within a reasonable time after notice of a proposed change is given, and prior to bargaining. Acknowledging that ground rules are an integral part of the bargaining process, the Judge found that the Respondent's interpretation was arguably correct, and that the dispute therefore may be resolved through the grievance/arbitration machinery of the parties' contract but not through the unfair labor practice procedures of the Statute. She therefore concluded that the Respondent's refusal to proceed to bargaining on ground rules until the Union had submitted substantive proposals was not a violation of the Statute, and recommended dismissal of the complaint.

III. Positions of the Parties

In its brief to the Judge, the Respondent argued that it was justified in refusing to bargain about ground rules alone because Article 4, Section 1 of the parties' agreement required the Union to submit substantive proposals before the Respondent was obligated to bargain concerning ground rules.

In exceptions to the Judge's Decision, the General Counsel argues that ground rules are an integral part of the bargaining process, and that the Respondent was thus obligated to bargain about ground rules prior to the submission of proposals on substantive matters. The General Counsel argues further that the Union did not waive its right to insist on such ground rules bargaining when it agreed to the terms of Article 4, Section 1 of the parties' collective bargaining agreement.

IV. Analysis

The Authority agrees with the Judge, who placed importance upon the fact that the meaning of Article 4, Section 1 of the parties' agreement has long been in dispute, and that the Respondent has consistently taken the position, since the inception of the parties' agreement, that the agreement obliges the Union to submit substantive proposals (as well as ground rules proposals, if any) prior to bargaining. The Judge acknowledged that ground rules are an integral part of the collective bargaining process, about which management must bargain, citing Authority precedent. She made a careful distinction in this case, however. The Judge found that the Respondent did not refuse to bargain on ground rules, but only insisted, consistent with its view of the parties' collective bargaining agreement, that bargaining on ground rules be deferred until the Union also submitted its substantive proposals. The General Counsel's argument concerning waiver is thus inapposite. Consistent with the Judge, we find that the Respondent merely insisted that the Union comply with what the Respondent viewed as a negotiated condition precedent to beginning negotiations on ground rules, namely, the submission of substantive proposals concerning the impact and implementation of the change.

We find, in essential agreement with the Judge, that this case involves differing and arguable interpretations of the parties' collective bargaining agreement. The Respondent relied upon what it argued was a clear requirement of the parties' agreement that the Union's substantive proposals must be submitted before it was required to meet its obligation to bargain as to ground rules. In such cases involving disputed interpretations of the parties' collective bargaining agreement, the aggrieved party's remedy lies within the grievance and arbitration procedures in the negotiated agreement rather than through unfair labor practice procedures.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties, and the entire record, and adopts the Judge's findings, conclusions, and recommended Order dismissing the complaint. We therefore conclude that the Respondent's refusal, based on its arguable interpretation of the parties' National Agreement, to proceed to negotiations on ground rules until the Union submitted substantive proposals on the subject matter did not violate section 7116(a)(1) or (5) of the Statute.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-50221 be, and it hereby is, dismissed.

Issued, Washington, D.C., September 25, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 62)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION AND SOCIAL SECURITY ADMINISTRATION FIELD OPERATIONS, NEW YORK REGION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party/Union

. . . .

Case No.: 2-CA-50221

Irving L. Becker and
Melvin Steuerman,
For the Respondent

Stanley Chodos,
For the Charging Party

Jon R. Steen,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of unfair labor practices filed on March 26, 1985, by Stanley Chodos on behalf of the Charging Party, the Regional Director, Region II, of the Federal Labor Relations Authority (Authority) investigated and, on May 29, 1985, served the complaint initiating this action.

The complaint alleges that Respondent violated Sections 7116(a)(1), and (5)[1] of the Statute by refusing to bargain over ground rules for negotiations between Respondent and the Charging Party concerning the impact and implementation of a management-initiated change relocating a branch office.

On July 16, 1985, a hearing was held in New York City at which the parties appeared and submitted a Stipulation of Facts with Joint Exhibits 1 through 31. Jon Steen stated the position of the General Counsel and Melvin Steuerman stated that of Respondent. The General Counsel's proposed order and notice to be entered in this case was received as General Counsel's Exhibit No. 1. Briefs were filed by the General Counsel and Respondent on August 15. Based upon the record made in this case and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact

1. The charge herein was filed by the Charging Party on March 26, 1985, and a copy thereof was served upon the Respondent by certified mail on March 27, 1985 (Joint Exhibit 1 to Stipulation).

2. On May 29, 1985, the General Counsel by the Regional Director for Region II, acting pursuant to Section 7104(f)(2) of the Statute, and 5 CFR 2423.9(a)(4), issued a Complaint and Notice of Hearing (Joint Exhibit 2 to Stipulation). On June 19, 1985, the Respondent served an Answer to the Complaint on the Regional Director (Joint Exhibit 3 to Stipulation).

3. At all times material herein, the Charging Party has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

4(a). At all times material herein, the Department of Health and Human Services, Social Security Administration (SSA) has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute.

---

[1] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
> >
> > (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . .

(b). At all times material herein, SSA, Field Operations, New York Region has been, and is now, a constituent entity within the Department of Health and Human Services, SSA, and an agent acting on its behalf.

5(a). At all times material herein, the following named persons occupied the positions set forth below, opposite their names:

Peter DiSturco - Regional Commissioner, SSA, New York Region;
Alex W. Bussey - Assistant Regional Commissioner for Field Operations, SSA, New York Region;
Michael DiSalvo - Manager, Babylon, New York Branch Office, SSA;
Melvin Steuerman - Labor Relations Specialist, SSA, New York Region.

(b). At all times material herein, the individuals named above in paragraph 5(a), have been, and are now, supervisors or management officials as defined in Section 7103(a)(10) and (11), respectively, of the Statute, and have been, and are now, agents of the Respondent acting on its behalf.

6(a). At all times material herein, the Charging Party has been, and is now, the certified exclusive representative of a unit of certain employees of Respondent, including all employees employed in the District and Branch Offices of the SSA in the States of New York and New Jersey, excluding all management personnel, professional federal employees, employees engaged in personnel work in other than a purely clerical capacity, guards and supervisors.

(b). At all times material herein, the Charging Party has delegated to the National Council of SSA Field Operations Locals (Council) authority to act as its representative for the purposes of collective bargaining for certain of Respondent's employees, including employees in the New York Region, and the Council's delegation has been recognized by Respondent.

(c). At all times material herein, the American Federation of Government Employees, Local 3369, AFL-CIO (AFGE Local 3369) has acted as agent for the Council for the purposes of collective bargaining for certain of Respondent's employees, including employees at the Babylon, New York Branch Office. AFGE Local 3369's delegation has been recognized by Respondent.

7. SSA, Field Operations, New York Region consists of all Branch and District Offices of the Respondent in the States of New York and New Jersey including the branch office located at Babylon, New York on Long Island.

8. On February 7, 1985, Charging Party, by its agent Stanley Chodos, Grievance Vice President for AFGE Local 3369, learned of a rumor that the Babylon, New York Branch Office would be moved.

9. By letter dated February 8, 1985, the Charging Party, by its agent Stanley Chodos, questioned the Respondent concerning the rumor of the office relocation (Joint Exhibit 4 to Stipulation).

10. On February 21, 1985 the Respondent, by its agent Melvin Steuerman, Labor Relations Specialist, notified Stanley Chodos by telephone that the Babylon Branch Office would move on March 1, 1985. Mr. Steuerman informed Mr. Chodos that consultations should take place before negotiations were requested.

11. By letter dated February 21, 1985, the Respondent, by its agent Alex Bussey, confirmed that the relocation of the Babylon Branch Office was tentatively scheduled to begin on March 1, 1985 and that the office would be open to the public at its new location on March 4, 1985. The letter further provided that the move might be delayed. See Joint Exhibit 5 to Stipulation.

12. The February 21, 1985 oral notification referred to above in paragraph 10 was the first notification the Charging Party received from Respondent regarding the relocation of the Babylon Branch Office. The Babylon Branch Office had no local on-site representative of the Charging Party.

13. On February 22, 1985 Stanley Chodos contacted Michael DiSalvo, the Branch Manager in charge of the Babylon Branch Office, and scheduled an appointment for February 28, 1985 for consultation over the office relocation.

14. Pursuant to Article 30, Appendix F, Section I, of the parties' collective bargaining agreement, generally, depending on the level affected by the change, the parties consult prior to formal negotiations being requested (Joint Exhibit 6 to Stipulation). The majority of management proposed changes result in no negotiations taking place.

15. On February 28, 1985 Stanley Chodos and Michael DiSalvo, the Babylon Branch Manager, met to consult over the Babylon office relocation. Mr. Chodos and Mr. DiSalvo viewed both the old and new office facilities during the consultation. Mr. Chodos informed Mr. DiSalvo that he would subsequently request bargaining in writing.

16. By letter dated March 12, 1985, Mr. Chodos requested negotiations over the relocation of the Babylon Branch Office and pursuant to Section 7114 of the Statute requested copies of old and new leases and any information on the exterminator service (Joint Exhibit 7 to Stipulation). That letter stated that ground rule proposals were enclosed but none were contained with the letter. The ground rule proposals were inadvertently omitted and by a second letter dated March 12, 1985 the Charging Party acknowledged that error and provided its ground rule proposals (Joint Exhibit 8 to Stipulation).

17. By letter dated March 12, 1985, Mr. Chodos wrote to Mr. DiSalvo and provided minutes of their February 28, 1985 consultation (Joint Exhibit 9 to Stipulation). The minutes named six issues as being unresolved by the labor-management consultation.

18. By letter dated March 19, 1985, Mr. DiSalvo informed Mr. Chodos of his position that there were certain errors contained in Mr. Chodos's consultation minutes (Joint Exhibit 10 to Stipulation).

19. The Babylon Branch Office moved on March 1, 1985 and the office was open for business at the new location on March 4, 1985. Even though the office has moved to its new location in Lindenhurst it is still referred to as the Babylon Office.

20. The parties have stipulated that, at all times material herein, including March 21, 1985, the Respondent was under an obligation to bargain pursuant to the Statute regarding the impact and implementation of the move of the Babylon branch office inasmuch as the move created actual and reasonably foreseeable adverse impact of more than a de minimis nature on bargaining unit employee working conditions.

21. On March 21, 1985, Mr. Chodos spoke with Mr. Steuerman by telephone. Mr. Chodos informed Mr. Steuerman that Mr. Chodos and Sharon Schwartz would be the Union's negotiators and that they would prepare substantive proposals on the move on March 25, 1985 and that those proposals would be provided when the parties met to negotiate ground rules. Mr. Steuerman informed Mr. Chodos that Respondent would not negotiate ground rules until the Union provided substantive proposals pursuant to the Respondent's position that Article 4, Section 1 of the parties' collective bargaining agreement requires the Union to submit its impact and implementation proposals, not just ground rule proposals, within a reasonable period after the notice of the proposed change. Mr. Steuerman also informed Mr. Chodos that the information requested on March 12, 1985, was in the process of being obtained.

22. By letter dated April 1, 1985 Mr. Bussey informed Mr. Chodos that the Respondent would not take any action on the Charging Party's ground rule proposals until the Union submitted its impact and implementation proposals (Joint Exhibit 11 to Stipulation). The Respondent's action was based on its position that Article 4, Section 1 of the parties' collective bargaining agreement requires the Union to submit its impact and implementation proposals, not just ground rule proposals, within a reasonable period after the notice of the proposed change. In this letter Respondent also provided the information requested by Mr. Chodos, to the extent that it existed.

23. The Respondent and AFGE Local 3369 have engaged in very few negotiations. The majority of management proposed changes never result in negotiations. Findings 25 through 32 detail the only instances of negotiations between the Respondent and AFGE Local 3369 during the term of the current agreement.

24. In May of 1982 AFGE Local 3369 requested negotiations over the opening of the Glendale (Ridgewood) Branch office and the reorganization of the Bushwick District Office. Negotiations took place in June through July of 1982 with agreements being reached on July 25 and 30, 1982, respectively (Joint Exhibit 12 to Stipulation). The parties negotiated a single set of ground rules - prior to the submission of substantive proposals - reaching agreement on July 21, 1982 (Joint Exhibit 13 of Stipulation). The Respondent was of the position that these ground rules negotiations were under the old agreement, since the bargaining request was made under that agreement. The effective date of the current agreement is June 11, 1982.

25. In March 1984, AFGE Local 3369 requested negotiations over the Boro Hall District Office relocation. In those negotiations proposed ground rules were submitted on or about April 30, 1984 by AFGE Local 3369 without any substantive proposals being included (Joint Exhibit 14 to Stipulation). By letter dated May 10, 1984 the Respondent insisted, pursuant to its interpretation of the contract, that substantive proposals be submitted (Joint Exhibit 15 to Stipulation). Substantive proposals were submitted on or about May 23, 1984 (Joint Exhibit 16 to Stipulation). Negotiations ultimately did take place over ground rules which went to impasse in June of 1984 which ultimately resulted in an agreement on ground rules in December 1984. Negotiations over the adverse impact of the relocation are still pending.

26. In October of 1983 AFGE Local 3369 requested negotiations over the relocation of the South Bronx District Office. Ground rule proposals alone were submitted with the bargaining request (Joint Exhibit 17 to Stipulation). By letter dated November 1, 1983 the Respondent insisted, pursuant to its interpretation of the contract, that substantive proposals be submitted (Joint Exhibit 18 to Stipulation). By letter dated November 7, 1983 AFGE Local 3369 informed Respondent that it did not agree with the position that negotiations required the submission of substantive proposals prior to the negotiation of ground rules but that to expedite negotiations, due to the impending move, substantive proposals would be, and were, provided (Joint Exhibit 19 to Stipulation). The parties went to impasse on both ground rules and substantive issues in May of 1984. Ground rules were finalized in May 1985; the negotiations on the substantive proposals are still pending.

27. In January 1984 AFGE Local 3369 requested negotiations on the Respondent's Employee Counseling Service (Joint Exhibit 20 to Stipulation). Ground rule proposals alone were submitted on March 8, 1984 (Joint Exhibit 21 to Stipulation). By letter dated March 27, 1984 Respondent responded to the letter of March 8, 1984 (Joint Exhibit 22 to Stipulation). AFGE Local 3369 submitted its substantive proposals on May 3, 1984 (Joint Exhibit 23 to Stipulation). No negotiations actually took place on the employee counseling service as an unfair labor practice charge was filed over the matter and no obligation to negotiate was found.

28. In July of 1984 AFGE Local 3369 requested negotiations over the elimination of telephones for certain work locations at the South Bronx District Office (Joint Exhibit 24 to Stipulation). AFGE Local 3369 submitted both its ground rules and substantive proposals simultaneously (Joint Exhibit 25 to Stipulation). No negotiations ever took place as an unfair labor practice charge was filed over the matter and no obligation to negotiate was found.

29. On August 20, 1984 AFGE Local 3369 requested negotiations over the move of the Riverdale Contact Station. Both ground rule and substantive proposals were submitted together (Joint Exhibit 26 to Stipulation). These negotiations are pending with the assistance of mediation. The ground rules were negotiated before the parties proceeded to the substantive proposals.

30. The Jackson Heights Branch Office Smoking Policy was negotiated in February and March of 1984. Both ground rule and substantive proposals were submitted by AFGE at the same time. Ground rules were negotiated first; the substantive agreement was then negotiated in March of 1984.

31. The parties are currently involved in negotiations over the use of a medical release form. Bargaining was requested by letter dated December 31, 1984 (Joint Exhibit 27 to Stipulation). Ground rule proposals were submitted on February 5, 1985 (Joint Exhibit 28 to Stipulation). By letter dated February 19, 1985 the Respondent notified AFGE Local 3369 that it would not act on the ground rule proposals until substantive proposals were submitted (Joint Exhibit 29 to Stipulation). On April 8, 1985 AFGE Local 3369 submitted its substantive proposals under protest (Joint Exhibit 30 to Stipulation). By letter dated April 11, 1985 AFGE Local 3369 informed Respondent that it disagreed with Respondent's interpretation of Article 4 Section 1 (Joint Exhibit 31 to Stipulation). The Respondent's conduct in regard to the medical release form ground rule negotiations is the subject of a separate pending unfair labor practice charge.

32. Neither the Charging Party nor AFGE Local 3369 has ever agreed with Respondent's interpretation of Article 4, Section 1 of the parties' collective bargaining agreement to the extent it would require submission of substantive proposals rather than just ground rules prior to bargaining.

Discussion and Conclusions

The General Counsel has not established, by the preponderance of the evidence,[2] that Respondent has engaged in the alleged unfair labor practices, to wit, refusal to bargain over ground rules for negotiations concerning the impact and implementation of the relocation of a branch office.

---

[2] This is the statutory burden of proof. See 5 U.S.C. §§ 7118 (7) and (8).

It is undisputed that ground-rule negotiations are an integral part of the collective bargaining process, both during formal contract negotiations, and negotiations conducted as a result of a change in conditions of employment made during the term of a collective bargaining agreement. See Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA 944, 945 (1985). But this is not a case where an agency has refused to negotiate ground rules. Here, the agency is merely insisting that a ground rule negotiated in the parties' National Agreement be followed, to wit:

> Article IV Negotiations During the Term of the Agreement
>
> Section 1 - General
>
> The Administration will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 USC 71. Upon notice from the Administration of a proposed change, the designated union representative will notify the designated management representative of its desire to consult and/or negotiate on the change.
>
> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.

See page 7 of Joint Exhibit 6 to the Stipulation, emphasis added.

Here, the Respondent gave notice of the proposed change to the Union on February 21, 1985. On February 28 the parties met to consult on the change, in accordance with the contract, prior to formal negotiations being requested. On March 12, the Union requested formal negotiations and submitted proposals for ground rules. On March 21, and again on April 1, management informed the Union that Respondent would not negotiate ground rules until the Union provided substantive proposals pursuant to its interpretation of Article 4 of the contract. The Union does not agree that Article 4 requires the submission of substantive proposals rather than just ground rules prior to bargaining, and has not furnished them.

Of course, to the extent that the Union believes the interpretation given to Article 4 by the Respondent is in error, it can resort to the negotiated grievance and arbitration procedures provided for in Articles 24 and 25 of the contract. See pages 44-53 of Joint Exhibit 6 to the Stipulation and compare Social Security Administration, 15 FLRA 614, 622 (1984).

But, arguably, the Respondent has placed the correct interpretation upon Article 4, which does not distinguish between ground rules and substantive proposals — it just says that "proposals" shall be submitted within a reasonable time after notice of a proposed change is given. That this Article is in the nature of a ground rule was established by the Authority in Environmental Protection Agency, 16 FLRA 602, 613 (1984).

Although, as all agree, the Statute requires the parties to negotiate ground rules before proceeding to the negotiation of substantive proposals, the Statute also obligates the parties to "avoid unnecessary delay." See Section 7114(b)(3) of the Statute. Respondent's interpretation of Article 4 of the parties' National Agreement is consonant with this obligation, in that negotiation of the substantive proposals could follow immediately upon the negotiation of the ground rules, in the event that the agreed-upon ground rules so allowed.

Thus, on this record, I am unable to conclude that Respondent committed an unfair labor practice by refusing to proceed to ground-rule negotiations until the Union complied with a reasonable interpretation of a ground rule which the parties had negotiated in their National Agreement.3/

Ultimate Findings and Recommended Order

The General Counsel has not established, by the preponderance of the evidence, that the Respondent has engaged in the unfair labor practices alleged in the complaint.

Accordingly, it is hereby ORDERED that the complaint be, and hereby is, dismissed.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: November 14, 1985
Washington, DC

3/ Judge Samuel A. Chaitovitz has reached a similar conclusion as to Article 4 of the parties' National Agreement in Department of Health and Human Services, Social Security Administration, and Social Security Administration, Office of Field Operations, New York Region, Case Nos. 2-CA-40051 and 2-CA-40102 (OALJ 85-114, July 26, 1985), wherein it was alleged that Respondent had violated a settlement agreement by refusing to bargain with the Union over ground rules until the Union submitted both ground rules and substantive proposals. His decision is pending before the Authority on exceptions.

9/ Case No. 394

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 394 REPORT OF CASE DECISIONS September 26, 1986

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REPRESENTATION CASE

23 FLRA No. 67 (September 26, 1986)

United States Department of Labor and National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and Labor Management Services Administration, United States Department of Labor and National Union of Compliance Officers, Independent and United States Department of Labor and American Federation of Government Employees, Local 12, AFL- CIO, Case Nos. 3-CU-40017, 3-CU-40018 and 3-CU-40019

UNFAIR LABOR PRACTICE CASE

23 FLRA No. 63 (September 25, 1986)

U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region , Kansas City, Missouri, Case Nos. 3-CA-30726-1, 37-CA-30523 and 37-CA-30537(1)

Y3.F31/21-3:

NEGOTIABILITY CASE

23 FLRA No. 66 (September 26, 1986)

American Federation of Government Employees, AFL-CIO, Council 157 and Department of the Treasury U.S. Mint, Case No. O-NG-1319

ARBITRATION CASES

23 FLRA No. 64 (September 26, 1986)

Defense Mapping Agency Hydrographic/Topographic Center and American Federation of Government Employees, Local 3407 (Harkless, Arbitrator), Case No. O-AR-1196

23 FLRA No. 65 (September 26, 1986)

Department of the Army Fort Carson, Colorado and American Federation of Government Employees, Local 1345 (Rappaport, Arbitrator), Case No. O-AR-1220

*Case No. 948 (Order Denying Request for Reconsideration of 22 No 67) (September 24, 1986)

Panama Canal Commission and International Organization of Masters, Mates and Pilots, Marine Division ILA, AFL-CIO

*Case No. O-AR-1117 (Order Denying Request for Reconsideration of 23 FLRA No. 33)

Wyoming Air National Guard (WANG) and National Association of Government ELmployees (NAGE), Local No. 14 - 76

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

September 24, 1986

O-AR-1162 O-AR-1174 O-AR-1188 O-AR-1191
O-AR-1192 O-AR-1198 O-AR-1202 O-AR-1203

September 25, 1986

O-AR-1197

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

23 FLRA No. 63

HUD and HUD, Kansas City Region, Kansas City, Mo. and AFGE, National Council of HUD Locals, Council #222, Case Nos. 3-CA-30726-1, 37-CA-30523 and 37-CA-30537(1) (Decided September 25, 1986)

SUBJECT MATTER INDEX ENTRIES

- Federal Service Impasses Panel
  - Maintenance of Status Quo
    - Pending Final Panel Action
      - To the Extent Consistent With Necessary Functioning of Agency
        - Cost Is Legitimate Factor - Efficient Functioning of Agency
          - Cost Alone May Not Justify Failure to Maintain Status Quo
- Unfair Labor Practice
  - Agency Violations
    - Refusal to Cooperate In Impasse Proceedings
      - Failure to Maintain Status Quo
      - Issuance of Notices of Transfer of Function and of RIF
  - Remedy
    - Do Not Repeat Unlawful Action
      - Activity Has Complied With FSIP's Final Order

STATUTE

7116(a)(1) and (6)
7118

DIGEST NOTES

The Authority held, in agreement with the Judge, that the activity violated § 7116(a)(1) and (6) when it failed to cooperate in impasse procedures by issuing notices of transfer of function and notices of RIF, thus, failing to maintain the status quo to the maximum extent possible while an impasse concerning the issuance of those very notices was pending before the Federal Service Impasses Panel (Panel). The Authority has determined that once parties have reached an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must be maintained to the maximum extent possible, that is, to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. While the foregoing policy would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the agency, the agency taking the action would be required to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency if its actions were subsequently

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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contested in an unfair labor practice proceeding. The Authority and the Judge rejected the agency's argument the costs associated with the maintenance of the status quo justified its action of issuing the notices. While costs are a legitimate factor in deciding what is necessary for the efficient functioning of an agency, cost alone cannot justify such action. The record showed that the daily costs cited by the agency would have continued until Congressional approval was received, and therefore, could not be attributable solely to the maintenance of the status quo while awaiting Panel action. Further, the costs of rerunning the transfers of function and RIF actions could have been avoided by compliance with the activity's statutory obligation in the first instance.

23 FLRA No. 64

Federal Labor Relations Authority

Defense Mapping Agency, Hydrographic/Topographic Center and AFGE, Local 3407 (Harkless, Arbitrator), Case No. 0-AR-1196 (Decided September 26, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Timeliness

STATUTE

7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions as untimely filed because they failed to comply with SS 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 65

Federal Labor Relations Authority

Dep't of the Army, Fort Carson, Colo. and AFGE, Local 1345 (Rappaport, Arbitrator), Case No. 0-AR-1220 (Decided September 26, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Procedure
    Standing
      Grievant Not "Party"

STATUTE

7103(a)(1)

DIGEST NOTES

This case is before the Authority on exceptions to the arbitrator's award, filed by the grievant. It is clear that the activity and the union participated as "parties" in the proceeding. However, it appears that the grievant did not participate as a "party" in the proceeding before the arbitrator. Consequently, the Authority held that the grievant was without standing under the Authority's Rules and Regulations to file exceptions to the arbitrator's award under 2425.1(a) of the Authority's rules of procedure. The exceptions therefore, were dismissed.

22 FLRA No. 82

Dept. of the Army, Fort Carson, Colo. and AFGE, Local 1345 (Jacquemart, Arbitrator), Case No. 0-AR-1130 (decided September 26, 1986).

Federal
Labor Relations
Authority

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration Procedure Standing Grievant not "party"	7103(a)(1)

SUMMARY OPINION

This case is before the Authority on exceptions to the Arbitrator's award, filed by the grievant. It is clear that the Activity and the Union participated as "parties" in the proceeding. However, it appears that the grievant was not participating as a "party" in the proceeding before the Arbitrator. Consequently, the Authority held that the grievant was without standing under the Authority's Rules and Regulations to file exceptions to the Arbitrator's award under 2425.1(a) of the Authority's Rules of Procedure. The exceptions therefore, were dismissed.

23 FLRA No. 66

Federal Labor Relations Authority

AFGE, Council 157 and Dep't of the Treasury, U.S. Mint, Case No. 0-NG-1319 (Decided September 26, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability Procedure Timeliness	7117(c)(2)

DIGEST NOTES

Under § 7117(c)(2) of the Statute and § 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the union of the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under § 2429.23(d) of the Authority's rules of procedures, the time limit established in § 7117(c)(2) may not be extended or waived by the Authority. The union's petition for review was dismissed as untimely filed because it failed to comply with the provisions of the Statute and the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

23 FLRA No. 67

Dep't of Labor and Nat'l Council of Field Labor Locals, AFGE, Case No. 3-CU-40017; Labor Management Services Administration, DOL and Nat'l Union of Compliance Officers, Case No. 3-CU-40018; Dep't of Labor and AFGE, Local 12, Case No. 3-CU-40019 (Decided September 26, 1986)

SUBJECT MATTER INDEX ENTRIES

Representation
  Clarification of Unit
    Employees Severed from Unit
      No Community of Interest
  Special Situations
    Accretion
    Reorganization
Executive Order 11491, section 3(d)
29 U.S.C. § 186(c) [Labor-Management Relations Act]

STATUTE

7112(b)(4)
7112(c)
7120
7135(a)

DIGEST NOTES

The three Clarification of Unit petitions arise out of the Department of Labor's reorganization in which the Labor Management Services Administration (LMSA) was abolished and concern the effects of the reorganization on the bargaining unit of LMSA employees represented by NUCO. The Authority found, contrary to the Regional Director, that the Office of Pension and Welfare Benefit Programs (OPWBP) employees were severed from and no longer share a community of interest with other employees in the NUCO unit and should be excluded therefrom. The Authority further found, that pursuant to § 7135(a)(1), the previous unit represented by NUCO which now includes only Office of Labor-Management Standards (OLMS) employees continues to exist.

Office of Pension and Welfare Benefit Programs employees were severed from and no longer share a community of interest with other employees in the NUCO unit because as a result of a reorganization OPWBP employees are now part of new separate activity; are under separate supervision and authority; and have little or no contact, interchange or transfer with other employees in the unit. The Authority found that the OPWBP employees constituted a functionally distinct group of employees who no longer share a community of interest with the employees of the existing unit. The Authority ordered that the certification be clarified to exclude the subject employees.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The Authority found that the OPWBP investigators administer statutes relating to labor-management relations within the meaning of § 7112(c) and therefore could not be represented by unions representing other employees within DOL. The investigators investigated allegations of fiduciary breaches to title I of ERISA, and a considerable portion of their work involved review of joint labor-management administered plans established under 29 U.S.C. § 186(c).

The exclusion of OPWBP employees as a result of reorganization did not substantially change the scope and character of the unit historically represented by NUCO, which consists of all OLMS employees, therefore NUCO remained the exclusive representative of the unit after the reorganization. The remaining employees were transfered intact into the OLMS which was established to handle the function previously handled by these employees prior to the reorganization. The Authority has required, consistent with § 7135(a), that an activity continue to recognize units that were appropriate under Executive Order 11491, where it found that a reorganization did not substantially change the character and scope of the existing units.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, KANSAS CITY REGION, KANSAS CITY, MISSOURI

Respondents

and

Case Nos. 3-CA-30726-1
37-CA-30523
37-CA-30537(1)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF HUD LOCALS, COUNCIL #222

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority on exceptions filed by the Respondents to the attached Decision of the Administrative Law Judge. The Charging Party (the Union) filed cross-exceptions and an opposition to the Respondents' exceptions. The issue is whether the Respondents, by issuing notices of transfer of function and of reduction-in-force (RIF) actions to unit employees while the Federal Service Impasses Panel (the Panel) had before it the parties' impasse regarding ground rules matters, violated section 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background and the Judge's Conclusion

Following an announcement by the Respondents in early 1983 of a proposed major field reorganization, the Union requested to negotiate concerning the impact and implementation of the reorganization. The parties met, but reached an impasse on certain ground rules. The services of the Panel were invoked, and the Panel asserted jurisdiction. The Judge found, and it is not disputed, that the Respondents issued notices of transfer of function and of RIF actions to unit employees while the Panel had before it the parties' impasse. The Panel, among other things, ordered the Respondents to extend the effective dates of certain RIF notices.

The Judge found that the Respondents violated the Statute as alleged. In so finding, he rejected the Respondents' argument that the costs of maintaining employees in their then current job functions justified the position that their action in issuing the notices was consistent with the necessary functioning of the agency.

III. Positions of the Parties

The Respondents argue first that the Panel was without jurisdiction to resolve a dispute over negotiation ground rules, and that the Judge therefore should not have found a violation in the Respondents' alleged failure to cooperate in the Panel's procedures. They point to the fact that the Judge did not find them to have bargained in bad faith, and to the fact that they complied with the Panel's final order.

As to the Judge's remaining findings, the Respondents take issue with his rejection of their argument as to cost justification. The Respondents argued before the Judge that maintenance of the status quo would cost approximately $30,000 a day, plus approximately $300,000 "to rerun the RIF." The Respondents also assert that the daily costs could have continued for a very long time because "[i]f the agency refused to comply" with a Panel decision, the process of resolving the noncompliance "would normally take several years[.]" Respondents Brief in Support of Exceptions at 3.

The Union argues generally in support of the Judge's findings and conclusions, pointing particularly to the fact that lack of good faith bargaining was not alleged and arguing that costs alone do not relieve the Respondents of their statutory duty to bargain.

IV. Analysis

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA No. 61 (1985), issued subsequent to the Judge's decision in this case, the Authority determined that once parties have reached an impasse in their negotiations and one party timely invokes the services of the Federal Service Impasses Panel (the Panel), the status quo must be maintained to the maximum extent possible, that is, to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. The Authority further found that, while the foregoing policy would not preclude agency management from taking action which alters the status quo to the extent that such action is consistent with the necessary functioning of the agency, an agency taking such action would be required to provide affirmative support for the assertion that the action taken was consistent with the necessary functioning of the agency if its actions were subsequently contested in an unfair labor practice proceeding.

We agree with the Respondents that costs are a legitimate factor in deciding what is necessary for the efficient functioning of an agency. We find that in the circumstances of this case, however, the Judge was correct in rejecting the Respondents' specific argument that costs alone justified their actions. While the amount of the daily costs is not disputed, the length of time the costs would have continued, conditioned on an assumption of noncompliance with an unfavorable Panel order, is purely speculative. The daily costs of retaining the employees subject to the RIF were to continue at least until the RIF notices became effective. The record contains evidence that daily costs would have continued until Congressional approval was received, and therefore those daily costs may not be attributable solely to the maintenance of the status quo while awaiting Panel action. In this case, the matter was resolved by the Panel's designee prior to the original effective dates of the transfers of function and the RIFs. The Respondents, in complying with the Panel's final order, extended the effective dates of the RIF notices, thus actually continuing the daily personnel costs and also incurring the costs of issuing new notices of some transfers of function. The costs of rerunning the transfers of function and RIF actions could have been totally avoided by compliance with the Respondents' statutory obligation in the first instance. We also note that, prior to impasse, the Respondents had offered to postpone the transfers and RIFs and that among the impasse items originally submitted to the Panel were (1) the completion of bargaining prior to implementation of any part of the reorganization, and (2) the content and scope of the notices, particularly the RIF notices, that were to be sent to unit employees.

Thus, in agreement with the Judge, we find that the Respondents failed to maintain the status quo to the maximum extent possible, while an impasse concerning the issuance of those very notices was pending before the Panel. Accordingly, we agree with the Judge's conclusion that the Respondents thereby unlawfully failed to cooperate in impasse procedures by issuing the notices while the dispute was pending.[1] We shall therefore order, as did the Judge, that the Respondents not repeat such unlawful action in the future. In view of the fact that the Respondents have complied with the Panel's final order, and in the absence of exceptions to the Judge's order, we find it unnecessary to require that the Respondents take further action to rerun RIFs or issue further new notices, or otherwise return to the status quo that existed prior to the unlawful action taken.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed,[2] and thus affirms those rulings. The Authority has considered the Judge's Decision, the exceptions, the opposition and cross-exceptions, and the entire record, and adopts the Judge's findings, conclusions and recommended Order. We therefore conclude that the Respondents, by failing to cooperate in impasse procedures by issuing notices of transfer of function and notices of RIF while the dispute was pending before the Panel, violated section 7116(a)(1) and (6) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the U.S. Department of Housing and Urban Development and the U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri shall:

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[1] In so concluding, it is noted that the Authority has previously found that ground rules negotiations are a part of the negotiation process leading to an agreement. Department of Defense Dependents Schools, 14 FLRA 191 (1984).

[2] The Judge denied the Union the right to cross-examine one of the Respondents' witnesses, solely on the ground that the General Counsel had declined to cross-examine. The Union excepted to this ruling. While we find that the Judge was in error in so ruling, in view of the disposition of these cases, the Authority concludes that such ruling has resulted in no prejudice to the Charging Party.

1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse proceedings by issuing notices of transfer of function and/or notices of reduction-in-force actions while an impasse concerning the impact and implementation of that reorganization is pending before the Federal Service Impasses Panel.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at their facilities wherever bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary, Department of Housing and Urban Development, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 25, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 63)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to cooperate in impasse proceedings by issuing notices of transfer of function and/or notices of reduction-in-force actions while an impasse concerning the impact and implementation of that reorganization is pending before the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ______________ By: ___________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, NW., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

OALJ-84-112

(23 FLRA No. 63)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

U.S. DEPARTMENT OF HOUSING AND :
URBAN DEVELOPMENT :
:
Respondent :
:
and : Case No.: 3-CA-30726-1
: 37-CA-30523
NATIONAL COUNCIL OF HUD LOCALS #222, : 37-CA-30537(1)
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO :
:
Charging Party :
:
. . . .

John Kosloske, Esquire
For the Respondent

Joe Goldberg, Esquire
For the Charging Party

Patricia Eanet Dratch, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.*,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, concerns whether Respondent's issuance of notices of transfer of function and specific notices of RIF after the National Council of HUD Locals #222, American Federation of Government

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(6) will be referred to, simply, as "§ 16(a)(6)".

Employees, AFL-CIO (hereinafter referred to as the "Union") had filed a request for the assistance of the Federal Service Impasses Panel (hereinafter referred to as "FSIP"), violated §§ 16(a)(6) and (1) of the Statute. This case was initiated by a charge filed on August 2, 1983, in Case No. 7-CA-30523 which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute (G.C. Exh. 1(a); a first amended charge in Case No. 7-CA-30523 filed on November 21, 1983, which alleged violations only of §§ 16(a)(1) and (6); a charge filed on August 15, 1983, in Case No. 7-CA-30537(1) (G.C. Exh. 1(c)) and a first amended charge in Case No. 7-CA-30537(1) filed on November 21, 1983 (G.C. Exh. 1(g)), each charge in Case No. 7-CA-30537 (1) alleging violation of §§ 16(a)(1) and (6) of the Statute; Order Consolidating Case Nos. 7-CA-30523 and 7-CA-30537(1), Consolidated Complaint and Notice of Hearing, for a hearing at a date and location to be determined, in Case Nos. 7-CA-30523 and 7-CA-30537(1) issued on November 30, 1983 (G.C. Exh. 1(1); by a Charge filed in Case No. 3-CA-3072-1 on August 31, 1983, alleging violation of §§ 16(a)(1) and (6) of the Statute; a Complaint and Notice of Hearing in Case No. 3-CA-30726-1 issued on November 28, 1983, for a hearing on February 1, 1984 (G.C. Exh. 1(j); by Order dated November 30, 1983 (G.C. Exh. 1(m)) Case Nos. 7-CA-30523 and 7-CA-30537(1) were transferred to Region III; by Order dated December 16, 1983, Case Nos. 7-CA-30523, redesignated as Case No. 37-CA-30523, and 7-CA-30537(1), redesignated as Case No. 37-CA-30537(1), were Consolidated with Case No. 3-CA-30726-1 for hearing on February 1, 1984, pursuant to which a hearing was duly held on February 1, 1984, in Washington, D.C. before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, March 2, 1984, was fixed as the date for filing post-hearing briefs, which time was subsequently extended, upon timely motion of Respondent, to which the other parties did not object, for good cause shown, to April 2, 1984. Respondent, the Union and the General Counsel each timely filed an excellent brief on April 2, 1984, which have been carefully considered. Upon the basis of the entire record,[2] I make the following findings and conclusions:

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[2] Respondent filed a Motion to Correct Transcript, to which no opposition was filed, and said motion is granted expect as noted hereinafter: a) the requested change on p. 18, 1.8 to change "evidence" to "evident" is denied; b) p. 18, 1. 17 to change "controls" to controlled" is denied and on my own motion the word "controls" is deleted; c) p. 138, 1. 25, to correct spelling is denied as the name does not appear at 1. 25; and on my own motion the same name at p. 139, 1. 25 is corrected from "DeDyn" to De Deyn"; p. 20, 1. 3 the second correction, "insert 'the" after "one" is denied, and on my own motion the word "one" is deleted and the word "the" is inserted. The transcript is hereby corrected as fully set forth in the Appendix hereto.

Findings

1. At all times material, the Union was the designated agent of the American Federation of Government Employees, AFL-CIO, the exclusive representative of two consolidated units consisting of approximately 9,000 of Respondent's nonprofessional and professional employees. At all times material, Respondent and the Union have been parties to a collective bargaining agreement (Jt. Exh. 1), which expired on November 10, 1982, but which the parties agree continued to govern (Tr. 7-8).

2. On February 22, 1983, Respondent announced a proposed major field reorganization (46 F.R. 7562 (1983), Res. Exh. 5) pursuant to which Respondent's field organization would be restructured and the field staff reduced.

3. The Union requested negotiations concerning the impact and implementation of the proposed reorganization and reduction-in-force and on, or about, June 17, 1983, the parties reached agreement on ground rules to be used to negotiate the impact and implementation (Tr. 37, 105) and the ground rules agreement was executed on June 27, 1983, (Res. Exh. 1, Tr. 37, 105). The following day, June 28, 1983, the parties began negotiations.

4. Prior to agreeing to ground rules, the Union's chief negotiator, Ms. Jane E. Newberry, had, inter alia, on June 17, demanded that Respondent pay travel and per diem expenses for the Union negotiators. Mr. Melvin S. Weinstein, Respondent's chief negotiator had responded, in essence, that the expired contract provided that payment of per diem and travel expenses was discretionary with management and that Respondent would not agree to payment of the Union negotiators' travel and per diem expenses (Tr. 44). Ms. Newberry first stated that she had been instructed to go to impasse on that issue; however, Ms. Newberry subsequently called Mr. Weinstein and informed him that payment by management of travel and per diem for Union negotiators was "not an issue"; that the Union agreed to the ground rules; and that she would see him on June 28 (Tr. 108).

5. Negotiations on the impact and implementation of the field reorganization and RIF began at 9:00 a.m. on June 28, 1983 (Tr. 37, 108-109). Mr. John Lynn, a member of Respondent's negotiating team, gave a briefing on the reorganization in which he highlighted information set forth in the February 22, 1983, Federal Register notice (Res. Exh. 5) and pointed out changes that had been made (Tr. 38). At the conclusion of the briefing, the parties caucused, at the Union's request, until about 1:00 p.m. During the caucus, the Union delivered a letter to Mr. Weinstein in which it requested the following information.

> "1. Current staffing plans/new approved staffing plans.
>
> "2. Current out-stationed positions and proposed out-stationed positions.

"3. All proposed transfers of function.

"4. FPM Chapter 351, as amended.

"5. Cost-benefit analysis of the field reorganization as required under the Dole Amendment." (Res. Exh. 3).

6. Negotiations resumed after lunch (Tr. 60) and the Union's request for information was discussed. Mr. Weinstein stated that Respondent had, in fact, already furnished the Union with current staffing data, proposed staffing plans (see, for example, Res. Exh. 2, Tr. 58), proposed out-stationed positions, FPM Chapter 351, and the cost benefit analysis required by the Dole Amendment (Tr. 113-115); however, he stated that Respondent could not provide the final, approved staffing plans because they were not yet available. Mr. Weinstein stated, however, that the proposed staffing plans should be 90-95 % of what the final approved plans will reflect and that the only changes expected were in supervisory positions (Tr. 113). Mr. Weinstein suggested that, since one of the major things the Union was looking for was final approved staffing plans, the negotiations be recessed until the final approved staffing plans were available. The Union responded with "AFGE proposal #1" (G.C. Exh. 2) which provided, in part, as follows:

> "1. . . . negotiations . . . be deferred until such time as the Employer furnishes the . . . information as outlined in UNION'S letter of 6/28/83. . . .
>
> "2. Additionally, the negotiations shall be delayed for two weeks. . . .
>
> "3. Employer agrees to pay travel, per diem and related expenses. . . .
>
> "4. Employer agreed that implementation of any part of this reorganization will not take place without first fulfilling its obligation to bargain including the furnishing of requested information." (G.C. Exh. 2).

Thereafter, Respondent submitted a handwritten counter proposal, the first paragraph of which read: "Negotiations on the proposed field reorganization will be deferred until the employer furnish the following:", and, at Respondent's request, the Union specified the items of information that it desired which Mr. Weinstein entered in the counter proposal as 1a. - e. (Tr. 117-118). The handwritten counter proposal was then typed and given to the Union (Tr. 118). "Management's Counter Proposal - 6/28/83" (G.C. Exh. 3), provided as follows:

"1. Negotiations on the proposed Field reorganization will be deferred until the Employer furnish the following:

a. Current staffing plans to include PFT's and Staff years by account by Region by Office;

b. New approved staffing plans;

c. Proposed out-stationed positions by Region by Office;

d. All proposed functional transfers designated by physical or administrative moves; and

e. Copies of response(s) to Congress reflecting management's compliance with DOLE.

2. Negotiations shall be delayed 48 hours after the final documents are sent to Jane Newberry, Executive Vice President for Council.

3. Employer agrees to pay travel and per diem for . . . [four employees] NTE three workdays for negotiations. Per diem will not include weekends.

4. Employer agrees to meet its obligations under law, rules, regulations and contract with the Union prior to implementing the reorganization." (G.C. Exh. 3).

Upon receipt of Respondent's counter proposal, the Union gave Mr. Weinstein copies of two unfair labor practice charges and negotiations were adjourned for the day (Tr. 118).

7. A general RIF notice had been issued on June 9, 1983, which was subsequently rescinded. On June 28, 1983, Respondent "shared" with the Union a preliminary letter prior to the issuance of the general RIF notice (Res. Exh. 8, Tr. 97) and this "preliminary letter was issued to all HUD employees on, or about, June 29, 1983 (Tr. 97). The general RIF notice was dated June 28, 1983 (Jt. Exh. 3, Attachment); was shown to the Union "on or about the same the same day" it was actually issued which was, apparently, June 30, 1983 (Tr. 172).

8. Negotiations reconvened at 9:00 a.m. on June 29, 1983. Following a caucus, the Union submitted "AFGE Proposal #2" which provided, in part, as follows:

"1. (same as Respondent's Counterproposal - 6/28/83)

> "2. Negotiations shall be delayed for 10 working days after the final documents are received by all UNION designated negotiators.
>
> "3. Employer agrees to pay travel, per diem, and related travel expenses for UNION designated negotiators . . . UNION . . . negotiators shall be on official time and in travel status for negotiations and up to three working days preparation time prior to the resumption of bargaining.
>
> "4. [Essentially the same as Respondent's Counter Proposal 6/28/83].
>
> "5. Employer shall not issue a General Notice of Reduction-in-Force until such time as negotiations with the UNION have been completed.
>
> "6. Employer agrees to include the following in any General Notice of Reduction-in-Force:
>
> > 'a. Notice to employees of the right to UNION representation.
> >
> > 'b. Written acknowledgement form for employee to request or decline UNION representation by signature.
> >
> > 'c. A statement that Employer has agreed with UNION to a minimum General Notice period of ninety days prior to the effective date of any Reduction-in-Force.'
>
> "7. The parties to this agreement agree that any dispute over the application of this agreement shall be referred directly to arbitration . . .the prevailing party shall not be held liable for any expenses related to arbitration." (G.C. Exh. 4).

Subsequently, at about 4:30 p.m., Respondent gave the Union "Management's Counter Proposal #2 - 6/29/83" which provided, in part, as follows:

> "1. (Same as Respondent's Counterproposal - 6/28/83).
>
> "2. Management will provide the information in 1 above to the union team of Jane Newberry, Dave Ronaldi, Sharon Turner, Ernestine Napue and Norris Crenshaw.

> "3. Upon receipt of the above stated information, the union team will be allowed two consecutive work days of official time at their duty stations to analyze the information. The Team will then be paid travel and per diem for two workdays to Washington, D.C. to prepare for negotiations. On the third workday in Washington, the Union team will present their proposals . . . The negotiations shall be limited to three workdays for which the union will be paid travel and per diem. Per diem and travel will not apply for Norris Crenshaw.
>
> "4. (Same as Respondent's Counter Proposal - 6/28/83)."

Negotiations were adjourned for the day without discussion of Respondent's second counterproposal. During the day, the Union had contacted the Federal Mediation and Conciliation Service and requested the services of a mediator and a Mr. Emmett De Deyn, a FMCS mediator, had agreed to be present the following day.

9. Mr. De Deyn met with parties on June 30, 1983, and at his request the Union prepared and submitted a counter proposal to Respondent's second counter proposal. "AFGE Proposal #3", provided, in part, as follows:

> "1. (Same as Respondent's Counterproposal - 6/28/83).
>
> "2. Employer shall provide the information in #1 above to five members of the UNION team designated by the Council President.
>
> "3. The UNION team will be paid be Employer for travel, per diem and related travel expenses for five days in Washington, D.C. to prepare for negotiations. On the following day in Washington, the UNION team shall present their proposals . . . negotiations shall be limited to ten days for which the UNION team shall be paid travel, per diem and related expenses. Should negotiations continue beyond ten days the UNION will continue to be on official time without entitlement to per diem.
>
> "4. The parties shall not be bound by provisions #2 of the 6/27/83 ground rules.[3]
>
> (5, 6, 7 and 8 same as Paragraphs 4, 5, 6 and 7 of AFGE Proposal #2.) (G.C. Exh. 6).

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[3] Section 2 of the Ground Rules agreement (Res. Exh. 1) provided for the daily schedule for negotiations. As Mr. Weinstein stated, this was a new item (Tr. 134) and Mr. Weinstein stated that the intent was not made clear (Tr. 134).

The parties then discussed each section of AFGE Proposal #3. Mr. Weinstein testified that Respondent would agree to Sections 1 and 2 but would not agree to Sections 4, 5, 6 and 7(c) (Tr. 133 - 137). With respect to Section 3, Mr. Weinstein stated that Respondent would agree to the concept of payment of travel and per diem but objected to the amount (Tr 134). With respect to Section 7(a) and (b), Mr. Weinstein was agreeable to the concept but requested the specific language that the Union wanted to include in the General RIF notice which the Union did not provide (Tr. 135 - 136). Mr. Weinstein stated that Respondent would agree to Section 8, arbitration, if the Union agreed to insert a clause expressly waiving the applicability of the negotiated procedure contained in the expired agreement (Tr. 137).

Mr. De Deyn asked Respondent to prepare a counterproposal to AFGE Proposal #3 which Respondent did. "Management Proposal #3 - 6/30/83" provided as follows:

> "The following options are presented to the Union for their choice as to a course of action:
>
> '1. Proceed to negotiate the impact and implementation of the regional reorganization, or
>
> '2. Recess the present negotiations and provide the desired information to the Union. Subsequently have the Union return to Washington, D.C. for negotiations in accordance with the June 27, 1983 Ground Rules.'" (G.C. Exh. 7).

Mr. Weinstein stated that the Union found this proposal unacceptable, because, as Ms. Newberry stated, ". . . it appeared to me that management pulled everything off the table they had previously given us and there was no where for me to try to negotiate with them cause they took all their proposals off the table." (Tr. 49). Mr. Weinstein conceded that "In our proposal of 6/30/83, we were no longer offering per diem and travel." (Tr. 144). Although there is a dispute whether Mr. De Deyn stated that the parties were at impasse and that they should go to the FSIP (compare, Newberry Tr. 49, 73 and Weinstein Tr. 139 - 140), there is no dispute that Ms. Newberry asked Mr. Weinstein if he would like to "go on a joint submission" to FSIP (Tr. 49, 139) and Mr. Weinstein said he would not (Tr. 49). The Union served two more unfair labor practice charges and left (Tr. 140). No further meetings were requested (Tr. 140).

10. On July 6, 1983, the Union filed a request with FSIP for assistance (Jt. Exh. 3).

11. On July 18, 1983, Respondent issued notices of transfer of function (Consolidated Complaint, Pars. 8(a) and 9(a) (G.C. Exh. 1(1)); Answer (G.C. Exh. 1(q); G.C. Exh. 8)).

12. By letter dated July 28, 1983, Respondent advised FSIP that it rejected the Union's proposal of July 22 whereby the Union would withdraw their request for FSIP assistance in return for Respondent's agreeing to allow one day of preparation for negotiations, "Capping" negotiations at five days, and withdrawing the specific RIF notices [actually, transfer of function notices] issued in Region VII (Res. Exh. 11).

13. On, or about, August 2 and 3, 1983, Mr. Weinstein gave the Union negotiating team the final approved staffing plans (Tr. 85, 86; Res. Exh. 4).

14. On August 4, 1983, Respondent issued about 1565 specific RIF notices[4] to its employee, 758 of whom were bargaining unit employees.

15. On August 4, 1983, FSIP asserted jurisdiction and referred "all issues in dispute" to FSIP Chairman Robert G. Howlett for mediation-arbitration.

16. At 9:00 a.m. on August 22, 1983, the parties met with Chairman Howlett. Mr. Harold W. Henry, Acting Deputy Director of Personnel and Respondent's spokesman, asserted that the parties were not at impasse, because the Union had never presented any "substantive" bargaining proposals and questioned the jurisdiction of FSIP. (Tr. 159 - 160) Mr. Henry stated that the Union stated that ". . . they were there because management had refused to give it the information that it needed to develop substantive negotiating proposals dealing with the implementation of the reorganization." (Tr. 159 - 160). Mr. Henry stated that Chairman Howlett stated that, ". . . he was serving as a mediator, that he was not interested on (sic) what took place prior to that date [August 22], that he was more interested in finding out what the Parties' positions were, and to see if he could not get the Parties to come to some agreement." (Tr. 161). After Mr. Henry, at Chairman Howlett's request, had explained the field reorganization, Chairman Howlett asked the Union if they had any bargaining proposals and the Union said they did not and requested two weeks to prepare them (Tr. 162). The Chairman gave the Union two days, until August 25, to develop their proposals (Tr. 162).

17. On August 25, 1983, the meetings with Chairman Howlett reconvened and the Union gave the Chairman its proposals (Jt. Exh. 5). Mr. Henry again ". . . raised the issue of whether or not he [Chairman Howlett] had jurisdiction, because these proposals had never been presented to management prior to that date; that had those same proposals been put on the negotiating table on June the 28, it was highly unlikely that we would be before the Impasses Panel; that most of those proposals simply could

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[4] As far as separations, there were approximately 200 (Tr. 148), the balance involved transfers, reassignments, demotions, etc. (Tr. 148).

have been submitted on the 28th of June, without regard to the information that the Union was insisting on, that supposedly brought us before that impasses panel." (Tr. 164). Mr. Henry stated that, ". . . the Chairman again reminded me that he was not interested on (sic) fault finding, that there were simply other avenues available for management to pursue or to use, if we wanted to find out who was at fault; that he was more concerned for the Parties trying to reach an agreement on those proposals and, therefore, asked me to go through each proposal, item by item, and state the management position, which I did." (Tr. 164). Thereafter, the session broke up and for the rest of the day Chairman Howlett conducted "shuttle negotiations" with the parties separately (Tr. 164 - 165).

18. The parties reconvened as a group on the morning of August 26. Chairman Howlett " . . . explained pretty much to the Parties where he was coming out on each of those proposals" (Tr. 165); Respondent agreed to some of the Union's proposals but did not agree to others (Tr. 165). Mr. Henry stated that Chairman Howlett then stated that, as there was not an agreement, ". . . he was going to put on his arbitrator's hat and artitrate and issue an award, which he did." (Tr. 165).

19. Chairman Howlett's "Arbitrator's Opinion and Decision" (Jt. Exh. 6; 83 FSIP 115) was issued by the Executive Director of FSIP on September 2, 1983. It is conceded that Respondent complied with that decision in its entirety (Tr. 165, 153, 84-85).

20. The first, of 14, issues addressed in the decision was:

> "1. Notification of Employees.
>
> The Union requests that the general and specific reduction-in-force notices be withdrawn and that new ones be issued. It contends that the failure of the Agency to bargain with it prior to sending out the notices requires that such action be taken. . . ." (Jt. Exh. 6, Arbitrator's Opinion and Decision, pp. 2-3).

Chairman Howlett addressed each of the Union's 14 proposals and specifically ordered that as to employees assigned to position outside their commuting areas who have been directed to move to their new position on September 12, 1983,

> ". . . the notice period shall be extended to a date no later than November 7, 1983, or an earlier date if requested by the employee." (Jt. Exh. 6, Arbitrator's Opinion and Decision, p. 8).

Conclusions

The Union on July 6, 1983, filed a request with FSIP for assistance and on August 4, 1983, FSIP asserted jurisdiction. On July 18, 1983, Respondent issued notices of transfer of function and on August 4, 1983, Respondent issued specific RIF notices to some 758 employees in the bargaining unit (1565 specific RIF notices were issued in total). Implementation of the reorganization by the issuance of notices of transfer of function[5] and the specific notices of RIF while the dispute was pending before the FSIP, violated the Statute inasmuch as the law requires that parties maintain the status quo while a matter at impasse is pending before the FSIP. U.S. Army Corps of Engineers, Philadelphia District, supra; Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, A/SLMR No. 912, 7 A/SLMR 859 (1977); U.S. Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA No. 39, 5 FLRA 288 (1981); National Aeronautics and Space Administration, Headquarters, Washington, D.C., 12 FLRA No. 94, 12 FLRA 480 (1983). In concluding that Respondent violated § 16(a)(6) of the Statute, and derivatively § 16(a)(1) of the Statute, by issuing notices of transfer of function and the specific notices of RIF while the dispute was pending before the FSIP, and that a remedial order should issue, I have given long and thoughtful consideration to the fact that the FSIP took action on the notices issued by Respondent: inter alia, directed that a letter, to be prepared by the Union, be transmitted to the 758 employees in the bargaining unit, and that the notice period for employees being moved outside the commuting area be extended to November 7, 1983 (from September 12, 1983) unless the employee requests an earlier date; and the further fact that Respondent has fully complied with the decision of the FSIP. Because the FSIP took action with respect to the notices issued by Respondent and Respondent has complied with the decision of the FSIP, a compelling argument can be made that it would not effectuate the purposes and policies of the Statute to find as an unfair labor practice that the same notices, as to which the FSIP has already acted, nevertheless violated the Statute. cf., Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA No. 95, 13 FLRA 571 (1984). I have, with considerable reluctance, rejected this argument for the reason that, although the FSIP acted with respect to the notices, it was Respondent's implementation of the reorganization, while an impasse was pending before the FSIP, as to which the FSIP asserted jurisdiction, that impelled the FSIP to consider the substantive aspects of the impact and implementation of the reorganization, as to which there had been no negotiations, in light of Respondent's imposed time sequence. That is, but for Respondent's change of the status quo while an impassed matter was pending before the FSIP, the substantive issues of impact and implementation would not have been before the FSIP, the FSIP would perforce have had jurisdiction only as to the issues at impasse,[6] essentially in the nature of ground rules. By issuing the notices when, and as it did, Respondent interferred with the processes of the FSIP and interfered with and restrained the Union in the exercise of its statutory rights. The relief requested, an appropriate notice, will effectuate the purposes and policies of the Statute by protecting the integrity of the FSIP's processes.

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[5] Where the FSIP asserts jurisdiction, here on August 4, 1983, the date of communication of the request to Respondent, here on, or about, July 6, 1983, was the beginning date that the matter was pending before the FSIP. This is consistent with U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 676, 6 A/SLMR 339 (1976) and effectuates the purpose and intent of §§ 19(b)(1) and (5) of the Statute.

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[6] The record is clear that on July 6, 1983, when the Union requested the assistance of the FSIP, the parties were in disagreement over per diem, travel expenses, and time for preparation for negotiations and for negotiations. As I stated at the hearing, I will not go behind the FSIP's assertion of jurisdiction where, as here, it clearly appears that the parties have reached a deadlock in negotiations, albeit on essentially "ground rules", without reaching substantive negotiations on impact and implementation (the single exception had been the Union's proposal on arbitration to which Respondent agreed, provided only that the Union agree that that provision govern rather than the procedure under the parties' expired agreement). The Statute gives the FSIP wide discretion to decide, where the parties have negotiated and remain at loggerheads, whether to decline jurisdiction because it determined that voluntary efforts to reach settlement had not been exhausted, National Aeronautics and Space Administration, Washington, D.C., Case No. 80 FSIP 24 (1980); Office of Personnel Management, Washington, D.C., Case No. 80 FSIP 72 (1980); to assert jurisdiction and order negotiations, Federal Deposit Insurance Corporation, Headquarters Office, Washington, D.C., Case No. 83 FSIP 63 (1983); or to resolve the impasse, Department of the Navy, Naval Air Propulsion Center, Trenton, New Jersey, Case No. 83 FSIP 93 (1983). Although orders of the FSIP are not subject to direct review, Council of Prison Locals v. Ronald Brewer, 735 F.2d 1497 (D.C. Cir. 1984), this does not mean that its actions are immune from review. To the contrary, orders of the FSIP are subject to review in unfair labor practice proceedings. By way of example, the FSIP's Regulations define "impasse" as follows:

> "(e) The term "impasse" means that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." (5 C.F.R. § 2470.2(e))

Quite obviously, the parties never negotiated over any substantive proposal concerning the impact and implementation of the reorganization, except the Union's proposal on arbitration as to which there was no apparent disagreement, and, never having negotiated, certainly had never reached a point at which they were unable to reach agreement. By the definition of "impasse" in its Regulations there was not "impasse" except as to the essentially ground rules disagreement, Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33, 9 FLRA 229, 241 (1982), and it is highly questionable that Chairman Howlett had jurisdiction to consider any other issue. If he had

(continued)

In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976), the Assistant Secretary stated, in part, as follows:

> ". . . should one of the parties involved in an impasse . . . request the services of the Panel, I believe that it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in conditions of employment can be effectuated." (6 A/SLMR at 341).

(footnote 6 continued)

jurisdiction over matters as to which there had been no negotiations and no impasse, on some theory of ancillary or pendent jurisdiction, it was only because of Respondent's issuance of the notices of transfer of function and specific notices of RIF. While Chairman Howlett may or may not have had jurisdiction over the substantive issues, as to which there had been no negotiations, he recognized that Respondent's implementation of the reorganization by issuance of the notices of transfer of function and RIF cried for action. That he might have ordered the notices withdrawn and the parties to negotiate, rather than proceeding as he did, is beside the point as no party has challenged the procedure he followed (Respondent's challenge to jurisdiction was without basis as, clearly, the FSIP had jurisdiction as to the matters on which the parties had bargained and were at loggerheads.) To the contrary, the Union submitted proposals, Chairman Howlett conducted "shuttle negotiations", Chairman Howlett resolved the dispute by his Arbitrator's decision, and Respondent fully complied with that decision. Nor, indeed, is the propriety of that decision questioned or in issue.

Suffice it to say, in a proper case jurisdiction of the FSIP is subject to review in an unfair labor practice proceeding and, while the FSIP has wide discretion, it can not with impunity disregard its own Regulations and the Statute.

In Internal Revenue Service, Ogden Service Center, et al., 6 FLRC 310 (1978) the Counsel stated, in part, that in denying review of U.S. Army Corps of Engineers, Philadelphia District, supra, 5 FLRC 177 (1977), it,

> ". . . did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes have run their course." (6 FLRC at 314, n. 3).

In Ogden Service Center, supra, the Council held, in part, that,

> ". . . once the Panel's processes are invoked . . . the parties must adhere to established personnel policies and practices . . . to the maximum extent possible - - i.e., to the extent consistent with the necessary functioning of the agency." (6 FLRC at 322; see, also, 6 FLRC at 320 and n. 18).

While in substantial agreement with the Assistant Secretary (6 FLRA at 320), the Council adopted, "to the maximum extent possible - - i.e., to the extent consistent with the necessary functioning of the agency" rather than the Assistant Secretary's, "absent an overriding exigency", qualification. The Authority has not, so far as I am aware, specifically addressed this question. There is no doubt that the Council quite deliberately adopted language different than that employed by the Assistant Secretary from which I infer an even more stringent qualification, i.e., as the Council stated, "to the maximum extent possible - - i.e., to the extent consistent with the necessary functioning of the agency", rather than "overriding exigency" as stated by the Assistant Secretary. Although Respondent showed substantial daily cost for salaries, Respondent showed no justification whatever for its failure to give the Union reasonable notice and opportunity to negotiate on impact and implementation prior to issuing the notices of transfer of function and the specific RIF notices to employees. Nor, having issued the notices unilaterally, does cost alone establish either that Respondent could not have maintained the status quo "to the extent consistent with the necessary functioning of the agency" or that cost alone was "an overriding exigency" such as would have justified Respondent not maintaining the status quo while a matter at impasse was pending before the FSIP.

I have considered Respondent's other arguments and find them without merit. The Complaints allege no refusal to bargain in good faith, either by the Union or by Respondent, and whether either the Union, or Respondent, or both, bargained in bad faith is neither material nor relevant to this proceeding. The absence of good faith bargaining is no bar to invocation of the services of the FSIP. § 19(b) of the Statute provides, in part, only that,

> "(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service . . . fail to resolve a negotiation impasse -
>
> "(1) either party may request the Federal Service Impasses Panel to consider the matter. . . ." (5 U.S.C. § 7119(b)(1)).

The Regulations of the FSIP, as noted in n. 6 above, define "impasse" as ". . . that point in the negotiations of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation. . . ." (5 C.F.R. § 2470.2(e)), and, as noted above, the FSIP has broad discretion as how to resolve any particular negotiating impasse, the only limitation on its jurisdiction being that "the parties are unable to reach agreement . . .by direct negotiations and by the use of mediation. . . ." Moreover, FSIP does not decide questions of good faith bargaining, such jurisdiction being the exclusive province of the Authority pursuant to § 18 of the Statute. Consequently, in this proceeding, which concerns violation of § 16(a)(6) of the Statute by failure to cooperate in impasse procedures, whether any party bargained in bad faith prior to the FSIP's assertion of jurisdiction is immaterial.

Having found that Respondent violated §§ 16(a)(6) and (1) of the Statute by its issuance of notices of transfer of function and notices of RIF while the dispute was pending before the FSIP, it is recommended that the Authority issue the following:

ORDER

Pursuant to § 18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the U.S. Department of Housing and Urban Development shall:

1. Cease and desist from:

   a. Failing and refusing to cooperate in impasse procedures by issuing notices of transfer of function and/or specific notices of RIF while a negotiating impasse concerning the impact and implementation of the reorganization is pending before the Federal Service Impasses Panel.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

a. Post at its facilities wherever bargaining unit employees are located,[7] copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Secretary, Department of Housing and Urban Development, or his designee, and shall be posted and maintained for 60 consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

William B. Devaney
Administrative Law Judge

Dated: September 24, 1984
Washington, DC

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[7] The notices of transfer of function were issued in Respondent's Kansas City Region (Des Moines, Iowa, Service Office and Omaha, Nebraska Area Office); but the reorganization was nationwide and the notices of RIF were issued nationwide. Accordingly, the posting is ordered nationwide.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to cooperate in impasse procedures by issuing notices of transfer of function and/or specific notices of RIF while a negotiating impasse concerning the impact and implementation of a reorganization is pending before the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ____________________ **By:** ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, NW., Suite 700, P.O. Box 33758, Washington, DC 20033-0758 and whose telephone number is: (202) 653-8507.

23 FLRA No. 64

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE MAPPING AGENCY
HYDROGRAPHIC/TOPOGRAPHIC CENTER

Agency

and   Case No. 0-AR-1196

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3407

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator James M. Harkless filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated June 5, 1986, and appears to have been served on the parties by mail on July 3, 1986.

Under section 7122(b) of the Statute, as amended, [1] and section 2425.1 of the Authority's Rules and Regulations, as amended, [2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on August 6, 1986. However the exceptions were not filed until August 7, 1986. Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 26, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
FORT CARSON, COLORADO

Activity

and

Case No. 0-AR-1220

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1345

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Michael D. Rappaport filed by Mr. William D. Cooney, the grievant in the above-entitled case. For the reasons stated below, the exceptions must be dismissed.

Section 2425.1(a) of the Authority's Rules and Regulations provides:

> Either party [emphasis added] to arbitration under the provisions of chapter 71 of title 5 of the United States Code may file an exception to an arbitrator's award rendered pursuant to the arbitration.

Section 2421.11 of the Rules and Regulations provides in pertinent part:

> "Party" means (a) any person[*/] . . . (4) who participated as a party . . . (ii) in a matter where the award of an arbitrator was issued . . . .

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*/ Section 7103(a)(1) of the Federal Service Labor-Management Relations Statute provides:

> (a) For the purpose of this chapter [chapter 71 of title 5 of the United States Code]--
> (1) "person" means an individual, labor organization, or agency; . . . .

It is clear that the Union and the Activity participated as "parties" in the subject proceeding. However, it appears that Mr. Cooney's status in the proceeding before the arbitrator was limited to that of grievant and that he did not participate as a "party" in the proceeding. Consequently, since Mr. Cooney was not a party to the proceeding, he is without standing under the Authority's Rules and Regulations to file exceptions to the arbitrator's award under section 2425.1(a) of the Authority's rules of procedure.

Accordingly, and apart from other considerations, the grievant's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 26, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 157

Union

and

Case No. 0-NG-1319

DEPARTMENT OF THE TREASURY
U.S. MINT

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under section 2429.23(d) of the Authority's rules of procedure, the time limit established in section 7117(c)(2) of the Statute may not extended or waived by the Authority.

The documents the Union submitted with its petition for review indicate the Agency's allegation that certain Union proposals are nonnegotiable is dated August 14, 1986. The allegation apparently was served on the Union by mail on the same date. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as sections 2429.21 and 2429.22 which also are applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, not later than the close of business on September 3, 1986. However, the petition was not filed with the Authority at its national office in Washington, D.C., until September 4, 1986.

As indicated by the Union's date stamp on the Agency's allegation of nonnegotiability, the Union received the allegation on August 20, 1986. However, as the period for filing the instant petition for review began on the date the Agency's allegation was served on the Union, that is, deposited in the mail (see section 2429.27(d) of the Authority's Rules and Regulations), and not on the date the allegation was received, the Union's appeal was untimely filed.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 26, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

23 FLRA No. 67

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40017

NATIONAL COUNCIL OF FIELD LABOR
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

LABOR MANAGEMENT SERVICES
ADMINISTRATION, UNITED STATES
DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40018

NATIONAL UNION OF COMPLIANCE
OFFICERS, INDEPENDENT

Labor Organization

UNITED STATES DEPARTMENT OF LABOR

Activity/Petitioner

and Case No. 3-CU-40019

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO

Labor Organization

DECISION AND ORDER

I. Statement of the Case

This consolidated case is before the Authority as a result of our order granting the applications for review of the Regional Director's Decision and Order on Petitions for Clarification of Unit filed by the United States Department of Labor (DOL) and the National Union of Compliance Officers, Independent (NUCO), and NUCO's request for a stay in the above-named cases. In his Decision, the Regional Director dismissed the petitions in Case Nos. 3-CU-40017 and 3-CU-40019 on the basis that the DOL 1984 reorganization which occurred had no effect on the employees involved, but granted the petition in Case No. 3-CU-40018 so as to exclude certain employees from the established unit pursuant to section 7112(b)(4) of the Statute[1] because they are engaged in administering provisions contained in section 7120 of the Statute concerning the standards of conduct for labor organizations. DOL and NUCO contended that their applications for review should be granted on the grounds that the Regional Director either departed from Authority precedent or in the absence of Authority precedent made erroneous factual determinations on substantial issues which prejudicially affected their rights.

The Authority granted these applications for review on the basis that it appeared that a compelling reason existed pursuant to the provisions of section 2422.17(c)(1) of the Authority's Rules and Regulations.2/ Supplementary briefs were filed by DOL, NUCO and American Federation of Government Employees, Local 12, AFL-CIO (AFGE). The three Clarification of Unit (CU) petitions under consideration arise out of DOL's 1984 reorganization in which the Labor Management Services Administration (LMSA) was abolished and concern the effects of that reorganization on the bargaining unit of LMSA employees represented by NUCO. The Authority finds, contrary to the Regional Director, that the Office of Pension and Welfare Benefit Programs (OPWBP) employees were severed from and no longer share a community of interest with the other employees in the NUCO unit and should be excluded therefrom. The Authority further finds contrary to the Regional Director that pursuant to section 7135(a)(1) of the Statute, the previous unit represented by NUCO which now includes only Office of Labor-Management Standards (OLMS) employees continues to exist.

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[1] Section 7112(b)(4) of the Statute provides:

> § 7112. Determination of appropriate units for labor organization representation
>
> . . . .
>
> (b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--
>
> . . . .
>
> (4) an employee engaged in administering the provisions of this chapter[.]

II. Background

A. Previous Recognitions

In 1962, AFGE was recognized as the exclusive representative of the DOL employees in the Washington, D.C. Metropolitan area; and in 1965, the National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO (NCFLL) was recognized as the exclusive representative of all eligible field employees of the DOL outside the Washington, D.C. Metropolitan area. NUCO came into existence in the early 1970's to represent employees of LMSA who otherwise could not have been represented because

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2/ Section 2422.17(c)(1) provides:

> § 2422.17. Application for review of a Decision and Order of the Regional Director.
>
> (c) The Authority may grant an application for review only where it appears that compelling reasons exist therefor. Accordingly, an application for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent[.]

of the restrictions contained in section 3(d) of Executive Order 11491.[3] NUCO was certified on October 18, 1972 as the exclusive representative of the field employees of LMSA.

B. Reorganization and Change

Prior to the January 1984 DOL reorganization, LMSA administered the OPWBP and Office of Labor Management Standards Enforcement (OLMSE) programs, designated as the PW and LM tracks, respectively, through a field organization of Regional, District and Resident offices. LMSA investigators were assigned to either the PW or LM tracks. On January 20, 1984, the Secretary of Labor issued an Order separating the OPWBP or Employee Retirement Income Security Act (ERISA) program from LMSA, making OPWBP an independent activity (under the same name) which reports directly to the Secretary. Thereafter, to complete the reorganization, the Secretary on May 3, 1984, issued an Order which formally abolished LMSA, and established the OLMS with its own Assistant Secretary to replace OLMSE. As a result of the reorganization, the PW field employees were incorporated into the OPWBP field organization and the remaining LM field employees were incorporated into the OLMS field organization. While all employees of OPWBP and OLMS at both the headquarters and the field levels continued to be located in the same place, the record indicates the work processes of the two components were not integrated and that their employees did not interchange. The effects of the reorganization were: to remove OPWBP from LMSA and make it a separate independent activity; to abolish LMSA; and to incorporate the remaining residual LM employees of LMSA into OLMS.

As a result of the reorganization, the pension program and PW investigators were transferred intact to the new independent activity. The primary job function of PW investigators, which was unchanged by the reorganization, is to investigate allegations of fiduciary breaches of title I of ERISA and certain sections of title 18 of the United States Code. Thirty percent of the fiduciaries they investigate are union officials, including some from federal sector unions, thirty percent of their cases involve Taft-Hartley or joint plans, and five to seven percent involve union plans.

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[3] Section 3(d) of Executive Order 11491 provided that:

> Employees engaged in administering a labor management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

Following the reorganization, the LM investigators of the OLMS continue to be responsible, as before, for the investigation of several types of cases arising under the Labor-Management Reporting and Disclosure Act (LMRDA), including election cases, compliance audit cases and embezzlement cases. They are also responsible for investigation of all standards of conduct cases filed pursuant to section 7120 of the Statute.

III. Regional Director's Determination

The Regional Director in his Decision and Order on Petitions for Clarification of Unit found in Case Nos. 3-CU-40017 and 3-CU-40019 that despite the reorganization which abolished LMSA and split employees within the PW and LM tracks into two separate independent activities, the field and headquarters employees of the OPWBP currently represented by NUCO did not accrete into the units represented by NCFLL and AFGE, but rather continued to be included in the pre-reorganization unit represented by NUCO. He based his findings on the following factors: (1) the record evidence revealed that the reorganization had little or no effect on employees' day-to-day work, their overall working conditions or their immediate supervision; (2) there was no evidence provided by the Activity to demonstrate that these employees' accretion into either the NCFLL or AFGE bargaining units would necessarily promote effective dealings and efficiency of agency operations; and (3) there is a long history of effective collective bargaining between LMSA and NUCO, and DOL has not changed its handling of personnel or labor relations matters for OPWBP investigators.[4]

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[4] Additionally, the Regional Director found in Case No. 3-CU-40019 that several employees in the Office of the Solicitor, Labor-Management Laws Division, the Elections and Trusteeships and Technical Assistance and Education Branches

(Continued)

In Case No. 3-CU-40018 the Regional Director found that the OLMS investigators currently represented by NUCO should be excluded from that unit pursuant to section 7112(b)(4) of the Statute because the OLMS investigators are engaged in administering section 7120 of the Statute (standards of conduct for labor organizations) which, according to section 7112(b)(4) of the Statute, requires their exclusion from the NUCO unit or any other appropriate unit of employees under the Statute. The Regional Director rejected NUCO's argument that section 7135(a)(1) of the Statute5/ allowed the continuation of the unit of OLMS investigators. He found that section 7135(a)(1) permitted continuation only until the issue was raised, at which point the preexisting unit would be evaluated to ascertain whether continued recognition was consistent with the Statute. As he found that section 7112(b)(4) of the Statute precluded OLMS investigators from being included in a unit because they administer provisions of the Statute, he ordered them excluded from the NUCO unit.

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of the Technical Assistance and Disclosure Section of OLMS were not engaged in administering the Statute within the meaning of section 7112(b)(4). On this basis, he concluded that they should remain in the unit represented by AFGE and dismissed that part of the petition. No application for review was filed with respect to the Regional Director's finding that these employees should remain in the unit represented by AFGE. The action has become final and is not at issue.

5/ Section 7135(a)(1) of the Statute provides:

> § 7135. Continuation of existing laws, recognitions, agreements, and procedures
>
> (a) Nothing contained in this chapter shall preclude--
>
> (1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter[.]

IV. Parties' Positions

DOL contends with regard to Case Nos. 3-CU-40017 and 3-CU-40019 that the employees in OPWBP do not administer any provision of law relating to labor-management relations within the meaning of section 7112(c) of the Statute,[6] and therefore should be included in the DOL's bargaining units represented by NCFLL and AFGE. NUCO argues that as no real change was brought about by the reorganization and the employees of OPWBP are precluded from inclusion in units with other employees pursuant to section 7112(c) of the Statute, the employees of OPWBP should continue as a viable unit represented by NUCO. AFGE objects to the consideration of any unit accretion issue raised by the DOL on the basis that, at the time of the hearing, personnel aspects of the reorganization creating the new OPWBP activity had not as yet been implemented.

In Case No. 3-CU-40018, DOL agrees with the Regional Director that the OLMS investigators should be excluded from the NUCO unit pursuant to section 7112(b)(4) of the Statute as they administer provisions of the Statute. NUCO contends that the Regional Director erred in ignoring the express provisions of the "grandfather clause" in section 7135(a)(1) of the Statute. While NUCO concedes that the OLMS investigators administer section 7120 of the Statute, it argues that section 7135(a)(1) was intended to protect representational relationships established before the

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6/ Section 7112(c) of the Statute provides:

> § 7112. Determination of appropriate units for labor organization representation
>
> . . . .
>
> (c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--
>
> (1) which represents the other individuals to whom such provision applies; or
>
> (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

effective date of the Statute, and that if section 7112(b)(4) is allowed to vitiate established units which predate the Statute, the intent of section 7135(a)(1) to protect such units would not be effectuated. AFGE agrees with NUCO concerning section 7135(a)(1) of the Statute.

V. Analysis

The Regional Director's Decision with respect to the employees of the OPWBP assumes that the DOL reorganization had only a minimal effect on the OPWBP employees and NUCO's bargaining relationship. Based on established precedent and the particular circumstances of the case, the Authority disagrees with this assumption. We find that the employees of OPWBP no longer share a community of interest with the other employees in the existing unit represented by NUCO. We note particularly that the OPWBP employees are now part of a new separate activity; are under separate supervision and authority; and have little or no contact, interchange or transfer with the other employees represented by NUCO. We find that as a result of their removal from LMSA, the OPWBP employees constitute a functionally distinct group of employees who no longer share a community of interest with the employees of the existing NUCO unit. Accordingly, the Authority will order that NUCO's certification be clarified to exclude the OPWBP employees. See United States Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 11 FLRA 591 (1983); Department of Defense, Department of the Army, Lexington-Blue Grass Depot Activity, Lexington, Kentucky, 8 FLRA 699 (1982); and Department of the Treasury, Bureau of the Mint, 7 FLRA 136 (1981).

As to DOL's contention in Case Nos. 3-CU-40017 and 3-CU-40019 that the OPWBP field and headquarters employees who had been represented by NUCO in the pre-reorganization LMSA unit accreted into units represented by NCFLL and AFGE, the Authority concludes that the OPWBP investigators administer statutes relating to labor-management relations within the meaning of section 7112(c) of the Statute and therefore cannot be represented by NCFLL or AFGE. The OPWBP investigators investigate allegations of fiduciary breaches of title I of ERISA, and a considerable portion of their work involves review of joint labor-management administered plans established pursuant to the Labor-Management Relations Act, 29 U.S.C. § 186(c). Approximately thirty percent of OPWBP investigations concern union officials, including some from federal sector unions. For these reasons, we find that the OPWBP investigators administer statutes relating to labor-management relations within the meaning of section 7112(c) of the Statute and thus cannot be included in units represented by NCFLL or AFGE.

In Case No. 4-CU-40018 the Regional Director found that section 7112(b)(4) of the Statute precluded the OLMS investigators from remaining in the established unit. He interpreted section 7135(a)(1) to permit the continuation of an existing unit only until an issue was raised as to its continuance. Based on the legislative history of section 7135(a)(1) and precedent, the Authority disagrees. The legislative history of the Statute indicates the intent of section 7135(a)(1) as follows:

> This subsection reflects the intention that successful on-going labor-management relationships shall not be disputed by enactment of title VII. Since the purpose of this title is principally to encourage the development of successful labor-management programs, it would have been inappropriate for this new legislation, designed to encourage collective bargaining, to operate in such a way as to thwart successful collective bargaining programs already in existence. . . .[7]

To this end, consistent with section 7135(a)(1), we have required an activity to continue to recognize units that were appropriate under Executive Order 11491, as amended, where we found that a reorganization did not substantially change the character and scope of the existing units. Federal Aviation Administration, Aviation Standards National Field Office, 15 FLRA 60 at 64 (1984).

In our view, the exclusion of OPWBP employees as a result of the reorganization did not substantially change the scope and character of the unit historically represented by NUCO, which now consists of all OLMS employees. Thus, with the removal of the OPWBP function and personnel and the subsequent abolishment of LMSA, the remaining former LMSA employees were transferred intact into the OLMS which was established to handle the function previously handled by OLMSE under LMSA. OLMS, with minor changes in the field structure, continues to function as did OLMSE prior to the reorganization of LMSA, and the Assistant Secretary of Labor for OLMS occupies the position vacated by the Assistant Secretary of Labor for LMSA.[8]

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[7] 124 Cong. Rec. 29,188 (1978).

In sum, we find in Case No. 3-CU-40018, pursuant to section 7135(a)(1), that NUCO continues to represent a viable unit of former LMSA employees certified in 1972 which currently includes only OLMS employees. Accordingly, the DOL must continue to recognize and bargain with NUCO as the exclusive representative of the remaining unit now entitled OLMS.

VI. Conclusion

Based upon the findings above, we will order that the Clarification of Unit (CU) petitions filed by DOL in Case Nos. 3-CU-40017 and 3-CU-40019 seeking to accrete the OPWBP field and headquarters employees who had been represented by NUCO in the pre-reorganization LMSA unit into units represented by NCFLL and AFGE be dismissed. Further, we will order that NUCO's certification be clarified to exclude the OPWBP employees. We will also order that the petition filed by DOL in Case No. 3-CU-40018 be dismissed, as we have found that the remaining unit of OLMS employees represented by NUCO continues to be a viable unit.[9]

ORDER

IT IS HEREBY ORDERED that the unit of employees at the United States Department of Labor sought to be clarified, for which the National Union of Compliance Officers,

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[8] While we recognize that section 7112(b)(4) of the Statute now requires the exclusion of employees who administer "the provisions of this chapter" from any unit determined to be appropriate under the Statute, in this case we are merely determining that a unit previously determined to be appropriate under Executive Order 11491, as amended, has not been rendered inappropriate by virtue of the reorganization and therefore remains viable by operation of section 7135(a)(1) of the Statute. In our view, this conclusion is materially different from a determination that such a unit would be appropriate under the Statute if a petition to represent a new unit of OLMS employees had been filed. The latter question is not before us in this case.

[9] In view of our decision, the Authority finds it unnecessary to pass upon the Motions for Clarification of Stay Order filed by the Regional Director and NUCO.

Independent, was certified as exclusive representative on October 18, 1972, be, and it hereby is, clarified by excluding from said unit the employees in the Office of Pension and Welfare Benefit Programs.

IT IS FURTHER ORDERED that the petitions in Case Nos. 3-CU-40017, and 3-CU-40019 in all other aspects, and the petition in Case No. 3-CU-40018 be, and they hereby are, dismissed.

Issued, Washington, D.C., September 26, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case No. 394/errata.

Federal Labor Relations Authority

Washington, D.C. 20424

ERRATA October 10, 1986

Report of Case Decisions Number 394 (September 26, 1986) 1/

Attached 13 pages

1. Insert pages at end of the report.

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Attachment

1/ Attached pages failed to be printed with the report.

Y3.F31/21-3:

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 23 FLRA No. 33]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

WYOMING AIR NATIONAL GUARD
(WANG)

Agency

and

Case No. 0-AR-1117
(23 FLRA No. 33)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (NAGE), LOCAL NO. 14 - 76

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of August 18, 1986, denying the Agency's exceptions.

In his award, the Arbitrator noted that consistent with the decisions of the Authority, the parties agreed that the requirement that civilian technicians wear the military uniform is a permissive subject of bargaining under section 7106(b)(1) of the Statute and that on expiration of the parties' collective bargaining agreement, the Agency at that time could require the wearing of the military uniform. In agreement with the Union, however, he determined that the agreement had not expired on the date specified by the Agency and that the Agency had violated the agreement by requiring the wearing of the military uniform beginning on that date. Accordingly, as his award, the Arbitrator sustained the grievance and ordered the Agency to comply with the terms of the collective bargaining agreement until the agreement expired.

In its exceptions the Agency contended that the award was contrary to section 7106(a)(1) of the Statute because wearing the military uniform by civilian technicians while performing technician duties was necessary to carry out the mission of the Agency and for purposes of internal security. The Authority rejected the Agency's arguments and specifically held that the Agency had failed to demonstrate that the award prevents the Agency from protecting its property from loss, destruction, or disclosure or interferes with management's right to determine the mission of the Agency. In its request for reconsideration the Agency essentially argues that the Arbitrator's award is contrary to law, ignores or misconstrues Authority precedent and that the Authority erred in failing to establish a specific date for the expiration of the parties' agreement.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Agency's request for reconsideration is denied.*/

Issued, Washington, D.C., September 24, 1986.

C. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The Agency's request for a stay of the Arbitrator's award is likewise denied.

[ORDER DENYING REQUEST FOR RECONSIDERATION
OF 22 FLRA No. 67]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PANAMA CANAL COMMISSION

Agency

and

Case No. 0-AR-948
(22 FLRA No. 67)

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, MARINE DIVISION
ILA, AFL-CIO

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's Order of July 17, 1986, dismissing the Union's exceptions.

The Union's exceptions to the Arbitrator's award, filed with the Authority on April 3, 1985, were dismissed on the basis that they were untimely. The award in this case, which resulted from a mediation-arbitration conducted by a Member of the Federal Service Impasses Panel, was dated January 17, 1985, and was apparently served on the parties by mail the same day. Subsequently, both parties requested clarification of the award and the Arbitrator responded on March 1, 1985, essentially reiterating his earlier award. In dismissing the exceptions as untimely, the Authority noted that while a response to a request for clarification which gives rise to the deficiencies alleged in the exceptions can operate to extend the time limits for filing with the Authority, the Arbitrator did not modify his award. In its motion for reconsideration the Agency argues that the Union's exceptions should be dismissed on a jurisdictional basis rather than on a procedural basis because the award was a final action of the Federal Service Impasses Panel reviewable under section 7117 or section 7118 of the Statute rather than an arbitrator's award reviewable under section 7122 of the Statute.

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the Authority's decision and an attempt to relitigate the matter.

Accordingly, the Agency's request for reconsideration is denied.

Issued, Washington, D.C. September 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, LOS ANGELES,
CALIFORNIA

Activity

and

Case No. 0-AR-1162

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2723

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Joe H. Henderson filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ROBINS AIR FORCE BASE
GEORGIA

Activity

and

Case No. 0-AR-1174

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Felix A. Nigro filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MILITARY ENTRANCE PROCESSING STATION
LOS ANGELES

Activity

and

Case No. 0-AR-1188

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2866

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator L. Lawrence Schultz filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1191

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 3506

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Ernest E. Marlatt filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NEW CUMBERLAND ARMY DEPOT

Activity

and

Case No. 0-AR-1192

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION No. 2004

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John Paul Simpkins filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Activity has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

Agency

and

Case No. 0-AR-1198

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Edward J. Sedlmeier filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.*/

Issued, Washington, D.C., September 24, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The Union's request for a stay is likewise denied.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ENGINEER DIVISION
NEW ORLEANS CORPS OF ENGINEERS
NEW ORLEANS, LOUISIANA

Activity

and

Case No. 0-AR-1202

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1124

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator H. Ellsworth Steele filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
KIRTLAND AIR FORCE BASE, NEW MEXICO

Activity

and

Case No. 0-AR-1203

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2223

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Don B. Hays filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 24, 1986.

J. C. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER, NEWINGTON, CONNECTICUT

Activity

and

Case No. 0-AR-1197

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-109,
MERIDEN, CONNECTICUT

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator James H. Stewart filed by the Activity under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Activity has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Activity's exceptions are denied.

Issued, Washington, D.C., September 25, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY